STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of the:

COMPLAINT AGAINST THE BOTTLE ROCK GEOTHERMAL POWER PLANT (79-AFC-4C)

Docket No. 12-CAI-04

BOTTLE ROCK POWER, LLC'S APPEAL OF THE COMMITTEE'S DECISION SUSTAINING COMPLAINT

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I. INTRODUCTION

Pursuant to section 1237, subsection (f) of Title 20, California Code of Regulations, Bottle Rock Power, LLC ("Bottle Rock") hereby appeals to the California Energy Commission ("Commission") the Decision Sustaining Complaint Against Bottle Rock Power, LLC ("Decision"), issued February 6, 2013 by the Committee re Complaint Against Bottle Rock Geothermal Power Plant. Bottle Rock respectfully requests that the Commission set aside the Decision and find Bottle Rock in compliance with all Conditions of Certification and Orders of the Commission related to Bottle Rock Power Plant ("Plant" or "Project"), including the Commission Order Approving Ownership Transfer ("2001 Order") from the Department of Water Resources ("DWR") to Bottle Rock's successor-in-interest, Bottle Rock Power Corporation ("BRP Corporation").

II. BACKGROUND

On May 30, 2001, the Commission approved DWR's petition to transfer ownership of the Plant from DWR to BRP Corporation in the 2001 Order.[1] (Ex. 106.) The transfer of ownership was accomplished through the Purchase Agreement for Bottle Rock Power Plant and Assignment of Geothermal Steam Lease, by and among DWR and BRP Corporation, dated April 5, 2001 ("Purchase Agreement"). (Ex. 110.) As noted in the 2001 Order, Section 2.4 of the Purchase Agreement required BRP Corporation to provide DWR with a five million dollar surety bond. The bond acted as security to cover the cost of Plant decommissioning and restoration and remediation of the Project site.

On August 14, 2012, Bottle Rock, DWR, and the Project landowner, V.V. & J. Coleman, LLC, entered into a Settlement Agreement and Release of Claims ("Settlement Agreement"), which amended the Purchase Agreement. (Ex. 112.) The Settlement Agreement lifted the bond requirement of the Purchase Agreement in exchange for a release of liability of DWR to Bottle Rock or the landowners.

On October 11, 2012, a complaint was submitted to the Commission by David Coleman. Mr. Coleman challenged the amendment of the Purchase Agreement, alleging that the Settlement Agreement violated the 2001 Order.

The Committee held a hearing on the complaint on January 22, 2013 and subsequently issued its Decision, appealed here. The Decision found that Bottle Rock violated the 2001 Order in failing to maintain the surety bond.

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[1] Ownership of the Plant was subsequently transferred from BRP Corporation to Bottle Rock Power, LLC, the current owner and appellant. The Commission approved this transfer on December 13, 2006.

III. ARGUMENT

A. The Decision is Premised on the Inaccurate Finding that the Bond Requirement is a Condition of the Project License.

The Committee found Bottle Rock in violation of its license for failing to maintain the five million dollar bond, because it concluded that the 2001 Order "contains provisions requiring [Bottle Rock] to obtain and maintain a bond to secure the costs of decommissioning and remediation." (Decision at 6, 8.) The Committee's finding of a violation rests entirely on its reading of the requirements the 2001 Order imposed on the Project owner. For the reasons outlined below, Bottle Rock respectfully disagrees with the Committee's interpretation of the 2001 Order. As there is no basis for the Commission to conclude that the 2001 Order required Bottle Rock to maintain the surety bond, Bottle Rock asserts that it did not violate the 2001 Order with its release of the bond. Rather, Bottle Rock released the bond only after the bond requirement was eliminated under the Settlement Agreement. The Settlement Agreement properly amended the Purchase Agreement pursuant to Section 10.14, allowing for amendment by an instrument in writing executed by the parties. The Decision of the Committee finding Bottle Rock in violation of its license should therefore be set aside.

B. The 2001 Order does not Require a Bond be Maintained for the Plant.

The Committee correctly frames the primary question under review in this matter: what are the terms and conditions of the permit under which the Plant is operated. (Decision at 4.) Bottle Rock concurs with the Committee that the Purchase Agreement, at the time of transfer of ownership from DWR to BRP Corporation in 2001, contained a bond requirement. (*Id.*) However, the Committee is mistaken as to the incorporation of this term of the Purchase Agreement into the 2001 Order or that the bond requirement became a condition of the license.

The Commission, at the time of the 2001 Order, may have had the intent of ensuring adequate funds for decommissioning at the end of the life of the Project. The Commission's concern for the proper decommissioning and remediation of the Plant and the Project site is evident in its discussion within the 2001 Order. (Ex. 106 at 2.) The Commission supported the inclusion of a bond requirement in the Purchase Agreement. The Commission did not, however, include a condition in the 2001 Order requiring a bond, nor did the Commission incorporate Section 2.4 of the Purchase Agreement by reference.

The 2001 Order provides only for adherence to the terms of the Purchase Agreement:

> Having considered staff's recommendations and comments from the parties and all submitted documents, the Commission hereby approves the transfer of ownership of the Bottle Rock Power Plant from the California Department of Water Resources to BRP Corporation subject to the following condition:
>
> (a) **The parties shall strictly adhere to the terms of the "Purchase Agreement** for the Bottle Rock Power Plant and Assignment of Geothermal Lease".

Ex. 106 at 4 (emphasis added).) The Commission is guided in its interpretation of the above language by standard rules of construction. "The meaning and effect of a judgment is determined according to the rules governing the interpretation of writings generally." (*Southern Pacific Pipe Lines, Inc. v. State Board of Equalization* (1993) 14 Cal.App.4th 42, 49.) If language is clear and explicit, and does not involve an absurdity, the language of a writing is to govern its interpretation. (*Estate of Careaga* (1964) 61 Cal.2d 471, 475 (citing Civ. Code § 1638) (distinguished on other grounds by *Newman v. Wells Fargo Bank* (1996) 14 Cal.4th 126).) Furthermore, the terms of a writing are presumed to have been used in their primary and general acceptation. (*Id.* (citing Code Civ. Proc. § 1861).) Where an ambiguity exists, the entire record relating to a judgment

may be examined to determine the judgment's scope and effect. (*People v. Landon White Bail Bonds* (1991) 234 Cal.App.3d 66, 76.) Here, however, there is no ambiguity to the words "[t]he parties shall strictly adhere to the terms of the Purchase Agreement" and the language is clear and explicit. Accordingly, the Commission should give the words their primary and general acceptation.

Under the rules of construction, the Commission must conclude that the 2001 Order did not incorporate Section 2.4 of the Purchase Agreement as a condition of the Project. Rather, the 2001 Order provided that DWR and BRP Corporation strictly adhere to the terms of the Purchase Agreement. DWR and Bottle Rock, as the successor-in-interest to BRP Corporation, have fully complied with this term of the 2001 Order, strictly adhering to the terms of the Purchase Agreement, including that term allowing the parties to amend the Purchase Agreement. Therefore, Bottle Rock respectfully disagrees with the Committee's conclusion that the "transcript of the May 30, 2001 Energy Commission Business Meeting leaves no doubt that the Energy Commission understood and intended its 2001 Order to incorporate the bond and insurance requirements in the Purchase Agreement at that time as conditions of its approval." (Decision at 4.)

C. If the Commission Intended to Require a Bond as a Condition of the License, It Could Have Done So.

Bottle Rock does not dispute that it is within the Commission's authority and discretion under the Warren-Alquist Act to require Bottle Rock to maintain a bond for decommissioning and remediation work, regardless of any separate requirement that DWR imposed in the Purchase Agreement. In fact, the Commission included several conditions in the license related to decommissioning, restoration, and reclamation, at the time it certified the Project. (Ex. 107, Conditions 5-2, 8-4, and 9-5.) The Purchase Agreement contemplates that regulatory agencies

with jurisdiction over the Project, such as the Commission and Lake County, might have an independent requirement for a decommissioning bond. (Ex. 110 at 10.)

The Commission declined, however, to include any bond requirement as a condition of certification at the time of licensing, or as a condition or term of the 2001 transfer of the Plant. Evidence that the Commission approved of the inclusion of a bond requirement in the Purchase Agreement does not mean that the Commission incorporated this requirement into its own conditions on the Project. The language of the 2001 Order does not contain "provisions requiring [Bottle Rock] to obtain and maintain both an Environmental Impairment Insurance policy and a bond to secure the costs of decommissioning and remediation," as the Decision maintains. (Decision at 6.) The Committee cannot now fix with this Decision what the Commission failed to do in 2001.

D. The Parties Amended the Purchase Agreement Numerous Times, Yet the Committee Takes Issue Only with the Amendment to Remove the Bond.

The Committee states that the "2001 Order effectively incorporated the conditions of the Purchase Agreement before them at that time" into the Project license, with the language that the parties adhere to the terms of the Purchase Agreement. (Decision at 5.) This would mean that every term of the Purchase Agreement was incorporated by reference, including the requirement to complete the sale by a certain date. The Purchase Agreement was amended seven times prior to the Settlement Agreement amendment to extend the closing date for the sale. Yet the Committee considers only the amendment to remove the bond requirement at odds with the license, despite the fact that the closing date of the transaction was as much of a "condition of the Purchase Agreement" as Section 2.4. (Decision at 6.) Under the Committee's logic the language "strictly adhere to the terms of the Purchase Agreement" incorporated the bond and insurance terms of the Purchase Agreement into the 2001 Order, but not others. To support this

incongruous result, the Committee argues that the amendment of the Agreement to alter the closing date of the sale did not concern an issue under the jurisdiction of the Commission; consequently there was no need for the parties to obtain permission from the Commission. (*Id.* at 5.)

If the Commission intended to incorporate only certain terms and conditions of the Agreement into the 2001 Order, that it believed were within its jurisdiction, and not incorporate those terms it felt were outside of its jurisdiction, it could have done so. Likewise, the Commission could have drafted its own condition requiring a bond. Bottle Rock agrees that the proper decommissioning of a power plant is an area well within the Commission's jurisdiction, while the closing date of a transaction between two parties is arguably less so. Nevertheless, the language of the 2001 Order bound the Project owner to adhere to the terms of the Purchase Agreement. It did not specify any particular terms to be incorporated by reference into the Order, nor did it specify that the owners were bound to only certain of the terms of the Purchase Agreement or to the terms as they existed at the time of the Order. The Committee's interpretation of the 2001 Order is unsupported by its inconsistent application of the language. This further reinforces that the Commission should set the Decision aside.

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IV. CONCLUSION

Based on the foregoing, Bottle Rock respectfully requests that the Commission set aside the Decision of the Committee and find that Bottle Rock is not in violation of its license or the 2001 Order by failing to maintain a bond for closure and decommissioning of the Plant.

Date: February 20, 2013

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IN THE MATTER OF THE COMPLAINT AGAINST THE BOTTLE ROCK GEOTHERMAL POWER PLANT

Docket No. 12-CAI-04
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DECLARATION OF SERVICE

I, Kimberly J. Hellwig, declare that on February 20, 2013, I served and filed copies of the attached **BOTTLE ROCK POWER, LLC'S APPEAL OF THE COMMITTEE'S DECISION SUSTAINING THE COMPLAINT**. This document is accompanied by the most recent Proof of Service list, which I copied from the web page for this project at: http://www.energy.ca.gov/sitingcases/bottlerock/documents/index.html#cai-04.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am over the age of 18 years.

Dated: February 20, 2013

Kimberly J. Hellwig