EVIDENTIARY HEARING

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of the:	)	
	)	
Application for Small Power Plant	)	Docket No.
Exemption for the Santa Clara	)	11-SPPE-01
SC-1 Data Center Project	)	
	)	

CALIFORNIA ENERGY COMMISSION

HEARING ROOM A

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

WEDNESDAY, FEBRUARY 22, 2012

11:00 a.m.

Reported by:
John Cota
Contract No. 170-09-002

COMMITTEE MEMBERS PRESENT

Karen Douglas, Presiding Member

Carla Peterman, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Kenneth Celli, Hearing Officer

Eileen Allen, Technical Advisor on Siting

Jim Bartridge, Advisor to Commissioner Peterman

Galen Lemei, Advisor to Commissioner Douglas

Jennifer Nelson, Advisor to Commissioner Douglas

CEC STAFF AND CONSULTANTS PRESENT

Richard Ratliff, Staff Counsel

Robert Worl, Project Manager

Gerry Bemis

Wenjun Qian, PhD

Rick York

OFFICE OF THE PUBLIC ADVISER

Jennifer Jennings, Public Adviser

APPLICANT

Monica Schwebs
Bingham McCutchen, LLP

Richard Waddle (via WebEx)
DuPont Fabros

Nora H. Monette (via WebEx)
David J. Powers & Associates, Inc.

INTERVENORS

None

ALSO PRESENT

Payal Bhagat (via WebEx)
City of Santa Clara

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P R O C E E D I N G S

11:06 a.m.

PRESIDING MEMBER DOUGLAS: Good morning and welcome everybody to the evidentiary hearing for the Santa Clara Data Center Phase 2 project.

This is an evidentiary hearing conducted by a committee of the California Energy Commission on the application from the Santa Clara SC-1 Data Center Phase 2 for a Small Power Plant Exemption from the Energy Commission's regular certification process.

The Energy Commission has assigned a committee of two commissioners who are to conduct these proceedings and before we begin I would like to introduce the committee members to you.

I am Commissioner Karen Douglas. Next to the hearing officer, on his left, is Commissioner Carla Peterman; Hearing Officer Ken Celli is on my left. On my right, Galen Lemei, my advisor. To the left of Commissioner Peterman is Jim Bartridge, Commissioner Peterman's advisor. And to the far left is Eileen Allen, an advisor to commissioners on siting matters.

Can I ask the applicant if you could introduce your representatives at this time.

MS. SCHWEBS: I'm Monica Schwebs with Bingham McCutchen, representing the applicant. And I have on the

phone Nora Monette, who is the project manager, and Rick Waddle, who is the director of construction for DuPont Fabros.

PRESIDING MEMBER DOUGLAS: Thank you. And staff, please.

MR. WORL: My name is Robert Worl, project manager for the project and to my left is Richard Ratliff, staff counsel. And we have some other members of the team that put together the analysis with us as well, Rick York, Wenjun Qian and Gerry Bemis.

PRESIDING MEMBER DOUGLAS: Thank you. And I know that we have Payal Bhagat from the City of Santa Clara on the line. Is there anyone else from the City of Santa Clara?

MS. BHAGAT: I believe not.

PRESIDING MEMBER DOUGLAS: Thank you. Are there any other federal, state or local agency officials on the phone or in the room?

(No response.)

PRESIDING MEMBER DOUGLAS: All right. Our Public Adviser, Jennifer Jennings is here with us today. And with that I will turn this over to the hearing officer.

HEARING OFFICER CELLI: Thank you, Commissioner Douglas. Good morning everyone.

This evidentiary hearing is a formal adjudicatory

proceeding to receive evidence into the formal evidentiary record from the parties. Only the parties, who in this case are the applicant and Energy Commission staff only, only the parties may present evidence for introduction into the formal evidentiary record, which is the only evidence upon which the Commission may base its decision under law.

Technical rules of evidence are generally followed. However, any relevant, non-cumulative evidence may be admitted if it is the sort of evidence upon which responsible persons are accustomed to rely in the conduct of serious affairs.

Testimony offered by the parties shall be under oath. Each party has the right to present and cross-examine witnesses, introduce exhibits and to rebut evidence of another party.

Questions of relevance will be decided by the Committee.

Hearsay evidence may be used to supplant or explain -- I'm sorry -- may be used to supplement or explain other evidence but shall not be sufficient in itself to support a finding.

The Committee will rule on motions and objections.

The Committee may take official notice on matters within the Energy Commission's field of competence and of any fact that may be judicially noticed by the California

courts.

The official record of this proceeding includes sworn testimony of the parties' witnesses, the reporter's transcripts of the evidentiary hearing, the exhibits received into evidence, briefs, pleadings, orders, notices and comments submitted by members of the public.

The Committee's decision will be based solely on the evidence in the record to determine whether the project is entitled to a Small Power Plant Exemption in accordance with applicable law.

Members of the public who are not parties are welcome and invited to observe the proceedings. There will be an opportunity for the public to provide comment before we close the hearing.

The public comment period is intended to provide an opportunity for persons who attend the hearing to address the Committee. It is not an opportunity to present written, recorded or documentary materials. However, such materials may be docketed and submitted to the Energy Commission for inclusion in the administrative record.

Members of the public who wish to speak should fill out a blue card provided by the Public Adviser, Jennifer Jennings, who is here. And if you would prefer not to speak publicly but would like to submit a written comment the blue card has a space to do so.

If you are a member of the public participating through the WebEx teleconferencing system you will need to speak up when the Committee calls upon you during the comment period that would immediately follow the evidentiary hearing.

I have passed out to the parties an Exhibit List today. There is also copies of the Exhibit List on the table in the foyer as you come in to the hearing room. The Exhibit List has been distributed to the parties electronically and the parties were asked to bring copies for their use today. We will use this list to organize the receipt of evidence into the record.

According to the prehearing statements of the parties, all subject areas are uncontested. None of the parties has filed any objection to submittal of all testimony by declaration.

Today we will proceed as follows: First, the applicant will move its testimony and exhibits into evidence. Next, staff will move its testimony and exhibits into evidence.

And with that I would ask that we swear in the project managers. We have one on the phone and we have one present.

So if you would, please swear in Mr. Worl and then Nora Monette.

Whereupon,

ROBERT WORL

NORA MONETTE

Was called as a witness herein, and after being duly sworn, was examined and testified as follows:

HEARING OFFICER CELLI: Thank you. With that the project managers are sworn.

Applicant, at this time do you wish to move evidence into the record.

MS. SCHWEBS: Yes. And the applicant moves the entire application with all its appendices into the record. The declaration for Ms. Monette is part of the Prehearing Conference Statement.

HEARING OFFICER CELLI: We have, for clarification sake, applicant's exhibits are Exhibits 1 through 18.

MS. SCHWEBS: Yes, according to your list, that's fine.

HEARING OFFICER CELLI: And is that the sum total of the exhibits you wish to move in at this time?

MS. SCHWEBS: Yes.

HEARING OFFICER CELLI: Any objection by staff of the admission of Exhibits 1 through 18?

MR. RATLIFF: No.

HEARING OFFICER CELLI: Okay, 1 through 18 are admitted and received into evidence.

(Applicant's Exhibits 1 through 18
were received into evidence.)
HEARING OFFICER CELLI: At this time do you have any other witnesses or testimony, Ms. Schwebs?
MS. SCHWEBS: That's all of our testimony.
HEARING OFFICER CELLI: Thank you. Staff, at this time do you have a motion?
MR. RATLIFF: Yes, we move that the Initial Study, Negative Declaration, Notice of Intent to prepare a Negative Declaration and the appendices to those documents, which are Exhibits 200 through 210, be admitted into the record.
HEARING OFFICER CELLI: Okay. Is there any objection by the applicant?
MS. SCHWEBS: No objection.
HEARING OFFICER CELLI: No objection. Then 200 through 210 are received into evidence.
(Staff's Exhibits 200 through 210
were received into evidence.)
HEARING OFFICER CELLI: I did receive an email this morning with a --
MS. SCHWEBS: An additional declaration.
HEARING OFFICER CELLI: A declaration from Rick York this morning. Is that already in that list of 200 through 210?
MR. WORL: No, it's not.

HEARING OFFICER CELLI: Would you want to move that in as 211?

MR. WORL: Yes, we would like to move Rick's declaration into evidence.

HEARING OFFICER CELLI: Any objection?

MS. SCHWEBS: No objection.

HEARING OFFICER CELLI: Okay, Rick York's declaration.

Any other evidence that needs to be received into evidence for staff?

MR. RATLIFF: We did file a memorandum yesterday, which is a proposed finding, or proposed findings, and we would request that that be made an additional exhibit for staff.

HEARING OFFICER CELLI: The next in order would be 212.

MR. RATLIFF: Yes. And Ms. Schwebs pointed out that there may be incorrect references in that filing in terms of the listing of exhibit numbers that you are using. So if she wants to correct it at this moment that would be, this would seem to be the time.

MS. SCHWEBS: Yes. Applicant does request that greater specificity be given to that third bullet in the list, if you have it before you, Ken. Currently it indicates that there are Exhibits 1-A through 1-Q, which was

the numbering scheme that the applicant used. It's perfectly fine to change that to 2 through 18, which is what it should be.

But we further request that if you choose to use these findings that you be a little bit more specific about the exhibit numbers. In particular some clarity should be given to the term "addendum" which appears in this bullet item without any definition of what it is an addendum to.

So we would request that you add "addendum to mitigated negative declaration issued by the City of Santa Clara" which were issued on those dates that are given in the third bullet. So I can just hand this to you when we are done if that would be of any assistance to you. I realize you may not use these findings anyway but I do request that we be a little bit more specific.

HEARING OFFICER CELLI: Okay. But you don't object to their admission?

MS. SCHWEBS: No. And there is no substantive objection, this is purely as to form.

HEARING OFFICER CELLI: Okay. Well then thank you, I'll take that into consideration. And with that, if there is no objection then, what I have in the record is staff's Exhibits 200 through 212, where 212 is a -- "Suggested Findings" is what we'll call it.

Anything further from staff?

MR. RATLIFF: No.

HEARING OFFICER CELLI: Okay, then 200 through 212 are received into evidence.

(Staff's Exhibits 211 and 212 were received into evidence.)

HEARING OFFICER CELLI: Anything further from staff?

MR. RATLIFF: No.

HEARING OFFICER CELLI: Anything further from applicant with regard to evidence?

MS. SCHWEBS: No.

HEARING OFFICER CELLI: Are there any questions from the Committee? Commissioner Douglas?

PRESIDING MEMBER DOUGLAS: No.

HEARING OFFICER CELLI: Commissioner Peterman?

ASSOCIATE MEMBER PETERMAN: No.

HEARING OFFICER CELLI: Eileen Allen has a question; go ahead.

ADVISOR ALLEN: I have a biological resources question for staff related to the discussion on potential for nitrogen deposition in the Initial Study Negative Declaration. Has staff had any communication from the U.S. Fish and Wildlife Service on this potential issue?

MR. RATLIFF: No, not to my knowledge.

ADVISOR ALLEN: Okay. I understand that critical

habitat for the listed Bay checkerspot butterfly is located approximately eight miles southeast of the project site and that a serpentine grassland area which is not considered critical habitat is located approximately five miles southeast of the project site on Communications Hill in San Jose.

Staff's AERMOD emission modeling work indicated that potential nitrogen deposition would fall far short many miles away of even the non-critical butterfly habitat, which is approximately five miles from the site. Is my understanding correct?

MR. RATLIFF: Yes.

ADVISOR ALLEN: Thank you.

HEARING OFFICER CELLI: Thank you. Any further questions from any of the members of the Committee? Thank you.

At this time I wonder if the parties feel it is necessary to file a brief and whether you think we need a briefing schedule? It's your call. Applicant?

MS. SCHWEBS: The applicant doesn't think a brief is necessary.

HEARING OFFICER CELLI: Staff?

MR. RATLIFF: No, there are no issues in contention to be briefed and we think the analysis that has been provided is sufficient and should be sufficient for the

Committee to make its decision and its findings.

HEARING OFFICER CELLI: Thank you. Then at this time are there any further matters before we go to public comment from applicant or staff? Applicant?

MS. SCHWEBS: No.

HEARING OFFICER CELLI: Staff?

MR. RATLIFF: No.

HEARING OFFICER CELLI: Thank you. At this time I am going to open up the record to public comment. We have on the phone Rick Waddle, who is associated with DuPont Fabros, Nora Monette who is also associated with the applicant, is the project manager in fact.

We have Payal Bhagat from the City of Santa Clara and no one else on the telephone. So I am going to take care of the telephone first and then I will inquire from Ms. Jennings, our public advisor, whether there is any public who wish to make a comment here in person. Ms. Bhagat, did you wish to make a comment?

MS. BHAGAT: No, thank you, sir.

HEARING OFFICER CELLI: Thank you. And then I am going to see if we have any members of the public. The record should reflect we have a pretty sparse group here today. Ms. Jennings, are there any members of the public who wish to make a public comment?

MS. JENNINGS: No, there are not.

HEARING OFFICER CELLI: Okay, there are none present here today to make a comment even though we gave an opportunity.

I do want to ask the parties whether they have received any public comment that was not addressed in staff's Initial Study? In other words, if the comments came in too late to be included in the staff's Initial Study I would ask the parties to respond to those comments now. Did anything, any comments come in after the filing of the Initial Study, Mr. Worl?

MR. WORL: No, we have received no comments.

HEARING OFFICER CELLI: Thank you. Then with that I am going to hand the hearing back to the Presiding Member, Commissioner Douglas, to conclude.

PRESIDING MEMBER DOUGLAS: I would like to thank all of the parties for working together on this and for bringing us an evidentiary hearing without contested issues. It is rare but it is also probably not surprising in this case because of the thorough work and analysis that has gone into it. So we will move forward with a proposed decision as expeditiously as possible. We would just like to thank you for being here. So with that the hearing is adjourned.

HEARING OFFICER CELLI: Thank you.

(The Evidentiary Hearing adjourned at 11:21 a.m.)

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CERTIFICATE OF REPORTER

I, JOHN COTA, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Evidentiary Hearing; that it was thereafter transcribed.

I further certify that I am not of counsel or attorney for any of the parties to said hearing, or in any way interested in the outcome of said hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 23rd day of February, 2012.

JOHN COTA

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

February 23, 2012

RAMONA COTA, CERT**478