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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

**PETITION TO AMEND THE
HIGH DESERT POWER PROJECT**

Docket No. 97-AFC-01C

STAFF'S REPLY BRIEF RESPONDING TO PETITIONER'S POINTS AND AUTHORITIES

I. Introduction

The Committee for the High Desert Power Project Petition to Amend (Committee), as part of its "Orders After March 16, 2016 Prehearing Conference" (Order) published on March 22, 2016, directed Staff and Petitioner to docket legal briefs responding to four questions no later than April 1, 2016. The Committee specifically requested that the briefs focus on legal points and authorities supporting the party's position. The Committee further stated in the Order that reply briefs, if desired, are to be docketed no later than April 8, 2016. The following is Staff's reply brief responding to assertions made by High Desert Power Project, LLC (Petitioner) in their "Points and Authorities In Response to Committee's Orders After March 16, 2016 Prehearing Conference" (Petitioner's Brief).

II. Staff's Response to Petitioner's Brief

- a. Petitioner misinterprets and misuses Executive Order B-29-15 in its assertion that CEQA does not apply.

In response to the Committee's question concerning the role of adopted laws, ordinances, regulations, and standards (LORS) after the original approval of the High Desert Power Project (HDPP) in 2000, Petitioner states:

[P]ursuant to [Executive Order B-29-15 (Executive Order)], the Commission should expedite consideration of the Petition. Furthermore, because drought relief actions were commenced with the filing of the Petition on October 30, 2015, any action taken by the Commission with

respect to consideration of the Petition is exempt from CEQA. . . .
(Petitioner’s Brief, p. 3.)

Moreover, on the matter of whether the Petition constitutes a project under CEQA, Petitioner states:

[The Executive Order] expressly waives Section 1769 of the Commission’s regulations, including the requirement that the petition contain a CEQA analysis of the impacts the modification may have on the environment and proposed measures to mitigate any significant adverse impacts. . . .
(Petitioner’s Brief, p. 8.)

The Executive Order, issued on April 1, 2015, mandates state-wide water saving measures. Paragraph 25 of the Executive Order requires the Energy Commission to expedite the processing of all applications or petitions for amendments to power plant certifications issued by the Energy Commission for the purpose of securing alternative water supply necessary for continued power plant operation. Title 20, section 1769 of the California Code of Regulations—concerning requirements for post certification amendments and changes—is waived for any such petition, and the Energy Commission is authorized to create and implement an alternative process to consider petitions. This process may delegate amendment approval authority, as appropriate, to the Energy Commission Executive Director. Under paragraph 26 of the Executive Order, statutory and regulatory provisions of CEQA are suspended for actions taken pursuant to paragraph 25 until May 2016.

However, Petitioner has explicitly declined expedited review of the Petition by the Energy Commission Executive Director by asking, instead, for review by a Committee. Petitioner filed a motion in November 2015 prior to the monthly Business Meeting requesting an item be added to the agenda to allow for the appointment of a Committee to HDPP. The November 6, 2015 motion states:

Consistent with the Executive Order, the Commission can consider the Motion on November 12th because the Commission is duly authorized to ‘expedite the processing of . . . petitions for amendments to power plant certifications issued by the Energy Commission for the purpose of securing alternate water supply necessary for continued power plant operation,’” (Applicant’s Letter Requesting Agenda Item for Motion and Motion for Appointment of a Committee and Expedited Processing, p. 2.)

At the November 12, 2015 Business Meeting, Jeffery Harris, counsel for Petitioner, appeared before the Commission to further represent the Petitioner's motion for the appointment of a Committee to HDPP. (Business Meeting Transcript, November 12, 2015, p. 10.) Mr. Harris appeared before the Commission again at the following two Business Meetings, held on December 9, 2015 and January 13, 2016, repeating his appeal for a Committee assignment. Mr. Harris's request was granted at the January 13, 2016 meeting. Petitioner cited to the Executive Order to persuade the Commission to expedite the assignment of a Committee to HDPP. (Business Meeting Transcript, December 9, 2015, pp. 10–11). However, the Committee was assigned to HDPP pursuant to Public Resources Code section 25211 and was not, and could not, be assigned pursuant to the Executive Order, which waives title 20, section 1769 of the California Code of Regulations, allowing for the assignment of a Committee to a petition for modification.

In Petitioner's Brief, Petitioner now contends that the Executive Order allows the assigned Committee to expedite review of the Petition under the temporary CEQA exemption. However, Petitioner's Brief reflects a misunderstanding of the plain language of the Executive Order. There is no language in the Executive Order granting expedited review by a Committee, because, as stated above, the Executive Order does not create a process for assignment of a Committee. Under the terms of the Executive Order, Petitioner had the opportunity for expedited review without consideration of the statutory and regulatory provisions of CEQA by the Executive Director. Instead, Petitioner explicitly requested that the Petition be heard in front of a Committee. Petitioner has opted out of the extraordinary procedures of the Executive Order, and so, the CEQA exemption under the Executive Order is not applicable to the Committee's review of the Petition.

- b. Petitioner incorrectly concludes that Resolution 75-58 and the 2003 IEPR do not apply.

Petitioner asserts that the 2003 Integrated Energy Policy Report (IEPR) is not applicable in the present proceeding, yet neglects to provide any discussion of existing state water policy established by State Water Resources Control Board's (SWRCB) Resolution 75-58. Resolution 75-58 explicitly encourages the use of wastewater in power plant cooling, which is confirmed in Article X, Section 2 of the California Constitution regarding the reasonable use of water. (Water Quality Control Policy for the Use and Disposal of Inland Waters Used for Power Plant Cooling, June 19, 1975 .) Incorporating Resolution 75-58, the 2003 IEPR water policy sets forth standards for the State's energy and water use. Furthermore, missing from the Petitioner's Brief is any

mention that the Commission and Petitioner have repeatedly relied upon the 2003 IEPR standard as a correct reflection of statewide principles of water use, in place since 1975.

- c. Petitioner fails to prove that Commission's authority over the Petition is merely ministerial.

In response to the Committee's question on whether the Petition is a project under CEQA, Petitioner states:

In the absence of the Commission's jurisdiction, the requested use of supplemental water supply would not require any discretionary approval or environmental review by the City of Victorville or [the Mojave Water Agency]. Therefore, applying applicable LORS, the activity requested by the Petition is not subject to discretionary government approval. Without discretionary governmental approval, CEQA does not apply. (Petitioner's Brief, p. 9.)

Furthermore, Petitioner offers the following interpretation:

[I]t is only the fact that the license needs to be amended, and not the underlying activity, that requires discretionary approval. The term "project" refers to the activity being approved. The term project does not refer to the governmental approval. (Petitioner's Brief, p. 9, footnote 9.)

As previously provided in Staff's Brief Responding to Committee's Legal Questions (Staff's Brief), the definition of a "discretionary project" subject to CEQA is one which "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine where there has been conformity with applicable statutes, ordinances, or regulations." (Cal. Code of Regs., tit. 14, § 15357.) Under Public Resources Code section 25500, the Commission has exclusive authority to certify jurisdictional power plants in the State, and such authority supersedes the authority of any local or regional agency or any applicable statute, ordinance, or regulation of any local or regional agency. It is irrelevant that, in the absence of the Commission's jurisdiction, another local agency would not require discretionary approval. The Petition is before the Committee because it clearly falls within the Commission's exclusive jurisdiction over the subject matter; it is within the authority of the Commission to consider the "underlying activity," or the conditions of operation of HDPP. (Petitioner's Brief, p. 9, footnote 9.) The ability to consider evidence and testimony, the ability to pose questions to the parties to gather additional information, the consideration of design and site alternatives, and, certainly, the final

determination on the Petition by a vote of the full Commission indicate “exercise of judgment or deliberation” sufficient to meet the definition of discretionary (See Pub. Resources Code, § 25209).

Petitioner’s conclusory statement that a determination by the Commission on the Petition is not discretionary ignores the obvious inverse: if an approval is not discretionary, it must be ministerial. As defined in section 15369, title 14 of the California Code of Regulations, “ministerial” is defined as “a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project.” To claim that the Commission “merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision” suggests that the Commission’s role does not extend beyond confirming the Petition’s adherence to applicable LORS. (Cal. Code Regs., tit. 14, § 20.) As stated above, the Commission’s ability to apply “subjective judgment in deciding whether or how the project should be carried out” clearly falls outside of a purely ministerial determination. (*Id.*)

d. Petitioner’s reliance on *Goat Hill Tavern v. City of Costa Mesa* is misguided.

Petitioner cites *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519 (“*Goat Hill*”) in support of the argument that Petitioner has a fundamental vested right in the continued operation of HDPP, including the right to use any lawful source of water. *Goat Hill* is inapplicable to the current proceeding. In *Goat Hill*, the court heavily relied on the fact that a nonconforming use was in existence for over 35 years in holding that the city council incorrectly refused to grant an extension for a conditional use permit. The facts of *Goat Hill* are not analogous to the current proceeding, because Petitioner availed itself of the Commission’s authority by filing the Petition to Amend its current license, and because Petitioner has not lost its license to operate HDPP. In fact, the Petition does not diminish HDPP’s current license, regardless of whether the Petition is granted or denied.

e. The Executive Order is inapplicable to the Committee’s ability to offer interim relief; any interim relief granted should be based on a showing of necessity by Petitioner.

Petitioner raises the Executive Order in another unsuitable context. Petitioner theorizes that the Executive Order may be used as a legal mechanism for granting interim relief. However, Petitioner’s selective choice of language from the Executive Order, used to postulate potential mechanisms, ignores the plain language of paragraph 25 of the Executive Order:

The Energy Commission shall expedite the processing of all applications or petitions for amendments to power plant certifications issued by the Energy Commission for the purpose of securing alternate water supply necessary for continued power plant operation. Title 20, section 1769 of the California Code of Regulations is hereby waived for any such petition, and the Energy Commission is authorized to create and implement an alternative process to consider such petitions. This process may delegate amendment approval authority, as appropriate, to the Energy Commission Executive Director.

Petitioner suggests that the Executive Order, in allowing the Energy Commission to delegate “amendment approval authority to the Executive Director,” broadly authorizes the Commission to delegate authority to the Executive Director to approve Petitioner’s requested interim relief. (Petitioner’s Brief, p. 20.) The ability of the Commission to delegate authority to the Executive Director to grant interim relief while awaiting a Committee decision on a pending Petition is clearly not a matter to be determined under the Executive Order. Petitioner had the opportunity to request expedited review of the Petition by the Executive Director, but, instead, repeatedly requested that the Commission assign a Committee—a request that was granted. Petitioner is now requesting that the Committee determine whether the Executive Director may assume partial control of the decision making process on a Petition. This hybrid approach is not imagined in the Executive Order nor supported by Energy Commission statutes and regulations relating to post-certification amendments.

Alternatively, Petitioner speculates that, in authorizing the Energy Commission to “create and implement an alternative process to consider such petitions,” the Executive Order allows the Commission to delegate authority to a Committee for the specific purpose of approving petitions for amendments needed to secure alternative water supply necessary for power plant production, and that such approval authority “could include the authority to grant interim relief as needed. . . .” (*Id.*) Petitioner has not met the burden outlined in the Executive Order, in which the need prescribed is, “securing alternate water supply necessary for continued power plant operation.” (Executive Order, paragraph 25.) Petitioner has not provided evidence of an urgent need for interim relief that would warrant the creation of an exceptional procedure allowing both the Committee and the Executive Director to share authority over the Petition.

Although Staff does not agree that the Executive Order is the correct legal mechanism to provide interim relief, Staff is not opposed to interim relief for Petitioner, as reflected in Staff’s Brief. However, any interim relief granted to HDPP should be predicated upon a showing by Petitioner that a two-year interim water supply is needed. In 2014, and in

response to the most severe curtailments of State Water Project (SWP) water deliveries during the recent drought, Petitioner requested that the Energy Commission allow for the purchase of adjudicated Mojave River Basin (MRB) water as interim relief. The Commission granted the request and limited the amount to 2,000 AFY for two water years (Oct. 2014 – Sept. 2015 and Oct. 2015 – Sept. 2016).

During the Pre-Hearing Conference on March 15, 2016 and in Petitioner's Brief, Petitioner requested an extension of the 2014 relief measures for an additional two years, under the authority of the Executive Order, while the Petition is under consideration by the Commission. (Transcript of March 3, 2016 Prehearing Conference, p. 69; Petitioner's Brief, p. 19.) However, Petitioner has not provided information verifying the need for two years of interim use of MRB groundwater. Moreover, the Executive Order includes a sunset date of May 2016, which is illustrative of the State's dynamic approach to drought conditions, allowing for consideration of and response to current conditions. The current SWP water allocation to HDPP for the coming water year should be more than adequate for project operation for that limited period of time. There may also be approximately 1,800 acre feet of excess SWP water available for banking, which would supplement the current storage in the injection bank and may be enough for six months of operation without the use of recycled water. But while HDPP may receive a sufficient allocation of SWP water for their uses for the coming year, all parties agree that SWP availability is variable and subject to curtailment, warranting a more stable, long-term solution to HDPP water supplies.

Furthermore, Petitioner's past operation of HDPP illustrates a failure to employ a loading sequence, even though it is applicable under the current license. In recent months, Petitioner chose to use MRB groundwater even though the project had full access to recycled water, SWP water, and banked SWP water. (High Desert Power Project Response to Committee Questions, p. A-6.) This sharply cuts against Petitioner's showing of necessity for use of MRB groundwater as interim relief.

If the Committee chooses to grant Petitioner's request for interim relief of percolation water banking by the Mojave Water Agency, Staff's Proposed Changes to Exhibit 1000 (TN 210088) Project Owner's Opening Testimony of High Desert Power Project could, if approved, improve banking effectiveness and ease for Petitioner. However, in making a decision on the matter of interim relief, which includes extended access to MRB groundwater, the Committee should consider the potential impacts on the MRB basin balance. The Watermaster, appointed by the court to oversee the adjudication decision for the MRB, purchases SWP water to replenish any shortages in the basin balance to maintain basin safe yield. Given the lack of reliability of SWP for future deliveries, as noted by the applicant, Staff is concerned that even if the assessments are paid by the

HDPP owner or others in the basin, there might be no or very limited SWP or alternate water supplies available for the Watermaster to acquire replacement water in the future.

III. Conclusion

First, it is clear that Petitioner misinterprets Executive Order B-29-15 in its assertion that CEQA does not apply. Second, Petitioner incorrectly concludes that Resolution 75-58 and the 2003 IEPR do not apply. Third, Petitioner fails to prove that the Commissions' authority over the Petition is merely ministerial. Fourth, Petitioner's reliance on *Goat Hill Tavern v. City of Costa Mesa* in the discussion on vested rights is misguided. And, fifth, Petitioner incorrectly postulates that the Executive Order is applicable to the Committee's ability to grant interim relief; however, any interim relief granted by the Commission should be predicated on a showing of necessity by Petitioner.

Dated: April 8, 2016

Respectfully submitted,

Original signed by
MICHELLE E. CHESTER
Staff Attorney
California Energy Commission