BEFORE THE HEARING BOARD
OF THE
BAY AREA AIR QUALITY MANAGEMENT DISTRICT

APPEAL

DOCKET
04-AFC-1
DATE MAR - 9 2006
REC'D MAR 17 2006

In the Matter of the Appeal of Californians for Renewable Energy from the City and County of San Francisco San Francisco Electrical Reliability Project Application 12344	)))))))	Docket No. 3511

MOTION TO DISMISS FOR LACK OF JURISDICTION

Pursuant to § 8.1a of the Hearing Board Rules, the City and County of San Francisco (City or CCSF) respectfully files this motion to dismiss for lack of jurisdiction. The appeal filed by Californians for Renewable Energy (CARE) is moot since the Bay Area Air Quality Management District (BAAQMD or District) has issued a revised Final Determination of Compliance (FDOC) in this matter upon review of CARE's comments. In addition, CARE's appeal is not yet ripe since there is no final agency action in this matter. Prior to issuance of an Authority to Construct, CARE will have ample opportunity to raise the concerns it has expressed in its appeal before the California Energy Commission in upcoming testimony and evidentiary hearings.

I. Background.

The City filed an application for certification (AFC) with the California Energy Commission (CEC) for a small, simple-cycle combustion turbine plant in San Francisco, the San Francisco Electric Reliability Project (SFERP). In connection with its AFC, the City filed an application for a Determination of Compliance for the SFERP with the BAAQMD. On July 26, 2005, the District issued a Preliminary Determination of Compliance (PDOC) which was served on the service list in the AFC proceeding for

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the SFERP on July 27, 2005. CARE is on that service list. According to CARE, it filed comments on the PDOC with the District on August 31, 2005. The District issued a Final Determination of Compliance (FDOC) on December 15, 2005, which was served on the service list in the AFC proceeding for the SFERP on the same date.

On January 11, 2006, CARE filed an appeal of the FDOC with this Hearing Board, claiming that its comments were not considered. CARE's appeal also contends that the FDOC fails to 1) require a dust control plan, 2) address environmental justice issues raised by CARE, 3) limit startups and shutdown, 4) identify all possible control alternatives that would reduce environmental impacts as mitigation for PM2.5 impacts. CARE's appeal requests that the PDOC be re-issued and an appropriate public comment period held. On January 25, 2006, the District issued a revised FDOC. By letter dated February 1, 2006, the District responded to CARE's comments in detail.

II. CARE's Appeal Is Moot In Light of the Issuance of a Revised FDOC.

CARE's allegation that its comments were not considered is moot in light of issuance of the revised FDOC. Moreover, in light of the background described above, the relief requested by CARE is unwarranted. Irrespective of whether CARE's comments were adequately considered in advance of the issuance of the FDOC on December 15, 2005, any potential procedural defect has been corrected by the issuance of a revised FDOC on January 25, 2006, subsequent to consideration of CARE's comments.

CARE's request for reissuance of the PDOC and an additional public comment period is not warranted. Regulation 2, Rule 3-404 requires that a PDOC be noticed and subjected to public comment in advance of issuance of an FDOC. CARE and all participants in the AFC proceeding had notice of issuance of the PDOC and CARE in fact submitted comments on August 31, 2005. Thus, CARE's only legitimate concern

with regards to the requirements of Regulation 2, Rule 3-404, is whether its comments were considered in the preparation and issuance of the FDOC. Regardless of whether or not this occurred with regards to the FDOC issued on December 15, 2006, the District did consider CARE's comments in preparation and issuance of the revised FDOC on January 25, 2006. Hence any procedural defect has been cured.

III. CARE's Appeal is Not Ripe Because the Authority to Construct is the Final Agency Action in this Matter and CARE Will Have an Opportunity to Present its Concerns Before the California Energy Commission.

Even if CARE's appeal were not moot, the Hearing Board lacks jurisdiction to hear CARE's appeal because the appeal is not ripe. It is hornbook law that "an agency action is not reviewable until it is final." *Board of Med. Quality Assur. v. Superior Court* 73 C.A.3d 860, 862 (1977); see also 9 Witkin, Cal. Proc. 4th (1997), Admin Proc § 107, p.1152.

The BAAQMD will not issue its final action, the Authority to Construct, until after the CEC has issued a license for the SFERP with the appropriate conditions. The Hearing Board itself recognized in a prior case that

> non-PSD portions of [an] FDOC become final only if and when all of the conditions required by the air district are included in the CEC's final licensing decision. Bay Area AQMD Rule 2-3-405 *et seq*. In developing the PDOC and FDOC, Bay Area AQMD staff work with CEC staff on the CEC staff's preliminary and final staff assessments . . . and participate in public workshops and public hearings/evidentiary hearings held by the CEC."

In the Matter of the Appeal of the City of Morgan Hill et. al., Docket No. 3350, Order Dismissing Appeal at 5, December 21, 2001.[1]

The CEC AFC process is only now entering the phase of testimony and evidentiary hearings. A notice has been issued establishing a prehearing conference on

[1] The Hearing Board also recognized in that case that because parties have ample opportunities to address concerns before the CEC, the issues in any appeal of the issuance of an Authority to Construct by the District would be very limited. Id. at 9, footnote 8.

April 3, 2006 and CARE will have ample opportunity to present testimony on, to cross examine witnesses on, and to brief its issues of concern. The final license conditions adopted by the CEC may adequately address all of CARE's concerns so that it would no longer challenge the FDOC or the Authority to Construct. Thus, adjudication at this point would be premature.

IV. Conclusion.

CARE's appeal should be dismissed. The remedy CARE seeks is unwarranted and CARE's contention that its comments were not considered is moot in light of the issuance of a revised FDOC upon consideration of CARE's comments. Moreover, CARE's appeal is not ripe since the District has not yet issued an Authority to Construct and will not do so until after the CEC holds hearings and issues a final decision on the AFC for the SFERP. CARE will have an opportunity to raise its concerns in the upcoming testimony and evidentiary hearings before the CEC.

Accordingly, the City respectfully requests dismissal of CARE's appeal.

Dated: March 9, 2006

Respectfully submitted,

DENNIS J. HERRERA
CITY ATTORNEY

THERESA L. MUELLER
JEANNE M. SOLÉ
DEPUTY CITY ATTORNEYS

/s/
By: Jeanne M. Solé

OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
San Francisco, CA 94102

ATTORNEYS FOR THE CITY AND COUNTY
OF SAN FRANCISCO

Docket No. 3511

CERTIFICATE OF SERVICE

I, KIANA DAVIS, declare that:

I am a citizen of the United States, over the age of 18 years and not a party to the within entitled action. I am employed at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, San Francisco, CA 94102.

On March 9, 2006, I served the following document(s):

MOTION TO DISMISS FOR LACK OF JURISDICTION

on the following parties:

Lynne Brown, Vice President
Californians for Renewable Energy, Inc. (CARE)
24 Harbor Road
San Francisco, CA 94124

Michael E, Boyd, President
Californians for Renewable Energy, Inc. (CARE)
5439 Soquel Drive
Soquel, CA 95073

☒ **BY MAIL:** I caused true and correct copies of the above documents, by following ordinary business practices, to be placed and sealed in an envelope at the City Attorney's Office of San Francisco, City Hall, Room 234, 1 Dr. Carlton B. Goodlett Place, City and County of San Francisco, California, 94102, for collection and mailing with the United States Postal Service. The envelope was addressed to the above addressee(s). I am familiar with the City Attorney's Office practice for collection and processing of correspondence for mailing with the United States Postal Service, and in the ordinary course of business, correspondence placed for collection on a particular day is deposited with the United States Postal Service that same day.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on March 9, 2006 at San Francisco, California.

/s/
KIANA DAVIS

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

APPLICATION FOR CERTIFICATION FOR THE SAN FRANCISCO ELECTRIC RELIABILITY PROJECT

Docket No. 04-AFC-01
PROOF OF SERVICE
Revised 2/17/06

DOCKET UNIT

Instructions: *Send an original signed document plus 12 copies* ***or*** *an electronic copy plus one original paper copy to the address below:*

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 04-AFC-01
DOCKET UNIT, MS-4
1516 Ninth Street
Sacramento, CA 95814-5512

Also send a printed ***or*** *electronic copy of all documents to each of the following:*

APPLICANT

Barbara Hale, Power Policy Manager
San Francisco Public Utilities Commission
1155 Market Street, 4th Floor
San Francisco, CA 94102
BHale@sfwater.org

Applicant Project Manager
Karen Kubick
SF Public Utilities Commission
1155 Market St., 8th Floor
San Francisco, CA 94103
kkubick@sfwater.org

APPLICANT'S CONSULTANTS

Steve De Young
De Young Environmental Consulting
4155 Arbolado Drive
Walnut Creek, CA 94598
steve4155@astound.net

John Carrier
CH2MHill
2485 Natomas Park Drive, Suite 600
Sacramento, CA 95833-2943
jcarrier@ch2m.com

COUNSEL FOR APPLICANT

Jeanne Sole
San Francisco City Attorney
City Hall, Room 234
1 Dr. Carlton B. Goodlet Place
San Francisco, CA 94102-4682
Jeanne.sole@sfgov.org

INTERESTED AGENCIES

Emilio Varanini III
Special Counsel
California Power Authority
717 K Street, Suite 217
Sacramento, CA 95814
drp.gene@spcglobal.net

Electricity Oversight Board
770 L Street, Suite 1250
Sacramento, CA 95814

Donna Jordan
CA Independent System Operator
151 Blue Ravine Road
Folsom, CA 95630
djordan@caiso.com

Dept. of Water Resources
SERS
Dave Alexander
3301 El Camino Avenue, Ste. 120
Sacramento, CA 95821-9001

INTERVENORS

*** Jeffrey S. Russell**
VP West Region Operations
Mirant California, LLC
P.O. Box 192
Pittsburg, California 94565
Jeffrey.russell@mirant.com

*** Mark Osterholt**
Mirant California, LLC
P.O. Box 192
Pittsburg, California 94565
mark.osterholt@mirant.com

Michael J. Carroll
Latham & Watkins LLP
650 Town Center Drive, Suite 2000
Costa Mesa, CA 92626
michael.carroll@lw.com

Potrero Boosters Neighborhod
Association
Dogpatch Neighborhood Association
Joseph Boss
934 Minnesota Street
San Francisco, CA 94107
joeboss@joeboss.com

San Francisco Community Power
c/o Steven Moss
2325 Third Street # 344
San Francisco, CA 94107
steven@sfpower.org

Californians for Renewable Energy, Inc.
(CARE)
Michael E. Boyd, President
5439 Soquel Drive
Soquel, California 95073
michaelboyd@sbcglobal.net

Lynne Brown – Member, CARE
Resident, Bayview Hunters Point
24 Harbor Road
San Francisco, Califomia 94124
L_brown123@yahoo.com

Robert Sarvey
501 West Grantline Road
Tracy, CA 95376
sarveyBob@aol.com

DECLARATION OF SERVICE

I, **Laura J. Murphy**, declare that on **March 17, 2006**, I deposited copies of the attached **Appeal on Motion to Dismiss for Lack of Jurisdiction of the City and County of San Francisco** 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. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. I declare under penalty of perjury that the foregoing is true and correct.

Laura J. Murphy

[signature]

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Parties DO NOT mail to the following individuals. The Energy Commission Docket Unit will internally distribute documents filed in this case to the following:

JAMES D. BOYD, Commissioner
Presiding Member
MS-34

JOHN L. GEESMAN, Commissioner
Associate Member
MS-31

Stan Valkosky
Hearing Officer
MS-9

Bill Pfanner
Project Manager
MS-15

Dick Ratliff
Staff Counsel
MS-14

Margret J. Kim
Public Adviser
MS-12