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<b>Docket Number:</b>	15-AFC-02
<b>Project Title:</b>	Mission Rock Energy Center
<b>TN #:</b>	223191
<b>Document Title:</b>	Mission Rock Energy Center Opposition to Motion to Terminate
<b>Description:</b>	N/A
<b>Filer:</b>	Eric Janssen
<b>Organization:</b>	Ellison Schneider Harris & Donlan LLP
<b>Submitter Role:</b>	Applicant Representative
<b>Submission Date:</b>	4/12/2018 4:48:26 PM
<b>Docketed Date:</b>	4/12/2018

**STATE OF CALIFORNIA**

**ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of: )  
 )  
Application for Certification for the )  
Mission Rock Energy Center )

Docket No. 15-AFC-02

**MISSION ROCK ENERGY CENTER, LLC's  
OPPOSITION TO MOTION TO TERMINATE**

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April 12, 2018

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STATE OF CALIFORNIA  
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In the Matter of: )  
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**MISSION ROCK ENERGY CENTER  
OPPOSITION TO MOTION TO TERMINATE**

Pursuant to Section 1720.2 of the Commission’s regulations and in accordance with the Committee’s *Order Extending Time to Rule on Notice of Suspension and Motion to Terminate* issued on March 30, 2018,<sup>1</sup> Mission Rock Energy Center, LLC (the “Applicant”) files this opposition to the motion to terminate the application for certification (“AFC”) proceeding for the Mission Rock Energy Center (the “MREC”) filed by Intervenor Wishtoyo Foundation (the “Intervenor”). The Intervenor’s motion should be denied for the reasons set forth below.

**DISCUSSION**

**I. THE INTERVENOR HAS NOT MET ITS BURDEN TO ESTABLISH THAT TERMINATION OF THE AFC PROCEEDING IS WARRANTED.**

Section 1720.2 of the Commission’s regulations provides that a motion to terminate an application for certification may be brought “based upon the applicant’s failure to pursue an application. . . with due diligence.” As the moving party, the Intervenor carries the burden of proof<sup>2</sup> that the Applicant has failed to pursue the application with due diligence. The Intervenor’s motion does not meet this burden, asking instead that the Committee rule on unfounded speculation, rather than evidence. For this reason alone, the Intervenor’s motion must be denied for failing to meet the requirements of Section 1720.2.

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<sup>1</sup> On March 30, 2018, the Committee issued an order stating that the Intervenor’s response will be treated as a motion to terminate under the Committee’s regulations. See, *Order Extending Time to Rule on Notice of Suspension and Motion to Terminate*, p. 2 (March 30, 2018), TN#: 223099.

<sup>2</sup> 20 C.C.R. §§ 1212(b)(2) and 1212(c)(1)-(3); Cal. Evid. Code § 550(a); *Baber v. Superior Court* (1980) 113 Cal.App.3d 955, 956, 966; *McCormick on Evidence* (6<sup>th</sup>) § 337.

**A. The Intervenor’s Motion Erroneously Asks The Committee To Rule On Speculation Regarding Future Actions, And Unfounded Speculation Is An Insufficient Basis To Justify Termination Of An AFC Proceeding.**

Section 1720.2 asks whether a party has pursued the AFC with due diligence. In marked contrast, the Intervenor’s motion asks the Committee to speculate as to whether the Applicant *will be able to* pursue the AFC with due diligence in the future. Rather than satisfy its burden with the substantive, factual showing required by Section 1720.2 relating to actions in pursuing the AFC, the Intervenor’s motion offers only its opinion that the Applicant will be unable to pursue the AFC with due diligence during the period of suspension, and asks the Committee to accept this as true.<sup>3</sup> Conjecture and speculation are an insufficient basis to support termination of an AFC proceeding because the Commission’s regulations require evidence to support a finding that the Applicant has not pursued the AFC with due diligence. “Such evidence does not include, among other things, speculation, argument, conjecture, and unsupported conclusions or opinions.”<sup>4</sup> The Intervenor’s motion should be denied because unsupported opinions and conjecture regarding the potential *future* actions of the Applicant do not constitute evidence, and therefore are an insufficient basis for the Committee to make a finding of fact, let alone terminate this AFC proceeding.

**II. INTERVENOR INCORRECTLY ASSUMES THAT AN AFC CANNOT BE DILIGENTLY PURSUED WITHOUT A FINDING OF “NEED” FOR THE PROJECT OR OTHER SOLICITATION OPPORTUNITY.**

The Intervenor’s motion must also fail because it misinterprets the Warren-Alquist Act.<sup>5</sup> The Intervenor’s motion dedicates several pages to its opinion regarding the lack of “need” for the MREC, focusing specifically on the 2012 Long Term Procurement Process (“LTPP”) and the California Independent System Operator’s (“CAISO’s”) Transmission Planning Process.<sup>6</sup> The Intervenor’s motion argues that because there is no “need” for the project, there is no possibility that the Applicant can act with due diligence in pursuing an AFC. This argument is wrong for several reasons.

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<sup>3</sup> Intervenor Wishtoyo Foundation, *Response to Notice of Suspension of Application for Certification*, p. 7 (March 23, 2018), TN#: 223032-1. (Hereinafter, “Intervenor motion”).

<sup>4</sup> 20 C.C.R. § 1212(c)(2).

<sup>5</sup> Pub. Resources Code §§ 25000 et seq.

<sup>6</sup> Intervenor motion, pp. 3-5.

First, the Warren-Alquist Act does not require that a project have a power purchase agreement prior to submission of an AFC, and “there is no rule prohibiting a developer from obtaining a permit to build a facility to generate power for which it does not yet have a buyer.”<sup>7</sup> Applicants are free to pursue applications for projects which do not have contracts or specific solicitations to bid.<sup>8</sup> Therefore, neither the presence nor absence of any immediate solicitation opportunities for a project is dispositive of the question of whether an applicant is pursuing an application with due diligence, and accordingly, the Intervenor’s motion must be denied.<sup>9</sup>

Second, the Commission does not evaluate the “need” for a project in the AFC process. Instead, “[t]he focus of the Energy Commission’s inquiry is a proposed project’s potential to create environmental impacts and its consistency with [laws, ordinances, regulations, and standards (“LORS”)].”<sup>10</sup> “Need”, as framed by the Intervenor, is essentially a request for the Commission to re-institute the former “Integrated Assessment of Need.” However, the Legislature has expressly removed “need” from the Commission’s consideration in the AFC setting. Nearly twenty years ago, Senate Bill No. 110 (Chapter 581, Statutes of 1999) amended the Warren-Alquist Act to prohibit the consideration of need in an AFC proceeding. Therefore, while the Intervenor’s motion argues at length regarding the “need” for the project, as a matter of law these arguments are not relevant to this proceeding, in general, and the motion, in particular, as a need assessment is no longer necessary, appropriate or permitted by existing law. The AFC is not dependent upon the existence of a power purchase agreement or other finding of “need” by

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<sup>7</sup> California Energy Commission. *Alamitos Energy Center Final Commission Decision* (2017) Docket No. 13-AFC-01, CEC-800-2017-001-CMF, p. 3-16. TN#: 217416. (Hereinafter, “*Alamitos Energy Center Final Decision*”).

<sup>8</sup> For example, see California Energy Commission Staff *2017 Integrated Energy Policy Report* (2017) California Energy Commission, CEC-100-2017-001-CMF, p. 345. (Hereinafter, “*2017 IEPR*”); also see, Jaske, Michael R. and Wong, Lana, *Mitigation Options for Contingencies Threatening Southern California Electric Reliability* (2016) California Energy Commission, CEC-200-2016-010, pp. 16-17. (Hereinafter, “*Mitigation Options for Contingencies Threatening Southern California Electric Reliability*”).

<sup>9</sup> While the Applicant intends to evaluate the results of the SCE LCR RFP from a commercial perspective (see, Mission Rock Energy Center, LLC, *Response to Committee Request for Comments on Applicant’s Notice to Suspend Proceedings* (March 19, 2018), TN#: 222999), as a legal matter, the results of the SCE’s LCR RFP have no relevance to the Commission’s certification process. The Applicant highlighted this commercial development not as evidence of why a suspension was needed, but rather to provide context for the length of the requested suspension.

<sup>10</sup> *Alamitos Energy Center Final Decision*, p. 3-15.

the CPUC, the CAISO, or any other agency or entity.<sup>11</sup> Therefore, the Intervenor’s attempt to litigate the “need” for the MREC as a basis for termination is not based in law and should be rejected.

Third, even if “need” were relevant to the question of whether the Intervenor’s motion to terminate should be granted, the Applicant disagrees with the Intervenor’s assertion that the “need” issue is fully resolved. The Intervenor’s confidence that there is “no uncertainty about the viability of the proposed transmission and procurement solutions” to address local reliability issues in the Moorpark Subarea and overall system reliability, and that “there is little chance of significant delay in project completion”<sup>12</sup> is misplaced. There is no certainty that the proposed transmission or procurement solutions will not be delayed or ever become commercially operable. As described in the *2017 Integrated Energy Policy Report*, delays in project completion are not uncommon, nor is completion guaranteed.<sup>13</sup> In addition, the question of whether the proposed transmission and procurement solutions are even sufficient to meet the need, remains unsettled. Even since the time the Applicant filed its notice to suspend the AFC, new assessments show changes in forecasted need. For example, on March 23, 2018, the California Independent System Operator (“CAISO”) completed its draft 2019 and 2023 local capacity requirements (“LCR”) study showing a need for new capacity to serve the Santa Clara Sub-Area.<sup>14</sup>

### **III. GRANTING A SUSPENSION IS APPROPRIATE FOR PUBLIC POLICY REASONS**

The Intervenor’s motion should also be denied because there are several public policy reasons why the MREC AFC should be suspended, rather than terminated. There are public policy benefits for having contingency mitigation measures, such as new gas-fired generation

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<sup>11</sup> California Energy Commission, *Carlsbad Energy Center Project Amendments Final Decision* (2015) Docket No. 07-AFC-06C, CEC-800-2015-001 CMF, pp. 3-6. TN#: 205625; see also, California Energy Commission, *The Metcalf Energy Center Commission Decision* (2001) Docket No. 99-AFC-3, P800-01-023.

<sup>12</sup> Intervenor motion, pp. 2-3.

<sup>13</sup> See, *2017 IEPR*, pp. 334-347.

<sup>14</sup> CAISO Presentation, 2019 & 23 Draft LCR Study Results Big Creek/Ventura Local Area (April 9, 2018), slide 7, available at <http://www.aiso.com/Documents/Presentation-Draft2019and2023LCRBigCreekVenturaLocalArea.pdf>. (Hereinafter, “CAISO 2019 & 23 Draft LCR Study Results Big Creek/Ventura Local Area Presentation”).

“ready to be developed”<sup>15</sup>, to ensure electric service reliability if “resource expectations do not match requirements.”<sup>16</sup> Suspension would provide the very sort of mitigation measures that would “be available for implementation, if needed, to guard against the adverse impacts from scheduling delays for preferred resources, planned generation additions, or California ISO-approved transmission system upgrades.”<sup>17</sup>

Furthermore, the MREC is not a one-dimensional project as portrayed by the Intervenor’s motion. Instead, the MREC combines highly efficient, fast, flexible, gas-fired generation peaking capacity with battery energy storage, and voltage support. With this combination of attributes, the MREC is uniquely designed to both address local reliability issues in the Moorpark Subarea and provide overall system reliability benefits. The MREC is particularly well-suited to provide long-term reliability benefits in place of older, less efficient and less environmentally-friendly once-through cooling units which the CAISO is now forecasting will need to remain on-line until the proposed transmission solution is implemented.<sup>18</sup> Suspending the MREC AFC allows all interested parties to evaluate the best solution to meet California’s energy and environmental policy goals in the event the proposed transmission solution cannot be implemented. Thus, suspending the MREC AFC, rather than terminating the process, offers contingency mitigation benefits envisioned by the IEPR by preserving all of the development and environmental review performed to date for the facility in a manner that can be easily and quickly resumed.<sup>19</sup> These benefits weigh against granting the Intervenor’s motion.

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<sup>15</sup> Jaske, Michael R. and Wong Lana, *Gas-Fired Generating Plants as Mitigation for Contingencies Threatening Southern California Electric Reliability* (2015) California Energy Commission, CEC-200-2015-005, p. i.

<sup>16</sup> *Mitigation Options for Contingencies Threatening Southern California Electric Reliability*, p. 1.

<sup>17</sup> *Mitigation Options for Contingencies Threatening Southern California Electric Reliability*, p. 3.

<sup>18</sup> See generally, CAISO 2019 & 23 Draft LCR Study Results Big Creek/Ventura Local Area Presentation.

<sup>19</sup> *2017 IEPR*, pp. 334-347. In determining LCR needs, the recently released CAISO draft 2019 & 23 LCR study identified a continued need for gas-fired generation pending completion of transmission upgrades and availability of new resources to maintain local area reliability in the Santa Clara and Moorpark Subareas. Due to the absence of contingency measures options, local reliability needs will be met through the continued operation of older, inefficient, retiring once-through cooling facilities. (See, CAISO 2019 & 23 Draft LCR Study Results Big Creek/Ventura Local Area Presentation, slides 7-8.)

#### **IV. SUSPENDING THE AFC IS CONSISTENT WITH COMMISSION PRECEDENT.**

It is appropriate to deny the Intervenor's motion and grant the Applicant's motion for suspension because it is consistent with Commission precedent. The Commission has consistently allowed for suspension when requested by similarly situated applicants, rather than termination in other Commission proceedings to provide an applicant the opportunity to evaluate its project.<sup>20</sup>

#### **V. SUSPENSION WILL NOT PREJUDICE OR HARM OTHER PARTIES.**

Suspending the AFC process for the MREC will not prejudice or harm other parties. Instead, suspension will allow for the conservation of time and resources of all parties while the Applicant reevaluates the project and the market. In contrast, terminating the AFC will cause substantial harm and prejudice to the Applicant, including loss of the resources and time expended to progress the current proceeding to its present state, and expenditure of additional time and resources to prepare, file, and progress a new AFC to an equivalent point in the Commission's AFC process.

### **CONCLUSION**

The Intervenor's motion asks the Committee to terminate the MREC AFC based on the Intervenor's speculation that the Applicant will be unable to act with due diligence to pursue the AFC because there has been no determination of "need" for the project by the CPUC, the CAISO, or any other agency or entity. The Committee should reject the Intervenor's invitation to speculate about the adequacy of possible future actions by the Applicant and deny the Intervenor's motion.

The Committee should also reject the Intervenor's invitation to consider the lack of current solicitation opportunities and determine whether there is a "need" for MREC in

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<sup>20</sup> See, for example, *Order Suspending Proceedings* (April 4, 2013), TN#: 70215; *Order Suspending Proceedings* (May 6, 2014), TN#: 202310; *Order Suspending Proceedings* (Jan. 17, 2013), TN#: 69173; *Order Suspending Proceeding* (June 26, 2017), TN#: 219922; *Committee Order Granting Applicant's Motion to Suspend and Denying Intervenor's Application to File Supplemental Response* (Nov. 3, 2017), TN#: 221678; *Committee Order Denying Motion to Terminate Application for Certification and Granting Request for Suspension Order* (July 2, 2015), TN# 205238-1; *Order Suspending Proceedings And Notice Of Cancellation Of The September 22, 2014 Status Conference* (Sept. 3, 2014), TN#: 203032; and *Order Suspending Proceedings* (Nov. 24, 2015), TN#: 206771.



considering the request to suspend this AFC proceeding. Neither solicitation opportunities nor the “need” for a facility are relevant to the Commission’s AFC process. Instead, the only question before the Commission is whether the Intervenor has carried its burden of proof as set forth in Section 1720.2 of the Commission’s regulations. The Intervenor has not.

In addition, suspension, not termination, is consistent with Commission policies identified in the IEPR and Commission precedent. The MREC is a multi-dimensional project of exactly the sort that will provide the State of California with reliable energy, and suspending the AFC, rather than termination, will ensure that the Commission’s proceeding for the facility can be easily and quickly resumed. Suspension is also appropriate as there is no prejudice or harm to other parties, in contrast with termination, which will cause substantial harm and prejudice to the Applicant. For all of these reasons, the Intervenor’s motion must be denied, and the Applicant’s request for suspension granted.

April 12, 2018

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