STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 01-AFC-7C
Amendment to the Application for Certification of	)	
the Russell City Energy Center	)	
	)	
	)	

DOCKET
01-AFC-7C
DATE JUL 24 2008
RECD. JUL 24 2008

**PROJECT OWNER'S RESPONSE
TO THE COMMENTS OF INTERESTED PARTIES
ON THE PETITION FOR EXTENSION OF THE
DEADLINE FOR COMMENCEMENT OF CONSTRUCTION
OF THE RUSSELL CITY ENERGY CENTER**

ELLISON, SCHNEIDER & HARRIS L.L.P.
Greggory L. Wheatland
Jeffery D. Harris
2015 H Street
Sacramento, California 95811-3109Telephone:
(916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Russell City Energy Company, LLC

TABLE OF CONTENTS

I. Procedural Background 3

II. Good Cause Has Been Shown For The Requested Extension. 4

III. The Commission's Rules Do Not Limit The Number Of Extensions That May Be Granted To A Project. 8

IV. The SEPCO Case Does Not Govern The Commission's Consideration Of This Request For An Extension Of The Construction Deadline. 11

V. There Has Been No Change In Applicable Laws That Would Require Reopening The Proceeding. 13

VI. The Commission Is Not Required To Make Findings Under Section 1769(A) 17

VII. Conclusion 17

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:	)	
	)	Docket No. 01-AFC-7C
Amendment to the Application for Certification of	)	
the Russell City Energy Center Project	)	
	)	
	)	

PROJECT OWNER'S RESPONSE TO THE COMMENTS OF INTERESTED PARTIES ON THE PETITION FOR EXTENSION OF THE DEADLINE FOR COMMENCEMENT OF CONSTRUCTION OF THE RUSSELL CITY ENERGY CENTER

Russell City Energy Company, LLC, ("Project Owner") submits the following response to the comments of various interested parties regarding the Petition For Extension Of Deadline For Commencement Of Construction For The Russell City Energy Center ("RCEC Project"), filed May 30, 2008. The Petition requests an extension of the deadline for commencement of construction for the RCEC Project to September 10, 2010.

We address below the comments of three parties: Alameda County, Chabot-Las Positas Community College District ("District") and Group Objectors. These are the same parties who have engaged over the past year in a series of unsuccessful efforts to obstruct or delay the licensing of this facility. The objections that have been raised by these parties have been rejected by the Commission, the California Supreme Court and the Bay Area Air Quality Management District. The objections by these parties to the instant Petition are similarly without merit.

Section I below recounts the relevant procedural history for the RCEC Project. As we explain in Section II below, the Project Owner has made a showing of good cause for extension of

the deadline as required by Section 1720.3 of the Commission's regulations. The Project Owner's showing meets the criteria that the Commission has regularly applied to extensions of milestones and deadlines. Specifically, the Commission has recently approved four requests for extension of construction deadlines or milestones based upon a showing of good cause. These decisions provide valuable guidance on the criteria the Commission should apply in finding good cause for extension of the construction deadline for the RCEC Project. Because the facts in the case of the RCEC Project are in complete accord with these most recent Commission decisions, the request for extension should be granted.

As discussed in Section III, the Commission's rules do not limit the number of extensions that may be granted to a project. The Commission has the discretion to extend any construction deadline or milestone and, in at least one case, has granted more than one extension of construction milestones to a project.

In Section IV we reject the argument that the Commission should rely on the SEPCO case to evaluate the request for extension of the RCEC Project. As discussed in Section II, using the criteria established by the Commission in recent cases related to extension of construction milestones, good cause has been shown for the RCEC Project's extension. The SEPCO case pre-dates the Commission's decisions discussed in Section II and involves much different facts.

In Section V, the Project Owner demonstrates that there has been no change in "Applicable Laws" that would require reopening the proceeding. There are no substantial changes proposed to the project and thus no new potential environmental effects and no increase in the severity of previously identified potentially significant effects. Given that the project is unchanged, the potential significant effects have been identified and fully addressed in the Commission's recent prior approval of Amendment No. 1.

Finally, as discussed briefly in Section VI, this Petition is a request for extension filed pursuant to Section 1720.3 of the Commission's regulations. It is not a request for amendment. As such the Commission is not required to make findings under Section 1769(a).

For the reasons set forth herein, the Petition to extend the construction deadline of the RCEC Project should be granted.

I. Procedural Background

The Commission Decision for the RCEC Project was adopted on September 11, 2002, with an initial deadline for commencement of construction of September 10, 2007.

On November 17, 2006, the Applicant filed Amendment Petition No. 1. The Commission commenced a thorough review of the Amendment, including an exhaustive, updated environmental review of the entire project. When it became apparent that the Commission would not complete its review of the Amendment in time for the Project Owner to commence construction prior to September 10, 2007, the Project Owner requested a one year extension of the September 10, 2007 construction deadline. The Project Owner requested only a one year extension because it planned to commence construction as soon as practicable after Commission approval of Amendment No. 1. By an order dated August 29, 2007, the Commission extended the deadline for commencement of construction to September 10, 2008.

The Commission issued an Order approving Amendment No. 1 on September 26, 2007 ("Decision"). The 205 page Decision contained findings and revised conditions regarding all aspects of the RCEC Project. The Decision concluded that the project will remain in compliance with all applicable laws, ordinances, regulations and standards and that there will be no unmitigated significant environmental impacts associated with the proposed modification.[1]

[1] Commission Adoption Order, Russell City Amendment No. 1, p. 2. September 26, 2007.

Following approval of the Amendment, three parties filed Petitions for Reconsideration of the Decision and untimely Petitions to Intervene. These Petitions were denied by the Commission on November 7, 2007.[2] These same parties also filed Petitions for Writ of Review of the Decision with the California Supreme Court. These Petitions were summarily denied on January 3, 2008.[3]

The Supreme Court's denial of the Petitions on January 3, 2008 should have cleared the path for the Project Owner to move forward with the RCEC Project and to commence construction well before September 10, 2008. However, on January 2, 2008, the day before the Supreme Court denied the three Petitions, Rob Simpson filed an Appeal of the RCEC Project's PSD Permit with the Environmental Appeals Board ("EAB") of the Environmental Protection Agency (the "Simpson Appeal"). Under the Clean Air Act, the Project Owner cannot commence construction of the RCEC Project until the EAB Appeal is resolved.[4] The Simpson Appeal is still pending before the EAB.[5]

II. Good Cause Has Been Shown For The Requested Extension.

Section 1720.3 of the Commission's regulations provides that the Commission may extend the deadline by which a project must commence construction for "good cause".[6] While Section

---

[2] Commission Decision Denying Reconsideration, Amendment No. 1, November 7, 2007

[3] County of Alameda v. State Energy Resources Commission, No. S157627, (Cal. 1/3/08) (*writ denied)*; Alameda County (Group Petitioners) v. State Energy Resources Development Commission, No. S158875, (Cal., 1/3/08) (*writ denied);* Chabo-Las Positas Community College District v. State Energy Resources & Conservation Commission, No. S158851, (Cal. 1/3/08) (*writ denied)*

[4] The Clean Air Act provides that no major emitting facility may be constructed unless specific regulatory review activities have been completed and a permit issued. (42 U.S.C.A. § 7475(a).) Similarly, the PSD regulations at 40 C.F.R. § 52.21(a)(2)(iii) require an applicable source to obtain a PSD permit before it may "begin actual construction." A final PSD permit decision becomes effective 30 days after the service of notice of the decision unless: (1) a later effective date is specified in the decision; (2) administrative review by the US EPA's EAB is requested on the permit under 40 CFR § 124.19; or (3) no comments requested a change in the draft permit, in which case the permit becomes effective immediately upon issuance. (40 CFR § 124.15(b).)

[5] The reason for the delay by the EAB in resolving the Simpson Appeal is not known. However, just as Alameda County sought untimely intervention in the Commission's Amendment proceeding, Alameda has also made an untimely filing to the EAB. A January 29, 2008 order by the EAB required briefs on the Simpson Appeal to be filed by February 11, 2008. On April 21, 2008, more than two months after the final date for filing briefs, Alameda County filed a Motion for Leave to File an Amicus Brief on the Simpson Appeal.

[5] The EAB has not ruled on Alameda County's motion.

[6] Cal. Code Regs., tit. 20, § 1720.3.

1720.3 does not define what constitutes good cause, other decisions by the Commission provide clear guidance. Specifically, the Commission has recently approved three requests for extension of start-of-construction deadlines or milestones based upon a showing of good cause.[7] These decisions granting extension of the date for commencement of construction provide valuable guidance on the criteria the Commission should apply in finding good cause for extension of the construction deadline for the RCEC Project.

The Commission has approved three requests for extension of construction deadlines or milestones.[8] In these cases, the Commission has found the following factors to constitute good cause for extension of the date by which a project must commence construction:

- "To help facilitate potential transfer of ownership and subsequent construction of the project"[9]; and
- Due to "economic circumstances beyond the control of the project owner" and to provide "additional time to properly update environmental analysis associated with" a planned amendment to the license[10].

Where the Commission has set milestone dates for commencement of construction of a project, the Commission has found that a showing of good cause for failure to meet a milestone will be made if *any* of the following criteria are met:

> "1. The change in any milestone does not change the established commercial operation date milestone.
> 2. The milestone is changed due to circumstances beyond the project owner's control.
> 3. The milestone will be missed, but the project owner demonstrates a good-faith effort to meet the project milestone.

---

[7] Contra Costa Power Plant #8, 00-AFC-1C; Salton Sea Power Plant, 02-AFC-02; RCEC; Russell City Energy Center, 01-AFC-7. While start-of-construction milestones are set forth by the Commission in individual decisions, rather than by rule, requests for extending construction milestones are also reviewed and granted based on "good cause shown."
[8] Id.
[9] Order No. 04-0825-04, Order Approving Request to Extend Construction Milestones, Docket No. 00-AFC-1C, 8-25-04
[10] Order No. 07-1219-4, Approving the Deadline for Commencement of Construction, Docket No. 02-AFC-02, 12-17-07

4. The milestone is missed due to unforeseen natural disasters or acts of God which prevent timely completion of the milestones."[11]

In the instant case, the "good cause" for extending the start of construction deadline for the RCEC Project is that the project has been delayed due to circumstances beyond the Project Owner's control. The start of construction for the RCEC Project is presently delayed by the Simpson Appeal that was filed with the EAB after the RCEC Project amendment was approved and after the previous Petition for Extension was granted. The Simpson Appeal as well as the Appeals to the Supreme Court could not have been anticipated because they were filed by individuals who were not even parties of record to the original Amendment proceeding.

Thus far, the litigation brought against the RCEC Project by Alameda County, the District, Group Objectors and Mr. Simpson has not been meritorious. All of the petitions for reconsideration have been denied. All of the petitions for writ of review to the California Supreme Court were denied on January 3, 2008. The sole remaining matter is the Simpson Appeal filed with the EAB on January 2, 2008. The Simpson Appeal is still pending before the EAB and resolution of the Appeal remains outside the control of the Project Owner.

In addition, the Project Owner satisfies the Commission's criteria for a showing of good cause for an extension because the Project Owner has made a good-faith effort to meet the construction deadline. The Project Owner has vigorously and successfully contested the myriad petitions for reconsideration and for writs of review. The Project Owner has executed a Power Purchase Agreement with PG&E. The Project Owner is prepared to move forward with the Project when the Simpson Appeal is resolved.

Without citation to any authority, Alameda County alleges that "subsequent litigation alone cannot form the basis for good cause."[12] In fact, however, subsequent litigation is a cause of delay

---

[11] Metcalf Final Decision, Docket No. 99-AFC-3, p. 44

outside of the control of the Project Owner. "Circumstances beyond the control of the Project Owner" are precisely the type of factor recognized by the Commission as constituting good cause,[13] especially where the litigation is brought after the Commission Decision by persons or groups who were not parties to the original licensing proceeding.

Alameda County further argues, again without citation to authority, that the RCEC Project amendment was "very controversial" and that the Project Owner should have anticipated the possibility of litigation when it made its request for a one year extension in August 2007. Alameda County's argument once again ignores the fact that the post-Decision litigation before the Commission, the Supreme Court, the BAAQMD and the EAB was filed by groups and individuals, such as Alameda County, who were not parties to the Amendment proceeding. The record of the Amendment proceeding will clearly show that while the Commission Staff contested some limited issues, no other party of record contested the RCEC Project when the Project Owner requested an extension of the construction deadline in August 2007. In summary the delays caused by the post-decision litigation brought by Alameda County and others were both unanticipated and beyond the control of the Project Owner. These are precisely the circumstances where an extension of the construction deadline should be granted.

Alameda County also argues at length that "lack of financing" cannot constitute good cause for an extension.[14] The argument is nothing but a straw man concocted by Alameda County. The Project Owner does not assert that the delay in the commencement of construction is due to a lack of financing. The Project will have the necessary financial support. The Petition for the extension states that once the litigation is resolved, a reasonable time will be required to "complete" financing. As Alameda County is certainly aware, for any large capital project certain legal formalities are

---

[12] Alameda County Comments, p.7.
[13] Order No. 07-1219-4, fn. 10, *supra*
[14] Alameda County Comments, pp. 7-8.

required in order to initiate the transfer of funds from the lender to the project. These steps cannot be completed until the litigation has been resolved.

Finally, Alameda County, the District and Group Objectors argue that there is not good cause for an extension because the Project Owner should not "rely on a 2002 analysis to extend its time to construct the plant to 2010."[15] Obviously, the Project Owner is not relying on the 2002 analysis of the RCEC Project for this extension. The request for the extension is based upon the Commission's September 26, 2007 Decision on Amendment No. 1, which comprehensively revised and updated every element of the AFC license, in a thorough public process that took place over 10 months.

Because the facts in the RCEC Project's request are in complete accord with recent Commission decisions finding good cause for the extension of construction deadlines and milestones, the RCEC Project's request for extension should be granted.

III. The Commission's Rules Do Not Limit The Number Of Extensions That May Be Granted To A Project.

Alameda County and the Group Objectors argue that Section 1720.3 of the Commission's regulations provide only for the granting of a single extension to commence construction.[16] These arguments are clearly wrong.

Alameda County incorrectly states that this Petition presents an issue of first impression. This is not a case of first impression. This is not the first time that the Commission has been asked to grant a second extension of time to a project to meet a date that had been set for the start of construction. As recited in Order No. 04-0825-04: "On July 6, 2004, Mirant Delta. LLC requested the Energy Commission extend Contra Costa Power Plant Unit 8 construction milestones for a

[15] District Comments, p. 3; Alameda County Comments, p. 8., Group Comments, p. 4.
[16] Alameda County Comments, p. 6; Group Comments, pp. 2-3.

second time."[17] The first extension was granted by Staff. The second extension was reviewed and approved by the Commission because, "Without another extension of the construction milestones, the status of the plant's certificate would be in question, and could jeopardize negotiations to transfer ownership."[18] The Commission has the authority to extend a date for start of construction for a project more than once, and has clearly done so in the past.

As a second basis for its contention that Section 1720.3 does not permit multiple extensions, Alameda County relies upon a principle of general statutory construction that "written language should be given its plain and ordinary meaning."[19] Alameda County's argument overlooks another important and more pertinent rule of statutory construction.

"[A] general rule of construction is that words used in the singular include the plural and vice versa."[20]

This general rule of construction is reinforced by Section 13 of the Public Resources Code, governing construction of the entire Public Resources Code, which states: "The singular number includes the plural, and the plural the singular." The California Energy Commission operates under the provisions of the Public Resources Code. The Commission's siting regulations are promulgated pursuant to the Public Resources Code.[21] The same rules governing the construction and interpretation of statutes govern the construction and interpretation of rules and regulations of

---

[17] Order No. 04-0825-04, Order Approving Request to Extend Construction Milestones, 8-25-04

[18] *Id.*

[19] Alameda County cites People v. Morris ((1988) 46 Cal.3d 1) for the proposition that "[i]f the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (Id. at 15.) This is a 1988 criminal case regarding an armed robbery in which the court discusses a criminal statute, not a regulation. The court in Morris emphasizes that in construing legislative intent, it is fundamental that a statute should not be interpreted in a manner that would lead to absurd results." (Id. at 15.) Section 1720.3 places no limit on the length of an extension of time that the Commission may grant. If one accepts Alameda County's argument that the regulation limits the number of extensions that may be granted but not the length, such an interpretation would lead to the absurd result that the Commission could grant one three year extension, but could not granted even two one-year extensions.

[20] Division of Occupational Safety and Health v. State Board of Control (1987) 189 Cal.App.3d 794, 807 fn. 9 (discussing the California Admin. Code, Cal. Code Regs., tit. 8, §5144) (citing Lab. Code §13; Civ. Code §14); see also Cal. Pub. R. Code §13; Cal. Code Civ. Proc. §17, subd. (a).

[21] Pub. Resources Code Section 25539.

administrative agencies.[22] Therefore, just as words used in the singular in the Energy Commission statutes also include the plural, words used in the singular of Energy Commission regulations also include the plural.

Another important rule of statutory construction is that "Where there are two possible interpretations of a statute, courts endorse that which is the more natural and logical.[23] The most natural and logical reading of Section 1720.3 is that where there is a deadline for commencement of construction, a Project Owner may ask that it be extended and the Commission, in its discretion, may so order. Alameda County's interpretation of Section 1720.3 is neither natural nor logical, because it requires the reader to infer that the reference to "an extension" should be read to mean "one extension, and only one extension," whereas it naturally and logically means "any extension."

The Group Objectors' interpretation of Section 1720.3 is also neither natural nor logical. The Group Objectors argue that where 1720.3 states the applicant may request an extension of the "the deadline", this section should be read to mean "the [five year] deadline" and not any other deadline that may be set by the Commission.[24] Clearly, Section 1720.3 does not contain the limitation which the Group Objectors seek to write into the rule. The Rule does not say that only the five year deadline can be extended. A court should not, moreover, add to or alter the words of the statute to accomplish a purpose that does not appear on the face of the statute or from its legislative history if the words of the statute are clear.[25] In construing Section 1720.3 it would be wrong to add words of limitation to the rule that the Commission did not include. A correct reading of Section 1720.3 is that an Applicant may request an extension of a deadline, whether that deadline is the initial deadline or any subsequent deadline set by the Commission.

---

[22] Smith v. Regents of Univ. of California (1976) 58 Cal.App.3d 397, 403.
[23] Petrou v. South Coast Emergency Group (2004) 119 Cal.App.4th 1090, 1095, citations omitted.
[24] The bracketed language has been added by the Joint Petitioners.
[25] Public Utils. Com v. Energy Res. Conservation & Dev. Com, 150 Cal. App. 3d 437.

Neither Alameda County nor the Group Objectors have offered any explanation as to why it is reasonable to imply a limitation in the language of section 1720.3. "Rules of statutory construction require courts to construe a statute to promote its purpose, render it reasonable, and avoid absurd consequences."[26] The purpose of the Commission's siting statutes and regulations are to promote the licensing of power plants consistent with applicable laws and public health and welfare. An arbitrary limit on the authority of the Commission to grant an otherwise reasonable extension of a license would not promote the purpose of the regulations and the statute.

IV. The SEPCO Case Does Not Govern The Commission's Consideration Of This Request For An Extension Of The Construction Deadline.

After arguing that the RCEC Project presents a case of first impression, Alameda County and Group Objectors then argue that the "SEPCO Compliance Proceeding" established three precedents that must be followed in the consideration of the instant petition for extension.[27] Setting aside the obvious flaws in the argument that the Commission is both faced with a case of first impression and bound by SEPCO "precedent," the parties' arguments are wrong for at least two reasons.

First, the Commission orders in the SEPCO proceeding are not decisions that can be relied upon as precedent under California law. Government Code Section 11425.60 provides that "a decision may not be expressly relied upon as a precedent unless it is designated as a precedent decision by the agency." None of the Commission orders in the SEPCO case cited by Alameda County were designated as precedent decisions. Moreover, if a Commission order cannot be relied upon as precedent unless it has been so designated, then certainly an order of a Commission committee or the statement of a single Commissioner at a hearing does not constitute a precedent.

---

[26] Ford v. Gouin (1992) 3 Ca. 4th 339, 348, citations omitted.
[27] Alameda County Comments, pp. 3-4; Group Comments, pp. 5-6.

Second, even if the SEPCO committee orders could be constructed to be "precedent decisions", a precedent can only furnish a rule for determination of subsequent cases involving identical or similar material facts. Here, in several important factual respects, the RCEC Project is readily distinguishable from the SEPCO project.

A brief review of the SEPCO proceedings is helpful to understanding how different the SEPCO and RCEC Projects are from each other. The SEPCO AFC, submitted on September 3, 1992, consisted of a cogeneration plant owned by the Sacramento Municipal Utility District Financing Authority (SMUD) and an ethanol manufacturing facility owned by Sacramento Ethanol Partners (SEP). SEPCO was to be two entirely separate projects with different owners, united only by a contractual arrangement and proposed to be constructed at the same time.

The Commission Decision approving the cogeneration plant was issued in May 1994. On July 1, 1994, SMUD filed a Petition for License Modification asking to amend the license to allow the project to operate as a stand-alone combined-cycle powerplant. On January 18, 1995, the Commission denied the requested modification. Thereafter, on June 28, 1996, SMUD terminated its development agreement with SEP and transferred the AFC license for the cogeneration plant to SEP.

On August 19, 1999, SEP filed a petition for a three year extension of the AFC license. Because SMUD had long ago abandoned the power plant project and SEP had no plans or partner to build the power plant, a February 7, 2000 Committee Order directed SEP to provide evidence of a project, including documentation of the powerplant, evidence of a powerplant financial partner and a confirmed water supply source. In response to the Committee order, on March 17, 2000 SEP

withdrew the petition to extend the license. The Energy Commission terminated the proceeding on April 5, 2000.[28]

Under the unique circumstances of the SEPCO project, it is understandable that the Committee desired to review environmental issues and to hold an evidentiary hearing. The SEPCO license had been issued five years ago and had not been updated during that period. Moreover, because SMUD had withdrawn from the project and because the project did not have a dedicated water supply, there was substantial question as to the viability of the project.

The license for the RCEC Project, in contrast, has been recently reviewed and updated by the Commission through an exhaustive and lengthy amendment proceeding. The RCEC Project, unlike SEPCO, has a signed power purchase agreement, a dedicated water supply and an identified financial partner. None of the uncertainty that plagued the SEPCO project is present in the case of the RCEC Project. In the absence of identical or similar material facts, the SEPCO proceeding offers no guidance, much less a precedent, for the Commission's consideration of the instant Project Owner's petition for an extension.

V. There Has Been No Change In Applicable Laws That Would Require Reopening The Proceeding.

Alameda County states that the Commission must conduct CEQA review of the request for extension of the construction deadline.[29] Under CEQA, supplemental review of a project that has been previously reviewed under CEQA is required when:

> (1) The lead agency determines that substantial changes are proposed in the project which will require major revisions of the previous EIR due to the involvement of new significant

[28] Alameda County incorrectly states that the Commission *denied* the SEPCO petition to extend the deadline for commencement of construction and that the Commission *terminated* the SEPCO AFC. (Alameda County comments, p. 8) In fact, SEP withdrew the petition and the Commission terminated the proceeding to consider the petition. The Commission never ruled on the merits of the SEP petition. Order of Termination, Docket No. 92-AFC-2C, 4-5-00.
[29] Alameda County Comments, pp. 5-6.

environmental effects or a substantial increase in the severity of previously identified significant effects, or
(2) When new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete shows that the project will have one or more significant effects not discussed in the previous EIR.[30]

None of the information cited by Alameda County rises to the standard of new information showing that the project will have one or more significant effects not discussed in the Decision on Amendment No. 1.

Alameda County suggests that the RCEC Project licensing proceeding should be reopened because of the adoption by the California Air Resources Board of a new, more stringent one-hour average air quality standard for NO_2 in March 2008.[31] Alameda County confounds its argument with references to the ambient air quality standards for ozone. Neither argument presents a basis for reopening the proceeding.

First, the state ambient air quality standards are not "LORS" in the sense that they establish requirements applicable to individual projects. The air quality requirements applicable to the RCEC Project are contained in the regulations of the Bay Area Air Quality Management District, and changes to the state 1-hour average NO_2 standard have not resulted in any corresponding changes to BAAQMD rules. The Commission does, however, use both state and federal ambient air quality standards as indicators of the potential significance of air quality impacts under CEQA. In the case of NOx emissions from the project, both as a result of the application of BAAQMD rules and the Commission's standard practice under CEQA, the RCEC Project has been required to fully offset, and hence fully mitigate, the project's NOx and POC emissions, which are both considered precursors to ozone formation. The impact of the tightened ambient air quality standard for NO_2 is,

[30] 14 C.F.R. § 15162
[31] Alameda County Comments, p. 9

and will be, more properly addressed in the event the applicant proposes a modification to the project that results in an increase in NOx emissions. (We note that there are numerous projects approved by the Commission prior to CARB's adoption of several new ambient air quality standards over the years, and the Commission has never indicated an intention to review those projects at later dates unless the applicants file a request for a project amendment.)

Second, the contribution of the project's NOx emissions to violations of state or federal ambient air quality standards for ozone is relevant only to the extent that it determines whether and to what extent mitigation (in the form of emission offsets) should be provided. As discussed above, the Commission has already required the RCEC Project to fully mitigate its NOx emissions, thus mooting the relevance of alleged changes to violations of ozone standards.

Third, the California Air Resources Board (ARB) amended the NO_2 ambient standards on February 19, 2008, after the record for this proceeding was closed. These new standards became effective on March 20, 2008. Consistent with BAAQMD rules and past Commission proceedings, the appropriate standards are those that were in effect at the time the application was determined to be complete which was in December 2006. Thus, the new NO_2 standard was not an applicable requirement.

Fourth, regardless of which NO_2 standard is to be applied, the RCEC Project will comply with the new 1-hour and annual NO_2 standards. Based upon the procedures outlined in the approved modeling protocol submitted to both the CEC and BAAQMD on November 11, 2006, the project impacts were calculated with the use of the hourly ozone limiting method (as described in the BAAQMD Permit Modeling Guidance for a Refined Air Quality Impact Analysis June 2007) to produce a maximum NO_2 impact of 287.52 ug/m^3 for the 1-hour average which is well below the revised 1-hour NO_2 standard of 339 ug/m^3. This modeling approach is also described in the

USEPA's "Supplement C to the Guideline on Air Quality Models" for evaluating the conversion of NO to NO_2. The Tier 3 Ozone Limiting Method (OLM) referenced in the BAAQMD/USEPA guidance documents uses both hourly ozone and background NO_2 concentrations. In the previous analyses, only hourly ozone concentrations were used to calculate 1-hour NO_2 impacts which were conservatively added to maximum measured 1-hour NO2 background concentrations for the entire three year (2002-2005) period. The project also complies with the revised annual standard of 57 ug/m^3.

Alameda County also alleges that the RCEC Project should be required to evaluate its impacts in the context of ARB's March 2008 draft risk assessment for the Port of Oakland and the West Oakland Community.[32] Alameda County confuses the purposes of ARB's community health risk assessment and the Commission's project-specific reviews. The ARB study for the Port of Oakland and West Oakland Community was specifically done to determine the impacts from exposures to diesel particulate matter associated with diesel exhaust in and near the West Oakland community. The study was designed to enhance the understanding of diesel PM emission impacts by evaluating the current and future contributions of diesel PM emissions from sources at the Port, the Union Pacific Railyard, local freeways and other sources of diesel PM near the West Oakland community on the potential health impacts for people living in the West Oakland community. The main sources at the RCEC Project are not a source of diesel particulate matter since the facility would burn natural gas, not diesel. The RCEC Project will include a small diesel fired emergency fire pump that will not normally operate except under emergency conditions or for limited emissions and reliability testing. The Commission has already reviewed the incremental health risk associated with the RCEC Project using health-conservative assumptions and has concluded that the project's risks are within safe and acceptable limits. While the recent CARB community

[32] Alameda County Comments, p. 10

risk assessment for West Oakland provides interesting, and potentially relevant background information, it in no way affects the Commission's conclusions regarding the RCEC Project "that the project complies with all air quality regulations, which are health and safety based, and that the public health analysis shows an increased cancer risk of 4 in 1 million in a hypothetical worst case against a background cancer risk of approximately 250,000 in 1 million."[33]

VI. The Commission Is Not Required To Make Findings Under Section 1769(A).

For this Petition filed Pursuant to Section 1720.3 of the Commission's regulations, Alameda County argues that the Commission is required to make findings also under Section 1769(a). Section 1769(a) requires a project owner to file a petition for any modification it proposes to "the project design, operation or performance requirements". By requesting a change in the deadline for commencement of construction, the Project Owner in this case is not requesting any modification to "the design, operation or performance requirements". Therefore, on its face Section 1769(a) is not applicable to this Petition.

VII. Conclusion

There is considerable incongruity in the fact that those groups and individuals who argue that the RCEC Project should be penalized for not starting construction by now are the same parties who have employed every possible tactic over the past year to delay the start of construction. The objections raised by these groups and individuals to the instant request for extension are simply another attempt to delay this project. These objections should be rejected.

The standards for review of a request for extension of the construction deadline are simple and straightforward. The deadline for commencement of construction is five years from the date of the decision. The Commission can extend the deadline for good cause. The Commission has

[33] Commission Decision, Russell City Amendment No. 1, p. 8. September 26, 2007.

granted another project a second extension of the date to commence construction and has the discretion to do so for the Russell City Energy Center as well.

July 24, 2008

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By _____

Greggory L. Wheatland
Jeffery D. Harris
Christopher T. Ellison
2015 H Street
Sacramento, California 95814-3109
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Russell City Energy Company, LLC