STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 01-AFC-21C
	)	
	)	
TESLA POWER PROJECT	)	STAFF'S POST-HEARING BRIEF
	)	
	)	Issues on Good Cause for the
	)	Requested Extension of the Deadline for
	)	Commencement of Construction

INTRODUCTION

On April 24, 2009, Pacific Gas and Electric (PG&E) submitted a petition under Title 20, California Code of Regulations, section 1720.3, for a five-year extension of the deadline to begin construction of the project from June 16, 2009, to June 16, 2014. The deadline, set by regulation, is otherwise five years from the effective date of the Energy Commission's decision, but an applicant, before the deadline, may request, and the Energy Commission may order, an extension for good cause.

In its petition, PG&E presented several factors in support of a finding of good cause. Such an extension would allow for development of the project if PG&E receives approval from the California Public Utilities Commission to move forward and, according to PG&E, would benefit the public if circumstances require quick development of the project. PG&E stated that it also wishes to preserve the value of the site for sale to a third-party for development of the project. PG&E further noted that the Energy Commission has spent extensive staff time and resources in the development of this license during the original licensing proceeding.

This matter was heard at a regularly scheduled business meeting on June 3, 2009, at which time staff and petitioner addressed the Energy Commission. The Energy Commission also received public comment. The Energy Commission decided to grant an extension for 90 days and to refer the matter of "good cause" to the Siting Committee for further deliberation. The Siting Committee, presided by Commissioner Byron, with Chairman Douglas as the associate member, thereafter on June 9, 2009, issued its "Notice of Evidentiary Hearing and Committee Order Re: Applicant's Petition for Extension of License." The Order posed several questions to the applicant, staff, and interested parties and set a hearing date of July 20, 2009.

On July 20, 2009, the evidentiary hearing was held by the Siting Committee on the subject of good cause. The project owner and staff offered testimony, and restated their positions on the subject matter. The Committee requested that the parties provide additional briefing on the

subject of an extension, and on July 21, issued a Post Hearing Briefing Schedule with several issues to be briefed. The issues and staff's responses follow in the next section.

QUESTIONS POSED BY THE COMMITTEE

1. Section 1720.3 of the Energy Commission's regulations sets a 5-year deadline for the "commencement of construction," but it does not establish a limit on the extension timeframe. When a project owner requests a license extension under section 1720.3, what is a reasonable time to extend the license? Could the Energy Commission grant an extension for 5 years, 10 years, 20 years?

Title 20, California Code of Regulations, section 1720.3, provides as follows:

> Unless a shorter deadline is established pursuant to Section 25534, the deadline for commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

The language of Section 1720.3 limits the deadline to commence construction to a maximum of five years after the effective date of the decision. While no limit is imposed for an extension, staff submits that, based on the language in 1720.3, a single extension cannot be granted for more than the initial period of five years for commencement of construction. Limiting extensions to no more than a five-year period is also consistent with the important policy concern that projects, following a hiatus between licensing and construction, not proceed relying on environmental analysis that has become "stale."

2. If PG&E's position on section 1720.3 is correct, the license would not expire even if construction did not commence within 5 years unless the Commission acted affirmatively to terminate the license. What are the implications of allowing certification to last in perpetuity?

Under the plain language of section 1720.3, the deadline to commence construction is five years after the effective date of the decision. By operation of law, if construction has not commenced, the certificate for a given project therefore expires on a date certain five years from the date of certification unless the Energy Commission grants an extension for good cause. There is nothing in section 1720.3 that requires additional affirmative action by the Energy Commission such as revocation. To preserve certification of a project for which construction has not yet begun within the first five years of project approval, the project owner has the burden to show good cause for an extension. Failure to meet that burden results in the lapse of the project's certification. By force of regulation, section 1720.3 subjects every certification to a five-year term in the absence of any construction activity. To accept the proposition that the license does not expire even if construction did not commence within five years unless the Energy Commission acts affirmatively to terminate the license would render section 1720.3 meaningless. Moreover, allowing a license to remain valid "in perpetuity" would allow projects to proceed using "stale" environmental analysis without regard to changed circumstances or legal requirements

3. PG&E has identified the reasons for requesting the license extension. What general factors should the commission consider in determining "good cause" for the license extension?

Title 20, California Code of Regulations section 1720.3, provides in relevant part:

> Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

Good cause is not defined within the Public Resources Code or in the Energy Commission's regulations and appears to be a flexible concept subject to the individual facts of a given circumstance. Good cause is "largely relative in [its] connotation, depending upon the particular circumstances of each case" (*R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 144).

Black's Law Dictionary defines "good cause" as follows:

> Good cause: Term generally means a substantial reason amounting in law to a legal excuse for failing to perform an act required by law. (*People v. Gillett*, Colo., 629 P.2d 613, 618) Legally sufficient ground or reason. Phrase "good cause" depends upon circumstances of individual case, and finding of its existence lies largely in discretion of officer or court to which decision is committed. (*Wilson v. Morris*, Mo., 639 S.W.2d 402, 407) It is a relative and highly abstract term….(*Wray v. Folsom*, 166 F. Supp 390, 394, 395)

As California courts have noted, the nature and extent of the showing necessary to satisfy the good cause requirement for an extension must, of necessity, vary with the circumstances of each case (*Chalco-California Corp. v. Superior Court of Los Angeles County* (1963) 59 Cal 2d 883). Indeed, the term "good cause" is "not susceptible of precise definition [and] its definition varies with the context in which it is used. (*Zorreno v. Unemployment Ins. Appeals Board* (1975) 47 Cal.App.3d 434, 439)

Staff reviewed the original petition filed by PG&E requesting a five-year extension of the construction deadline, and does not take issue with the representations made therein. In its petition, PG&E presents the following factors in support of a finding of "good cause" for the extension request:

- To preserve the value of the site for sale to a third-party for development.
- To enable development by PG&E in the future if PG&E gains PUC approval to move forward with the project.
- PG&E customers could benefit if circumstances require quick development of the project.
- The project would assist in providing customer protection if additional projects are unable to deliver electricity pursuant to their contracts with PG&E.

- The Energy Commission has spent extensive staff time and resources in the development of this license.

As staff has stated on the record at the business meeting and at the hearing on the subject of good cause, staff believes that PG&E has provided factually and legally sufficient reasons to support a finding of good cause as required by the California Code of Regulations, Title 20, section 1720.3.

Extending the start-of-construction deadline is consistent with the Energy Commission's general interest in the development of facilities it licenses. For this reason and for the reasons provided by PG&E, staff has stated its support of the request for extension of the deadline. Staff's position remains unchanged.

4. If a project owner applies for another license extension when an existing extension expires, when should the request be filed and what time period would be appropriate for a second extension?

Following the requirements of Section 1720.3, a subsequent request to extend a license should be filed prior to the expiration of the first extension. The time period that would be appropriate for a subsequent extension would depend on the specific facts of that project, but should not exceed five years.

5. If the Energy Commission decides to grant PG&E's request for an extension of the Tesla Power Plant license, what conditions should be attached to such an order?

Staff anticipates that numerous conditions of certification may need to be modified, if not added, to address any changed circumstances and changes in applicable laws, ordinances, rules, or standards that may have occurred. For example, emissions standards may have changed since the time the project was originally certified, and the project may now be subject to new standards that would have to be reflected in new conditions of certification. Other matters are also likely to be the subject of revised, if not new, conditions if the project is to be constructed and operated in a manner protective of the environment and public health and safety and in accordance with applicable laws. The granting of the Petition to Extend the Deadline to Commence Construction would allow time for the project owner to file a petition to modify the project, where required, pursuant to Title 20, California Code of Regulations, section 1769, to resolve these issues. Staff would recommend that such petition for modification and its approval by the Energy Commission be a prerequisite for the commencement of construction of the project.

Date: August 3, 2009

Respectfully submitted,

/s/

KEVIN W. BELL
Senior Staff Counsel

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APPLICATION FOR CERTIFICATION FOR THE *Tesla Power Project*

DOCKET NO. 01-AFC-21C

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DECLARATION OF SERVICE

I, Janet Preis, declare that on August 4, 2009, I reserved and refiled copies of the attached Staff's Post-Hearing Brief, dated August 3, 2009, The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [www.energy.ca.gov/sitingcases/tesla].

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

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

_____/s/_____