STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

Application for Certification of the Tesla Power Project	)))	Docket No. 01-AFC-21C Order No. 09-0923-XX

[PROPOSED] ORDER DENYING PETITION FOR EXTENSION OF CONSTRUCTION DEADLINE

The full Commission will conduct a public hearing, at its Business Meeting on September 23, 2009, to consider this Proposed Order.

I. Introduction and Summary

On June 16, 2004, the California Energy Commission ("Commission") certified (or "licensed") the Tesla Power Project ("Tesla" or "Project"). Our regulations state that construction must begin on a certified power facility within five years of the date of certification, unless the project owner shows "good cause" for an extension. (Cal. Code Regs., tit. 20, § 1720.3) ("section 1720.3"). On April 24, 2009, Pacific Gas & Electric Company ("PG&E"), the current owner of Tesla, filed a petition requesting a five-year extension of the start-of-construction deadline, until June 16, 2014. (Docket No. 01-AFC-21C, Petition for Ownership Change and Extension of License) ("Petition"). In this Order we (1) determine that the Petition should not have been considered at all, because the project for which it was filed is undefined and is certainly not the Project that was certified; and (2) find that PG&E has failed to show good cause for an extension of the start-of-construction deadline. For each of these reasons, we deny the Petition. We also conclude that when a project owner fails to meet the start-of-construction deadline, the certificate for the project expires by operation of law. The current deadline for Tesla (which has twice been extended for short periods to consider whether "good cause" exists for a multi-year extension) is October 15, 2009; therefore, the project will no longer have a certificate beginning October 16, 2009.

II. Background

On October 12, 2001, Midway Power LLC, which was then owned by Florida Power & Light ("FPL"), filed an application for certification ("AFC") for Tesla, a 1,120 megawatt ("MW") natural-gas-fired powerplant proposed to be built in a rural area of eastern Alameda County. We certified the Project on June 16, 2004. On November 13, 2006, FPL filed a

petition to amend the license. In January 2007 the Commission Staff issued data requests for further information on the proposed amendments. FPL filed an addendum to its petition on January 23, 2007, but the owner did not respond to Staff's data requests. There is no record of any further efforts by FPL to develop the Project.

On July 17, 2008, PG&E entered into an agreement to acquire Midway Power LLC from FPL. (Exs. 1, 3.) One day later PG&E filed an application with the California Public Utilities Commission ("CPUC") for expedited approval of a project at the Tesla site – but for a 560 MW powerplant, half the size of the certified plant. On November 6, 2008, the CPUC denied PG&E's application. (CPUC, D.08-11-004.) On December 2, 2008, PG&E finalized its purchase of Midway Power LLC from FPL. (Exs. 1, 3.)

On April 24, 2009 PG&E filed with the Commission its Petition seeking a five-year extension of the construction deadline. (Ex. 1.) At a public hearing on June 3, 2009, the Commission granted an extension of the deadline (from June 16, 2009 to September 15, 2009) for the purpose of conducting further proceedings on whether good cause exists for the extension. We delegated the authority to conduct the proceedings to the Commission's Siting Committee ("Committee"), which conducted an evidentiary hearing on July 20, 2009. On September 9, 2009, we extended the deadline an additional 30 days. PG&E's Petition is scheduled to be heard on September 23, 2009.

III. Positions of the Parties

PG&E states that a five-year extension of the construction deadline is "necessary" because it did not acquire Tesla until December 2008 and could not meet the June 16, 2009, construction deadline. According to PG&E, the value of a fully permitted site would be lost if the extension is not granted since substantial Commission resources were expended in the certification process and public input was already considered. Our Staff supports the extension as consistent with the Commission's general interest in developing certified facilities (Ex. 100), while The Utility Reform Network ("TURN") asserted that the Project could foster a hybrid generation market where independent power producers and utilities compete to provide the lowest prices to consumers. In contrast, intervenor Robert Sarvey opposes the extension due to the Project's environmental deficiencies and PG&E's potential anti-competitive advantage in CPUC procurement proceedings (Exs. 200, 203, 204), and Rob Simpson also opposed the license extension. (7/20/09 RT 78 et seq.)

IV. Applicable Law

Section 1720.3 states in full:

> Unless a shorter deadline is established pursuant to [Public Resources Code] Section 25534, the deadline for the commencement of construction shall be five years after the effective date of the decision [that granted the license]. Prior to the deadline, the project owner may request, and the Energy Commission may order, an extension of the deadline for good cause.

(Cal. Code Regs., tit. 20, § 1720.3.) Section 25534 is inapplicable here, so the five-year start-of-construction deadline controls.

V. The Petition Is Not Properly Before the Commission, Because It Is for a Project Different from the Project That Was Originally Certified

An extension of a start-of-construction deadline can be granted only for the project that was certified by the Commission, and therefore is subject to the deadline in the first instance. Support for this seemingly axiomatic principle comes first from section 1720.3 itself, which refers to the "decision" – i.e., to the decision that granted the license *for the original project*. If a project owner could seek a deadline extension for a project substantially different from the approved project, the Commission would have to spend considerable time and resources (perhaps including a CEQA review) assessing the change during the license extension proceeding, which is supposed to be limited to the issue of "good cause" for the extension.[1]

If a project owner finds it necessary to substantially change the scope of a licensed project, a license for the amended project (i.e., an amendment to the original license) must be obtained before an extension of the license can be sought. This enables the Commission to know what project the extension is for. For the Russell City powerplant, for example, which we certified in September 2002, the project owner filed for, and received, an amendment to the certification decision in 2007, so that it could move the project site. Only then did the owner follow up, in 2008, with a successful request for an extension of the start-of-construction deadline. (See Docket No. 01-AFC-7C, *Final Commission Decision* p. 5 (Oct. 2007); Docket No. 01-AFC-7C, Order No. 08-730-3 (July 30, 2008).)

Here, PG&E has asked for a deadline extension for a project much different from that which was originally certified – indeed, a project that is now undefined. The Tesla Project we certified is a *1120* MW powerplant. Yet PG&E recently applied to the CPUC for approval of a *560* MW project at the site. Moreover, during the hearing at our June 3, 2009 Business Meeting, counsel for PG&E effectively acknowledged that an amendment to the license would be required if the extension were granted: "[We always anticipate that . . . [we] would likely be coming forward with a project that is smaller than 1120 megawatts. I can't tell you how small.

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[1] This relates to the principle, discussed in Section VI. C. *infra*, that a license extension should facilitate more economical completion of the project.

I can't tell you how much; therefore, I cannot tell you how much water or [air pollution offsets would be needed] . . . ." (6/3/09 RT 27.)

Since PG&E is seeking an extension for a project that has not been certified by this Commission, its Petition is not properly before us. The correct course of action is for PG&E to seek certification of its project when that project is defined.

VI. Even if the Petition Were Properly Before the Commission, We Would Deny It Because There Is No Good Cause for an Extension of the Start-of-Construction Deadline

The courts have long held that what constitutes "good cause" depends upon the circumstances of each case, and that a finding of good cause lies largely within discretion of the decisionmaker. (See, e.g., *Chalco-California Corp. v. Superior Court* (1963) 59 Cal.2d 883, 888.) Thus "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.) Three factors are particularly important in determining whether there is good cause to extend a start-of-construction deadline:

> whether the project owner was diligent in seeking to begin construction, and in seeking the extension;
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> whether factors beyond the project owner's control prevented success; and
>
> a comparison of (a) the amount of time and resources that would have to be spent by the project owner, the Commission, and interested persons in processing any amendments to the license if the extension is granted; with (b) the amount of time and resources that would have to be spent in processing a new AFC, if the extension is denied.

Consideration of each of these factors weighs against granting PG&E's Petition.

A. Diligence in Trying to Start Construction and in Seeking an Extension

PG&E did not exercise due diligence in this matter. PG&E must, at least to some extent, stand in the shoes of FPL, which apparently did nothing since the license was granted to develop the project. (Were this not the rule, a project owner could avoid the need to pursue construction diligently merely by making a sham transfer of a project to another entity that it controlled.) After several years of no action, the Commission Staff met with FPL – and PG&E – in 2008 to discuss strategies for amending the project. (7/20/09 RT 66 - 68.) There is no evidence explaining why FPL (or PG&E) still took no action then, or why PG&E waited to file its Petition until April 24, 2009, less than two months before the construction deadline. Perhaps PG&E was waiting for the CPUC's decision on the (revised) project, or for the completion of

its purchase of the Project from FPL; however, the CPUC's proposed decision was issued in September 2008 and the final decision in November 2008, and the purchase was executed in December 2008, and still PG&E took no action, either to begin construction or to seek an extension, for several more months.

Moreover, it appears that PG&E has no plans to begin construction even if we were to extend the start-of-construction deadline. "PG&E does not have any plans at this time for the development of [Tesla]." (Petition, p. 2.) Rather, PG&E intends to seek re-evaluation of Tesla in the CPUC's 2010 Long-Term Request for Offers ("RFO") process to determine whether the Project fits in the mix for renewable and conventional generation and whether it remains a viable economic resource.[2] (Ex. 3; 7/20/09 RT 44 et seq.) Intervenor Robert Sarvey also notes that PG&E has requested recovery of $4.9 million dollars for Tesla as "abandoned project cost" in a recent filing with the CPUC. (Ex. 203.) Where a project owner has no plans to start construction, there is no good cause to extend a start-of-construction deadline.

B. Factors Beyond the Project Owner's Control

No party presented any evidence or argument that any such factors interfered either with starting construction or with seeking a license extension, on the part of either FPL or PG&E. (We would reject an attempt to so characterize the CPUC's recent denial of approval for a project at the Tesla site: filing an application with the CPUC was necessitated by PG&E's voluntary purchase of the Project, and the CPUC's denial of the application must be attributed to PG&E's failure to meet its burden of proof.))

C. Time and Resources Expended with and without an Extension

PG&E has conceded that it would have to submit a petition to amend the license before construction could begin (Ex. 3), and it appears that the issues involved in the amendment proceeding would be many and substantial; they would include at least assessing potential changes in the environmental baseline at and near the site, changing the size of the project, obtaining a water supply, obtaining air pollution offsets, updating the transmission study, and revising several permits(7/20/09 RT 60 - 63). The Staff testified that such a proceeding could take longer than a year – the statutory time period for processing a brand-new AFC. (7/20/09 RT 62 - 63.) In other words, there is little if any difference in the time and resources that PG&E, the CEC, and others would have to expend, between (1) granting the extension and

[2] There is a disconnect between the five year extension sought by PG&E, and PG&E's stated justification that it wants to include Tesla in the CPUC's 2010 Long-Term Procurement Proceeding, in which a decision is expected by mid-2012 (7/20/09 RT 45). That PG&E would wait up to two years after a procurement decision before commencing construction belies its claim to be diligently pursuing this project.

processing an amendment; and (2) denying the extension and processing a new AFC. As a result, there is no good cause to pursue the first path.

PG&E claims that our recent extension of the start-of-construction deadline for the East Altamont powerplant present facts similar to the Tesla situation, because that project will require an extensive amendment proceeding before construction can begin. While East Altamont may well approach the outer limit of allowing an extension as opposed to requiring a new AFC, there are two critical distinguishing factors. In East Altamont, the project licensed was the same project for which the construction deadline was sought: "Owner does not request any modification to the [East Altamont] project design, operation or performance requirements as set forth in the Commission's . . . decision . . . ." (Docket No. 01-AFC-4C, Petition For Extension of Deadline for Commencement of Construction, p. 2 (May 16, 2008.) Moreover, the project owner demonstrated that it wanted to begin construction. (See Docket No. 01-AFC-4C, Order Approving the Extension of the Deadline for Commencement of Construction (Aug. 18, 2008).)

VII. Expiration of the Start-of-Construction Deadline Means That the License Expires by Operation of Law

PG&E asserts that a project owner's Commission license remains valid after the expiration of a start-of-construction deadline, unless the Commission takes express, affirmative action to terminate the license. We disagree. Accepting PG&E's proposition would render section 1720.3 virtually meaningless, as the license would continue in perpetuity, and a project owner could attempt to show good cause for an extension long after the deadline had passed. The purpose of section 1720.3 is clear:

> Failure to provide a deadline for the initiation of construction . . . can create situations in which an applicant builds a powerplant or transmission line [with] outdated . . . . [s]afety and engineering standards, environmental laws, available mitigation measures or alternatives . . . . This regulation is necessary to prevent construction of a power plant [sic], which, due to the passage of time, is no longer warranted.

(Docket No. 91-SIT-1, Initial Statement of Reasons) p. 19 (Feb. 1993).) To effectuate this purpose it is necessary that a license expire when its start-of-construction deadline passes with no construction.

VIII. Conclusion

We deny the Petition because (1) the project for which it was filed is undefined and is certainly not the Project that was certified, and (2) there is no good cause for an extension of the

start-of-construction deadline. As a result, the deadline of October 15, 2009, remains, and the project will no longer have a certificate beginning October 16, 2009. In light of these conclusions and the discussion above, there is no need to examine the other issues raised in our June 3, 2009 hearing notice or raised by the parties.

September 23, 2009

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