CALIFORNIA ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION

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

ORDER DENYING PETITIONS FOR INTERVENTION AND DENYING PETITIONS FOR RECONSIDERATION, ETC.

November 7, 2007

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Introduction and Summary

In this Order we deny the petitions for intervention and reconsideration recently filed by the County of Alameda ("County"), the Chabot-Las Positas Community College District ("Chabot"), and the Group Petitioners (the California Pilots Association, Citizens for Alternative Transportation Systems, San Lorenzo Homeowners Association, Skywest Townhouse Homeowners Association, Hayward Democratic Club, and Hayward Area Planning Association). We deny the petitions for intervention because they were filed months past the legal deadline for such petitions (as all petitioners acknowledge), and because no good cause for the delay has been shown. As a result, none of the petitioners are "parties" to the proceeding. Therefore, we must also summarily deny their petitions for reconsideration (and for reopening, etc.), because such petitions may be filed only by parties. Moreover, even had the reconsideration petitions been properly filed, we would deny them. This is because the substantive grounds upon which reconsideration is sought are legally inadequate, and because some of those grounds were not raised during the proceeding, which also makes them ineligible to be heard upon reconsideration.

Most of the issues raised in the reconsideration petitions, and all issues raised in the intervention petitions, concern the adequacy of the notice of the proceeding provided by the Commission to the petitioners. In fact, notice was extensive and more than legally adequate.

Because we are denying all of the petitions for reconsideration that have been filed in this proceeding, the Commission's decision approving the amendment to the Russell City Energy Project certificate, and thereby approving the modification to the Project, remains unchanged in all respects and effective as of the date we adopted it, September 26, 2007.

Procedural History

On May 22, 2001, an Application for Certification ("AFC") for the Russell City Energy Center ("RCEC") Project was filed at the Commission. The Project is a 600-megawatt, natural-gas-fired, combined cycle powerplant to be located in the "Industrial Corridor" of the City of Hayward, which is in the County of Alameda. After a thorough, 14-month review of the proposed Project, in which Alameda County participated, in July 2002 we approved a 244-page Decision certifying the RCEC Project. The Decision contains hundreds of Conditions of Certification designed to ensure that the project will conform with all applicable laws and will not cause any significant adverse environmental impacts. Every condition requested by Alameda County was included in the Decision. No one sought judicial review.

After certification, the RCEC Project did not proceed to construction, because the project owner was unable to obtain financing. However, when the Project was selected by Pacific Gas & Electric for future electricity purchases, through the California Public Utilities Commission's Request for Offer process, the project became financially viable – if it could begin operations no later than June 2010.

On November 17, 2006, the RCEC owner filed a petition to amend the AFC Decision and to modify the Project by moving the facility about 1300 feet northwest of the location described in the current certificate – but still within the same industrial area – and for ancillary changes. The change in location avoids two important effects of the project as originally certified – the destruction of a small fresh-water marsh, and the relocation of a radio tower adjacent to a shorelands park – and thereby eliminates the need for the expensive mitigation required by our original Decision. (The new location was analyzed during the original AFC proceeding but it was unavailable for purchase at that time.)

Although the RCEC amendment proceeding nominally dealt only with a relatively minor modification to a previously-approved project, in its breadth and depth the case closely resembled a full-blown AFC proceeding. After carefully considering all applicable environmental, health, safety, and other issues, on September 26, 2007, we issued a Final Decision granting the amendment to the certificate and approving the modification of the project.

In late October 2007, the three petitions for reconsideration (which also asked for re-opening of the record and similar relief) were timely filed. Correctly recognizing that reconsideration petitions can be filed at the Commission only by "parties" that have intervened in the underlying siting proceeding, and acknowledging that they are not "parties," the reconsideration petitioners simultaneously filed petitions to intervene.

Public Notice

For the RCEC amendment, the Commission provided the same type of thorough public notice that it does for certification proceedings, even though such notice is not required for amendment proceedings. Less than two weeks after the amendment petition was filed, the Commission sent a Request for Agency Participation in the Review of the RCEC Project and a Notice of Informational Hearing and Site Visit to all agencies that had participated in the RCEC AFC proceeding, and any other agency identified as having a potential interest. This included the City of Hayward and no less than seven departments within the government of Alameda County.[1] (When the amendment petition was filed, the project site was partly within the City of Hayward and partly within an unincorporated part of Alameda County. During the amendment proceeding, the County and the City agreed on and implemented the City's annexation of the previously-unincorporated land.)

The Commission also provided written notice of the amendment petition to all property owners within 1,000 feet of the project site or 500 feet of the proposed natural gas pipeline, or the proposed electric transmission line associated with the project. To ensure that all of the people potentially most affected by the Project would be informed, before the first informational hearing and site visit the Public Adviser conducted outreach to sensitive receptors in the area such as local schools, daycare centers, elder care facilities, and nonprofit organizations (youth sports associations, outdoor interest groups, children's organizations, and the like).

In addition, the Commission established a public website for the RCEC amendment proceeding, upon which were posted all notices and orders issued in the proceeding and all of the major documents filed by participants. The website included a detailed written guide to public participation in the siting process, including specific instructions on how and when to file a Petition to Intervene. Information about the project was also posted on the websites of the City of Hayward and of Assemblywoman Mary Hayashi, whose district includes the project site.

Public notice activities continued throughout the entire proceeding. Thus every person or entity on any one (or more) of the Commission's three RCEC mailing lists received paper notice of all events, whether or not the person or entity was a formal party in the proceeding. The "interested agency" list included roughly 30 local, regional, state, and federal agencies, including two Alameda County departments (the

[1] The seven departments are the Department of Agriculture, Department of Environmental Health, Hazardous Materials Team, County Assessor, County Auditor, Department of Public Works, and County Sheriff's Department. The County Mosquito Abatement District also received notice.

Hazardous Materials Office and the Department of Public Works). The "general list" included more than 80 citizens, several interested businesses, and agencies that were not on the "interested agency" list – including seven Alameda County departments. Finally, the "property owner" list included 129 names of entities or persons owning property adjacent to or near the RCEC project. And in addition to the paper mailing lists, the Commission used an e-mail list to provide, to 260 public citizens and agency employees, all documents filed in the case.

As the proceeding progressed, the Commission staff held publicly noticed workshops in the community on such issues as air quality, public health, hazardous materials use, land use, and aviation safety. Subsequently, the Commission held publicly noticed evidentiary hearings on a wide range of issues, and a hearing to take comment on the proposed decision, at Hayward City Hall.

In addition to the Commission's extensive public notification and outreach, the RCEC amendment proceeding received frequent media coverage in local outlets such as the *Oakland Tribune*, the *TriValley Herald*, the *San Jose Mercury-News*, the *Contra Costa Times*, and KPFA radio. Informal meetings and discussions were held throughout the project area, for example at Chabot College.

Describing the results of all this activity, Michael Monasmith of the Public Adviser's Office reported to the Commission that "there's been the highest degree of public involvement that I've experienced in my four years with the Commission, with these two cases."

Legal Framework

Reconsideration of Commission decisions is available only in facility siting proceedings, and then only upon the motion of the Commission itself or upon "petition of any *party*." (Pub. Resources Code, § 25530 [emphasis added]; see also Cal. Code Regs., tit. 20, § 1720, subd. (a).) Apart from the applicant and the Commission Staff, the only "parties" in siting proceedings are those "person[s] who ha[ve] been granted leave to intervene . . . ." (Cal. Code Regs., tit. 20, § 1702, subds. (i)-(j).) In the RCEC amendment proceeding, there was only one intervenor (and thus only one "party" other than the applicant and the Staff): an interested local citizen, Paul Haavik.

Because the reconsideration petitioners knew that they were not parties and therefore could not petition for reconsideration, they submitted petitions for intervention. In siting cases, the Commission's regulations establish a deadline for intervention petitions that is related to the first hearing (or the prehearing conference) (Cal. Code Regs., tit. 20, § 1207, subd. (b)); late petitions may be granted "only upon a showing of good cause by the petitioner" (*id.* § 1207, subd. (c)).

The deadline for intervention petitions in the RCEC amendment proceeding was July 3, 2007. Obviously, the three intervention petitions at issue here were filed well after the deadline. Therefore, they can be granted only if we find that the petitioners have demonstrated "good cause" for missing the deadline (and that they meet the other legal criteria for intervention). And only if we grant an intervention petition (and thereby confer "party" status on the petitioner) may we even consider that entity's reconsideration petition, for only "parties" may file reconsideration petitions.

I. THE PETITIONS FOR INTERVENTION.

All three petitioners assert that the "good cause" for not filing their intervention petitions on a timely basis is that they did not receive adequate notice of the RCEC amendment petition in sufficient time to allow them to file.[2] Yet the record very clearly shows that all three petitioners had (1) no legal right to notice, (2) notice from the Commission at the beginning of the proceeding, or (3) actual knowledge of the proceeding in plenty of time to file punctually, or some combination thereof. Therefore, no good cause exists for any petitioner's failure to meet the filing deadline, and we must deny each intervention petition.

A. Alameda County.

Alameda County admits that the Commission sent notice to seven of its departments very early in the proceeding, but the County asserts that the notice was inadequate because (1) notice was not directed to the County Development Agency ("CDA"), the County's Airport Land Use Commission ("ALUC"), or the Board of Supervisors; and (2) the initial notice erroneously referred to the project site as being located entirely within the City of Hayward. (The actual location was partially within unincorporated County land and partially within the City of Hayward – which is itself entirely within the County.) Both rationales are specious.

The County cites no legal authority for the proposition that notice to one County department (or seven County departments) with interest in a Commission proceeding does not constitute notice to the County itself. Such a principle would elevate form quite unreasonably far over substance. In any event, the Board of Supervisors, and the CDA and the ALUC, actually knew about the RCEC Project well before the deadline

[2] It is unclear from the Warren-Alquist Act and our regulations whether (1) the notice requirements for siting proceedings are applicable to amendment cases, (2) reconsideration is available in amendment cases, and (3) intervention is available at the reconsideration stage. We will assume, without deciding, that the answer to each question is Yes.

for intervention petitions, and all three had detailed knowledge about the site location and its relationship to the boundaries of the County and the City of Hayward.

On December 19, 2006 – only a month after the amendment application had been filed at the Commission, but more than six months before the intervention deadline of July 3, 2007 – the Board approved an agreement concerning the RCEC Project site (the agreement is generally referred to as the "Mount Eden Agreement"). The Agreement was executed by the Board itself, the County Redevelopment Agency (which is part of the CDA), and the City of Hayward, and it dealt with the City's annexation of the previously-unincorporated County land and the division of the property tax revenues from the site among the three entities after construction of the RCEC. Among other things, the Agreement obligated the City of Hayward to "use diligent good faith efforts" to secure the licensing of the facility so that the revenues for both the County and the City would be increased. A cover memorandum urging the Board to approve the Agreement was provided by the Executive Director of the CDA, James E. Sorensen.

The Mount Eden Agreement flatly contradicts Mr. Sorensen's claims, both in his personal appearance at the Commission on September 12, 2007, and in his sworn declaration supporting the County's petitions for intervention and reconsideration, that he and his staff were confused about where the project was located because the Commission's notice indicated that the location was the City of Hayward, and that but for this "false impression" the County would have participated more vigorously. Moreover, if a false impression that the project was entirely within the City of Hayward justified the County's failure to intervene before the annexation, then the same "impression," which is now true as a result of the annexation, indicates that the County has no interest justifying intervention at this time.

Finally, several County representatives participated actively in the Commission's RCEC proceeding. As early as February 6, 2007, for example, an employee wearing both CDA and ALUC hats participated in a public workshop, and she and other County representatives participated throughout the case.

In sum, the notion that the County did not receive adequate notice, and that its participation in the RCEC amendment proceeding was thereby somehow compromised, is false. The County has shown no good cause for its failure to intervene on time, and its petition is denied.

B. Chabot.

Chabot asserts that it was entitled to notice under section 1714 of the Commission's regulations. Not so. The provision requires the Commission to provide notice to various specified agencies, and to any other agency that would have

jurisdiction over an electricity facility but for the Commission's exclusive "one-stop" siting authority. (Cal. Code Regs., tit. 20, § 1714, subd. (c).) Chabot is not such an agency. It is, then, in the exact same position legally as all other individuals and entities that might have an interest in a project that requires a government permit in their locale. In such proceedings (or in any other kind of administrative proceeding), there is no requirement that the licensing agency provide direct notice to every person and organization in the area (however that area might be defined), which often, as here, will include literally millions of individuals. Many, many intervenors in Commission proceedings have become informed of projects in their vicinity without direct notice. Chabot has no legal claim to special treatment here.

Moreover, Chabot College, one of the two colleges that make up the Chabot-Las Positas District, received direct notice from the Commission, and at least one community (non-Commission) meeting concerning the Project was held there. This certainly appears sufficient to have informed the District itself. The District's petition to intervene is denied.

C. Group Petitioners.

As is the case for Chabot, the Group Petitioners were not legally entitled to notice from the Commission. Furthermore, several members of petitioners had actual knowledge of the proceeding and participated in it from its early stages. For example, the California Pilots Association received regular communications from the Commission Staff and testified at hearings. Mr. Toth and Mr. Wilson, declarants for the Group Petitioners, have been following the case since February 2007 and have spoken at workshops and hearings. And the Citizens for Alternative Transportation Systems was represented by counsel during the case. Thus the Group Petitioners had months during which they could have intervened in a timely manner. No good cause exists for their failure to do so, and their petition is denied.

II. THE PETITIONS FOR RECONSIDERATION.

Because the petitions for intervention are denied, the petitioners do not have party status, so they are not entitled to file petitions for reconsideration. The latter petitions are, therefore, summarily denied. Moreover, reconsideration petitions "must fully explain why the matters set forth could not have been considered" during the proceeding. (Cal. Code Regs., tit. 20, § 1720, subd. (a).) Because none of the reconsideration petitions did so, we would be required to deny those petitions even if they had been filed by parties.[3] Nevertheless, we briefly set forth some observations on

[3] All three reconsideration petitioners argue that they could not have raised their issues during the proceeding because of lack of notice. We have thoroughly dealt with those

the major substantive arguments they present.

Conformance with LORS. Group Petitioners argue that the RCEC Project does not conform with local or regional laws, ordinances, regulations, or standards. No evidence is offered to support the argument, and it is directly refuted by the reams of evidence in the record that support the Commission's findings of conformance. The City of Hayward, the local agency within whose territory the Project now exclusively lies, supports those findings.

CEQA Issues. Group Petitioners and Chabot argue, without supporting evidence, that the RCEC will cause unmitigated significant adverse environmental impacts. The Decision is rife with requirements for mitigation that will avoid all impacts or reduce them to insignificant levels. Group Petitioners also argue that the Commission's siting process is inconsistent with CEQA in that it is more formal that the procedures required by CEQA. Nothing in CEQA prevents an agency from crafting its own procedures, as long as CEQA's minimums are met. Moreover, CEQA's procedural requirements (as opposed to its substantive criteria) are not applicable to the Commission, which operates under a certified regulatory program. (See Cal. Code Regs., tit. 14, §§ 15250, 15251, subd.(j).) In addition, many of the requirements in the Commission's siting process are necessary to adhere to the provisions in the State Administrative Procedure Act on quasi-adjudicatory proceedings.

Air Quality. Group Petitioners argue that the methodology used for calculating air emissions and mitigation is flawed. This argument is based solely on the declaration of Michael Toth, who has no air quality or modeling expertise, and who failed to raise all but one of his methodology issues at the evidentiary hearing in which he participated. The one issue he did raise was directly addressed by the Staff's witness. Group Petitioners also contend, incorrectly, that the project does not use best available control technology ("BACT"). The Bay Area Air quality Management District ("BAAQMD") determined that the RCEC will use BACT, as is required by law.

Aviation Safety. Group Petitioners point out that the ALUC has recently asserted that NOTAM alerts (restriction of airspace) "are not mitigation." ALUC's advisory opinion is not legally binding. Moreover, it would not be entitled to any more weight (even had it been timely) than the considerable body of evidence in the record, including that presented by the Federal Aviation Administration ("FAA"), which supported a NOTAM requirement as one of several measures to reduce what it concluded was "acceptable risk." The County claims that it did not have adequate time to respond to

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claims in Part I. of this Order. The County's argument concerning the Commission's alleged failure to delay the final decision is essentially a repetition of the County's notice argument, and nothing more needs to be said about it here.

the FAA's most recent presentation (at the September 26 hearing), but no one objected to the introduction of the FAA's evidence at that time, and it is too late for the County to raise an objection now. In any event, the County's ALUC, which appears to be the County department with expertise in the matter, participated throughout the proceeding, so the County has no cause for complaint.

The Amendment Process. Group Petitioners assert that the Commission should have processed the RCEC amendment as a full-blown AFC and that the Commission must find that amendments are "needed." It is far too late to object to the Commission's decision, made almost a year ago, that the minor location change qualified as an amendment. In any event, the combination of the consideration of the new location in the original AFC proceeding, and the quasi-AFC treatment of the new location in the amendment proceeding, ensured that examination of the current RCEC has been exhaustive and certainly as extensive as is required by law. With regard to "need," there is no "need" requirement in AFC proceedings and therefore none in amendment cases.

Conclusion

The petitions for intervention are denied because no good cause for their tardiness was shown. Because none of the petitioners are parties, their petitions for reconsideration must be, and are, summarily denied. In addition, the allegations in the reconsideration petitions fall short of substantive and procedural legal requirements. In light of these conclusions and the discussion above, we need not address other issues raised by petitioners or the responding parties.

November 7, 2007

ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

Amendment to the APPLICATION FOR CERTIFICATION OF THE RUSSELL ENERGY CENTER POWER PLANT PROJECT	**Docket No. 01-AFC-7C PROOF OF SERVICE (Revised 7/6/07)**

INSTRUCTIONS: All parties shall 1) send an original signed document plus 12 copies OR 2) mail one original signed copy AND e-mail the document to the web address below, AND 3) all parties shall also send a printed OR electronic copy of the documents that shall include a proof of service declaration to each of the individuals on the proof of service:

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DECLARATION OF SERVICE

I, Lynn Tien-Tran, declare that on November 13, 2007, I deposited copies of the attached ORDER DENYING PETITIONS FOR INTERVENTION AND DENYING PETITIONS FOR RECONSIDERATION, ETC. November 7, 2007 to the Russell City Energy POS List in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmitted via facsimile transmission to those identified above with a Fax number.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.

Lynn Tien-Tran