

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA**

In the Matter of:

The Application for a Small Power Plant
Exemption for the Orange Grove Power
Plant Project

Docket No. 07-SPPE-2

**ORANGE GROVE ENERGY, L.P.'S RESPONSE TO THE COMMITTEE'S
REQUEST FOR BRIEFS**

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Jane E. Luckhardt
Kevin Takei
DOWNEY BRAND LLP
555 Capitol Mall, 10th Floor
Sacramento, California 95814
Telephone: (916) 444-1000
FAX: (916) 444-2100
E-mail: jluckhardt@downeybrand.com
Attorneys for Applicant

April 1, 2008

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Orange Grove Energy, L.P. ("Orange Grove Energy") understands the Committee's¹ concern regarding potential delays in the proposed schedule associated with approving Orange Grove Energy's application for a Small Power Plant Exemption ("SPPE"). Furthermore, Orange Grove Energy appreciates the fact that the Committee's, the California Energy Commission ("CEC") Staff's, and the intervenor's ability to expend their time and resources is limited. As such, Orange Grove Energy requests that the Committee suspend the current SPPE proceeding. Concurrent with this request for a suspension, Orange Grove Energy agrees to an unlimited extension of the SPPE proceeding.

The Orange Grove Project ("Project") resulted from a competitive bidding process pursuant to the 2008 Peaker Request for Offers ("RFO") issued by San Diego Gas & Electric Company ("SDG&E") on October 18, 2006. The scope of the RFO encompassed new generating capacity resources to be built to support reliability within the SDG&E service territory and to meet other portfolio needs to be located upon a selection of SDG&E substation properties. SDG&E would provide certain services and the Project would supply the remaining services. On May 9, 2007 SDG&E and J-Power, USA Development Co, LTD (Orange Grove Energy's parent company) entered into an Option Agreement and a Power Purchase Tolling Agreement which was approved by the California Public Utilities Commission on September 6, 2007. The entire process and development of the Project was placed upon a fast track to respond to projected needs for peaking generation in SDG&E's service territory. At times a fast track approach is effective, but in this instance the Project encountered some problems with linear facilities. First, in response to comments and questions from CEC Staff and the Committee at the Informational Hearing, Orange Grove Energy sought out and secured a reclaimed water supply for the cooling water needs for the Project. The only method of bringing the reclaimed water to the site is by truck. If the right-of-way could be acquired, a pipeline could not be designed, permitted and built in time to serve the Project from this source. Furthermore, given the relatively small amount of water required by the Project, constructing a fifteen mile pipeline from the Project to the closest identified reclaimed water source is not economically feasible.

¹ The Committee assigned by the California Energy Commission to review the Orange Grove Project consists of Commissioners Boyd and Rosenfeld.

Next, upon working with SDG&E, who was initially going to design and build the natural gas pipeline to the Project site, Orange Grove Energy determined that the original pipeline route was infeasible due concerns expressed by the California Department of Transportation (“CalTrans”) and local businesses regarding the extensive disruption that would occur to traffic on the two lane road leading to the Project. Subsequently, Orange Grove Energy worked with SDG&E to explore alternative routes for the gas pipeline. The evaluation of the initial route within the roadway followed by the assessment of a new route required additional time to accomplish. The resulting delays kept the Project from moving forward as expected by all parties. Though the SPPE’s progress has been delayed, Orange Grove Energy has diligently worked to complete necessary environmental studies for the new pipeline route. Field work has been completed except for certain species-specific biological studies that are season-dependent and necessary to comply with CalTrans’ requirements.

CalTrans’ Encroachment Permits Manual Table 3.1 Item 12 requires, “[a] full explanation of the available alternatives to the proposed encroachment, together with costs and potential consequences if the requested encroachment is not approved.” This requirement was further described in a CalTrans letter dated September 13, 2007 to the County of San Diego Department of Planning & Land Use which states that “[t]he applicant will have to demonstrate there is no other way to locate this pipeline other than within the Caltrans right of way.” Because the agreement between SDG&E and Orange Grove Energy’s parent company to construct the facility was not executed until May 2007, after the traditional spring biological survey season, the earliest time when such species-specific biological studies can be conducted is this spring 2008. As such, the earliest that Orange Grove Energy could begin assessing certain potential environmental impacts of the new route is this spring 2008.

As more fully described below, Orange Grove Energy needs to be able to investigate the new gas pipeline route by performing biological surveys and cultural resources surveys to better understand the environmental impacts this new route may pose. No other participant in the SPPE proceeding should be required to do anything on this Project while that investigation is proceeding. Therefore, Orange Grove Energy requests a suspension of the current proceeding at this time while Orange Grove Energy’s consultant completes the necessary studies.

I. SPECIFIC RESPONSE TO THE QUESTIONS POSED BY THE COMMITTEE

The Committee in the *Committee Order and Tentative Decision and Notice of Hearing on Committee Recommendation to Deny the Small Power Plant Exemption* requested briefing on the following three questions:

1. Should the Committee recommend that the CEC deny Orange Grove Energy's application for a SPPE?
2. Is the SPPE process governed entirely by the California Environmental Quality Act (“CEQA”)?
3. If an EIR, rather than an initial study, is required for this proceeding, what is the appropriate legal standard for reviewing that EIR?

A. The SPPE should not be denied, instead the current proceeding should be suspended.

1. The Committee should not deny the SPPE.

First and foremost, the Committee should not deny the SPPE because the Project has been forced to make changes during the proceeding. The Committee should allow Orange Grove Energy to provide evidence, if the environmental analysis supports such evidence, that the Project will not create a substantial adverse impact on the environment. Orange Grove Energy cannot make that showing at this time because it has not yet gathered the evidence needed to support such a finding and is requesting a suspension of the proceedings in order to investigate whether such a showing can be made.

Although the Project linears have changed, the Project site and technology has not changed. The Project remains a simple cycle configuration with two LM 6000 combustion turbines on a disturbed site adjacent to a SDG&E substation. The basic power block has not changed and presents few impacts. The gas pipeline in question is two miles long. There is no information relating to gas-line impacts, other than those at the February 19th meeting. Further, the Project now incorporates the use of reclaimed water for Project cooling, which is a benefit to the environment. But the distance between the Project and the reclaimed water source is too great to allow construction of a grey water pipeline, forcing the use of trucks. Orange Grove Energy needs time to evaluate the effect, if any, of the changes to the Project linear facilities. Also, before the CEC denies the application, it must have sufficient information to make the determination, i.e. more than was available at the February 19th status conference.

The regulations allow Orange Grove Energy to extend processing timelines. As discussed below², the regulations allow the applicant to extend timelines “in order to permit a full and fair exploration” of the issues. Thus, Project timeline delays should not cause the Committee to deny the application for an SPPE. By suspending the current proceeding so that Orange Grove Energy can complete the applicable environmental surveys, the Committee would be providing a full and fair exploration of the issues. Conversely, a denial precludes Orange Grove Energy’s discretion to extend the processing timelines.

Lastly, the practical effects of denying the SPPE would not serve to meet the SPPE’s purposes of expediency. Staff stated in their November 1, 2007, Brief on the Standard for Exempting a Small Power Plant and the Effect of a Fair Argument, that rather than deny the SPPE and require Orange Grove Energy to re-file, “[p]reparing an EIR would be the most efficient option, as staff has already begun analyzing the project, assessing its potential for environmental impacts, and considering the need for mitigation measures” (emphasis added). As such, denying the SPPE at this point would not benefit Staff nor fulfill the SPPE’s purpose. Instead, granting the suspension would allow Orange Grove Energy to provide Staff all necessary environmental analysis so that Staff can continue assessing potential environmental impacts.

² See subsection A.2 of this document, *infra*.

2. *Orange Grove Energy requests a suspension of the current proceeding.*

Orange Grove Energy is permitted and desires to stipulate to a more lengthy time schedule as needed by Staff for a full and fair project evaluation. Concurrent with this extension, Orange Grove Energy requests that all proceedings be suspended until Orange Grove Energy completes all of the studies needed to evaluate the environmental impacts of the entire Project including the new gas pipeline alignment. Furthermore, Orange Grove Energy would retain the Project in suspension while it meets with resources agencies to discuss and agree upon the appropriate level of mitigation for Project impacts.

Public Resource Code³ Section 25541 allows the CEC to exempt certain powerplants from the AFC process. This is referred to as the small power plant exemption (“SPPE”).⁴ The SPPE process is part of the CEC’s policy to promote electric energy supply development by expediting approval procedures.⁵ However, as part of this policy, the CEC allows applicants to stipulate to an extended review schedule.⁶ The CEC does not limit the duration of extension.⁷

Orange Grove Energy is allowed to stipulate to a more lengthy review period. Here, an extension of the SPPE review period would be consistent with the CEC’s policy. It may seem that an extension is contrary to expediency. However, the CEC included the right to extend as part of the provisions aimed at expediency.⁸ Thus, it must have intended extensions to further the CEC’s policy in favor of expediency, which it does. For instance, even if an applicant stipulates to an extended review period, the process avoids resort to the more burdensome Application for Certification (AFC) proceeding, which can last longer than an extended SPPE. And in this case, where the applicant might otherwise be required to start the entire AFC process anew, an SPPE extension would instead serve to shorten the overall amount of time for approval. Thus, it also follows that CEC’s regulations do not limit the applicants right to stipulate to an extended review period.

Orange Grove Energy hereby agrees to a more lengthy time schedule. Orange Grove Energy originally proposed that a Final Decision should occur by September 2008. However, in light of the timing needed to fully evaluate the potential impacts from the revised pipeline route, Orange Grove Energy requests the proceeding be put into suspension until all of the environmental review for the pipeline, and all other Project changes is complete including all protocol biological surveys. Orange Grove Energy would also provide complete agreed upon mitigation packages for all Project impacts. Based upon CEC Staff’s proposed schedule which includes the preparation of an environmental impact report, the CEC’s review of the Project would be complete within six months of receiving the information from Orange Grove Energy. If Orange Grove Energy is able to construct the pipeline in a way that reduces the environmental impacts to

³ Unless otherwise specified, all references hereafter are to the Public Resources Code.

⁴ 20 C.C.R. § 1934 et. seq.

⁵ 20 C.C.R. § 1934.

⁶ 20 C.C.R. § 1947.

⁷ Id.

⁸ See generally 20 Cal. Code Regs. Article Div. 2 Chap. 5 Art. 5.

those that could be addressed with a mitigated negative declaration, the processing time could be reduced. At this time, Orange Grove Energy is evaluating the Project based upon the longer review period allowing for CEC Staff to prepare an EIR.

B. An EIR is compatible with the SPPE process.

There is no regulation or statute that limits the environmental review associated with an application for SPPE to an initial study, negative declaration, or mitigated negative declaration (collectively “Negative Declaration”). Instead, section 25541 of the Public Resources Code, which provides for the CEC to approve an SPPE, merely requires the CEC to find that approving the SPPE does not result in any substantial adverse environmental impacts. Section 25541 does not require the finding to be supported by a negative declaration. Section 25541 specifically provides:

The commission may exempt from this chapter thermal powerplants with a generating capacity of up to 100 megawatts and modifications to existing generating facilities that do not add capacity in excess of 100 megawatts, if the commission finds that no substantial adverse impact on the environment or energy resources will result from the construction or operation of the proposed facility or from the modifications (emphasis added).⁹

Using an EIR to support a finding of no substantial adverse impact is consistent with the CEC’s prior reliance on negative declarations in its SPPE process. A negative declaration is an appropriate level of environmental review if an initial study determines that there would be no significant impacts, or that there would be no significant impact after mitigation.¹⁰ Conversely, if the initial study determines that there may be a significant impact, an EIR is required to be prepared.¹¹ However, the preparation of an EIR does not, by itself, indicate that a project would have a significant adverse environmental impact. Instead, the EIR merely analyzes any potentially significant impacts to determine if such impacts are in fact significant.¹² And as such, the EIR could determine that there would be no substantial adverse environmental impact and be used to support the approval of an SPPE.

Though an EIR traditionally involves a more in depth environmental analysis than a negative declaration, such fact does not preclude the CEC from using an EIR to support the approval of an SPPE. The CEC has stated in previous SPPE proceedings that “the environmental analysis in SPPE proceedings are generally similar, in their breadth and depth, to those in AFC proceedings” which utilize the equivalent of an EIR. And to require such SPPE projects to “undergo the AFC process would neither produce additional environmental information nor result in any additional

⁹ Pub. Res. § 25541.

¹⁰ Pub. Res. §§ 21064, 21064.5; 14 C.C.R. §§ 15063(b), 15064(a)(1).

¹¹ Pub. Res. § 21080(d).

¹² Pub. Res. § 21100(b); 14 C.C.R. § 15126.2(a).

environmental protection.”¹³ Of note, the CEC has gone so far to state that in some cases, an SPPE’s environmental “analysis can be as, or more, exhaustive than the environmental impact report type review done in the AFC process. (emphasis added)”¹⁴ Therefore, given Staff’s past engagement in conducting extensive environmental reviews not traditionally associated with a negative declaration, conducting that same analysis to prepare an EIR is consistent with the SPPE process.

If Staff conducts an extensive environmental analysis traditionally attributed to an EIR, an EIR should be the resulting product, not a negative declaration. As explained by California caselaw, a “negative declaration is simply a brief statement describing the reasons why a proposed project will not have a significant effect on the environment. . . . An EIR, on the other hand, is a more formal report, the result of extensive study and public review. (emphasis added)”¹⁵ Additionally, by producing an EIR, Staff’s in-depth environmental analysis would be reviewed under an EIR’s more deferential standard of review (the standard of review is more fully discussed below in section B.2. of this brief) as compared to that of a negative declaration. As acknowledged by the parties to this proceeding as well as the CEC in prior SPPE proceedings, the fair argument standard of review applies to SPPE approvals based on negative declarations.¹⁶ Thus, when reviewing a negative declaration associated with an SPPE, if based on substantial evidence there is a fair argument that a proposed project may have a significant environmental impact, the CEC cannot rely on the negative declaration to support section 25541’s necessary finding that the project would have no substantial adverse environmental impact. In that case, an EIR should be prepared and the applicant should engage in the AFC process. As evident from this process, the fair argument standard creates a “low threshold” for requiring preparation of an EIR.¹⁷ Thus, even if Staff engaged in the more detailed analysis associated with an EIR but produced a negative declaration, then such fair argument could undermine Staff’s copious expenditure of time to conduct the more in-depth environmental analysis. However, if after conducting an extensive environmental review Staff produces an EIR, the standard of review would, unlike the fair argument standard, be more deferential to Staff’s extensive analysis of environmental impacts. In that case, Staff could be assured that its efforts would garner the deference that should be attributed to the more extensive analysis than what is normally conducted for a negative declaration.

In at least two SPPE proceedings Staff’s extensive environmental analysis was exposed to the fair argument standard attributed to negative declarations. Like negative declarations that are brief statements, Staff’s more in-depth environmental analysis that produced a 300+ page document could have been invalidated by a fair argument that the proposed project may have a

¹³ CEC SPPE Decision and Mitigated Negative Declaration, Riverside Energy Resource Center, p. 15 (Docket No. 04-SPPE-1).

¹⁴ Id. at p. 6.

¹⁵ *Chamberlin v. City of Palo Alto* (1986) 186 Cal.App.3d 181, 184, fn. 1.

¹⁶ See CEC SPPE Decision and Mitigated Negative Declaration, Riverside Energy Resource Center, p. 13, (Docket No. 04-SPPE-1).

¹⁷ *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 310 (quoting *No Oil Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84).

substantial environmental impact.¹⁸ Therefore, if the finished product is an EIR rather than a 300+ page negative declaration, Staff would be assured that their more in-depth environmental analysis would not be invalidated by a fair argument.

Limiting the use of an EIR, or its equivalent, to the AFC process not only places additional burdens on Staff, but is contrary to the SPPE's intended purpose of providing an expedited permitting process.¹⁹ In this and future SPPE proceedings where while conducting the environmental review Staff determines that an analysis beyond the traditional negative declaration would be required to more thoroughly assess any environmental impacts, it is more efficient for Staff to prepare an EIR rather than to transition the process to that of an AFC. By allowing the CEC Staff to complete their environmental analysis and utilize the work they completed to prepare an EIR (rather than an extensive negative declaration resembling an EIR), Staff can complete the review in a more timely fashion than transitioning into the AFC proceeding. If after completing the EIR, it is determined that approving the project evaluated within the SPPE process would, as opposed to may, result in substantial adverse environmental impacts, then the SPPE process would not be appropriate and the review should transition to the AFC process. However, as indicated by section 24451, unless it is determined that the SPPE would have a substantial adverse environmental impact, the SPPE process would be appropriate regardless if an EIR is used to support the environmental analysis.

1. CEQA governs the environmental review associated with the SPPE process.

As noted by the Committee, an EIR is not mentioned in section 25541 of the Public Resources Code or the SPPE regulations (Title 20, Chapter 4, Article 5, of the California Code of Regulations). Additionally, only the site certification program (Public Resources Code section 25500 et seq.), from which the SPPE is exempt, is a certified regulatory program that is exempt from CEQA's provisions.²⁰ As such, the Committee questioned if the SPPE process is governed by CEQA.

The CEC is designated as the CEQA lead agency "for projects that are exempted . . . from certification pursuant to section 25541."²¹ Therefore, given the lack of statutory and regulatory authority addressing the environmental review of an SPPE application, the lack of CEQA certification for the SPPE process, and the CEC's role as CEQA lead agency, an SPPE's environmental analysis is governed by CEQA.

The fact that the SPPE process is governed by CEQA does not preclude the use of an EIR during that process. In fact, because the SPPE is under CEQA and CEQA does not prohibit the use of an EIR, the CEC is free to engage in whatever environmental review is determined to be appropriate in order to make section 25541's finding that there be no substantial adverse

¹⁸ See Final Initial Study El Centro Unit 3 repower Project, (Docket No. 06-SPPE-2); Final Initial Study Niland Gas Turbine Plant, (Docket No. 06-SPPE-2).

¹⁹ See 20 C.C.R. § 1934.

²⁰ See Pub. Res. § 21080.5; 14 C.C.R. § 15060(d).

²¹ Pub. Res. § 25519(c).

environmental impact. Of note, though an EIR is not mentioned in section 25541 or the SPPE regulations, neither is an initial study nor a negative declaration. Instead, section 1943 of the SPPE regulations which provides for the presentation of evidence states that a party can offer as evidence “any environmental impact documentation.”²² Therefore, as recognized by the SPPE regulations, an EIR can be prepared in support of a finding that an SPPE would have no significant environmental impact.

2. *The appropriate legal standard for reviewing an EIR is whether there was an abuse of discretion.*

On November 1, 2007, Orange Grove Energy and other parties responded to the Committee’s request for clarification on the proper legal standard that the Committee should use in recommending that the CEC exercise its discretion to either grant or deny an SPPE. In the initial paragraphs of its November brief, Orange Grove Energy explained that it expected a negative declaration to be prepared for the SPPE, but that the brief’s analysis was conceptual and may or may not be applicable to a specific fact pattern in this proceeding. With that qualification, Orange Grove Energy explained that the fair argument standard would apply if a negative declaration were prepared. Thus, if a negative declaration were prepared, but a fair argument could be made that there may be a substantial adverse environmental impact, then the SPPE process should transition into an AFC. As mentioned on pages 6-7 of Orange Grove Energy’s November brief, we stated that the environmental analysis for an SPPE may be equal to an EIR and as such, the proceeding’s details and issues in dispute should be analyzed beyond the fair argument standard. However, as noted in the brief, Orange Grove Energy did not analyze using an EIR but instead limited its discussion to the situation presented by the Committee involving a negative declaration. Because the fact pattern now involves an EIR rather than a negative declaration, Orange Grove Energy is providing the following analysis to address a scenario not presented in the November brief.

Just as CEQA employs the fair argument standard for reviewing negative declarations, CEQA also employs the abuse of discretion standard for reviewing an EIR. As acknowledged by the CEC and the parties to this proceeding, the fair argument standard is appropriate for reviewing a negative declaration associated with an SPPE application. Use of the fair argument standard to review negative declarations is rooted in CEQA caselaw.²³ CEQA also establishes the standard of review for an EIR where such standard of review considers if the lead agency abused its discretion.²⁴ Therefore, in accordance with the CEC’s current practice of using CEQA’s fair argument standard to review a negative declaration, CEQA’s abuse of discretion standard should be used to review an EIR.

²² 20 C.C.R. § 1943.

²³ See *Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002 (where review considers if a substantial evidence supports a fair argument that significant effects may occur).

²⁴ Pub. Res. §§ 21168, 21168.5; see also *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392.

An abuse of discretion is established if the CEC did not proceed in a manner required by law or if the determination or decision is not supported by substantial evidence.²⁵ Substantial evidence is defined as “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached . . .”²⁶ Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.”²⁷ As such, the CEC should not consider the correctness of an EIR’s environmental conclusions, but only if the EIR is sufficient as an informative document.²⁸ So regardless if an opposite conclusion would have been equally or more reasonable than that presented in the EIR, such fact is not grounds for setting aside the CEC’s approval of an EIR.²⁹ As such, an EIR should be upheld if there is substantial evidence in the record to support the CEC’s decision that the EIR is adequate and complies with CEQA.³⁰

If the EIR determines that there would be no substantial adverse environmental impact from the project proposed under an SPPE, and such determination is supported by substantial evidence, then the CEC should certify the EIR. However, in the event the EIR determines there would be a substantial adverse environmental impact, or if the EIR lacks substantial evidence to support a determination of no impact, then the CEC should not certify the EIR. In the event that there would be a substantial adverse environmental impact, the SPPE process should be terminated and the applicant should be able to transition into the AFC process. If, however, substantial evidence supports the EIR’s determination that there would be no substantial adverse environmental impacts, the CEC can issue the necessary finding of no substantial adverse environmental impact and approve an SPPE.

C. Should an EIR be required for this proceeding, and the Committee desires Orange Grove Energy to submit an AFC instead of remaining in the SPPE process, the current SPPE proceeding should transition into the AFC proceeding to avoid redundant efforts on the part of all parties to this proceeding.

It is premature to assume that an EIR is required for this proceeding until the environmental impacts of the proposed gas line are thoroughly surveyed. However, the environmental analyses in SPPE proceedings are generally similar, in their breadth and depth, to those in AFC proceedings. Thus, if an EIR is required and the Committee desires Orange Grove Energy to prepare an AFC, then the current SPPE proceeding should be transitioned into the AFC process, rather than starting anew, thereby avoiding as much as possible any repeat of similar proceedings or requirements that may have already been addressed such as the informational hearing and the site visit.

²⁵ Pub. Res. § 21168.5; *see also Laurel Heights Improvement Assn. v. Regents of the University of California supra* 47 Cal.3d at 392.

²⁶ 14 C.C.R. § 15384(a).

²⁷ 14 C.C.R. § 15384(b).

²⁸ *Citizens of Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal.3d 553, 564.

²⁹ *Ibid.*

³⁰ *Barthelemy v. Chino Basin Municipal Water District* (1995) 38Cal. App.4th 1609, 1620.

The contents for an AFC application are provided by Public Resources Code Section 25520, whereas the contents for an SPPE application are provided for in 20 CCR Chapter 5 Appendix F. Both require a project description, location/site description, fuel description, information regarding need for the project, information regarding transmission line routing, surround land-use ordinances and regulations, and plant output. Furthermore the SPPE allows the applicant to submit any other information deemed necessary. Additionally both processes provide for public hearings and testimony.³¹

Requiring Orange Grove Energy to undergo the entire AFC process from the beginning would not produce additional environmental information, nor result in additional environmental protection because many of the requirements are the same. Therefore if the Committee desires Orange Grove Energy to prepare an AFC, then the current SPPE proceeding should be transitioned into an AFC process. The transition should avoid, as much as possible, a repeat of any similar proceedings or requirements.

If an AFC is required, the Project should transition into the AFC proceeding prior to the Preliminary Staff Assessment. Once the Project consultants complete the analysis of the revised pipeline and agree upon appropriate mitigation with resources agencies, CEC Staff could complete the review of the Project and its impacts necessary to complete the Preliminary Staff Assessment. If CEC Staff needed a round of data requests, it could be accommodated prior to issuing the Preliminary Staff Assessment.

II. CONCLUSION

First, Orange Grove Energy requests a suspension in the current SPPE proceeding.

Second, Orange Grove Energy further requests the Committee rule on whether it would allow CEC Staff to prepare an environmental impact report (EIR) within the SPPE process. Orange Grove Energy has not completed its environmental review of the revised pipeline route but understands that CEC Staff may want to prepare an EIR rather than a mitigated negative declaration. As stated above, Orange Grove Energy believes the CEC can accept and use an EIR within the SPPE process. A final decision on the appropriate level of environmental documentation of the Project and its potential impacts most likely will be dictated by the environmental review of the revised pipeline. The Committee's position on this issue would help inform the Orange Grove Energy of the best course of action upon completion of the environmental surveys for the gas pipeline and evaluating the entirety of the Project's impacts.

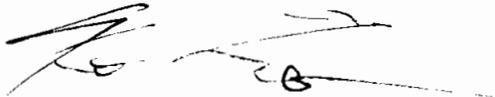
Third, the Committee should not recommend denial of this Project based upon permitting delays and potential Project impacts. Orange Grove Energy has yet to complete the environmental analysis of the revised pipeline route let alone provided the information to the Committee. At this point the Project should be suspended to allow Orange Grove Energy to complete the studies and fully evaluate the potential impacts of the entire Project. If those studies would support a finding by the Committee and the CEC of no substantial adverse impacts on the environment or

³¹ See 20 C.C.R. §§ 1943 – 1945; Pub. Res. § 25513.

energy resources, Orange Grove Energy should be afforded an opportunity to present that evidence to the CEC Staff, other parties, the public and the Committee.

DATED: April 1, 2008

DOWNEY BRAND LLP

By: 

Kevin Takei

**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA**

**APPLICATION FOR SMALL POWER
PLANT EXEMPTION FOR THE
ORANGE GROVE POWER PLANT**

DOCKET NO. 07-SPPE-2
(SPPE filed 10/10/07)

**PROOF OF SERVICE
(Revised 10/16/07)**

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-SPPE-2
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

<p><u>APPLICANT</u></p> <p>Stephen Thome J-Power USA Development 1900 East Golf Road, Suite 1030 Schaumburg, IL 60173 sthome@jpowerusa.com</p>	<p>Charles Diep, PE, CPP TRC 21 Technology Drive Irvine, CA 92619 cdiep@trcsolutions.com cdiep@Roadrunner.com</p>
<p>Mike Dubois J-Power USA Development 1900 East Golf Road, Suite 1030 Schaumburg, IL 60173 mdubois@jpowerusa.com</p>	<p><u>COUNSEL FOR APPLICANT</u></p> <p>Jane Luckhardt Downey Brand, LLP 555 Capital Mall, 10th Floor Sacramento, CA 95814 jluckhardt@downeybrand.com</p>

<p><u>APPLICANT CONSULTANT</u></p> <p>Uday Singh, Vice President TRC 21 Technology Drive Irvine, CA 92619 usingh@trcsolutions.com</p>	<p>Wayne Song Morgan, Lewis & Bockius LLP 300 S Grand Avenue, 22nd Floor Los Angeles, CA 90071 wsong@morganlewis.com</p>
<p>Joe Stenger, PG, REA TRC 2666 Rodman Drive Los Osos, CA 93402 jstenger@trcsolutions.com</p>	<p><u>INTERESTED AGENCIES</u></p> <p>Larry Tobias Ca. Independent System Operator 151 Blue Ravine Road Folsom, CA 95630 LTobias@caiso.com</p>
<p>Electricity Oversight Board 770 L Street, Suite 1250 Sacramento, CA 95814 esaltmarsh@eob.ca.gov</p>	<p><u>ENERGY COMMISSION</u></p> <p>JAMES D. BOYD Presiding Member jboyd@energy.state.ca.us</p>
<p>Steve Taylor San Diego Gas & Electric 8306 Century Park Court San Diego, CA 92123 srtaylor@semprautilities.com</p>	<p>ARTHUR ROSENFELD Associate Member pflint@energy.state.ca.us</p>
<p><u>INTERVENORS</u></p> <p>Gloria D. Smith Marc D. Joseph Adams Broadwell Joseph & Cardozo 601 Gateway Boulevard, Suite 1000 South San Francisco, CA 94080 gsmith@adamsbroadwell.com</p>	<p>Kenneth Celli Hearing Officer kcelli@energy.state.ca.us</p> <p>Felicia Miller Project Manager fmiller@energy.state.ca.us</p>
<p>Anthony J. Arand 219 Rancho Bonito Fallbrook, CA 92028 (760) 728-7388 Voice tony@envirepel.com</p>	<p>Jared Babula Staff Counsel jbabula@energy.state.ca.us</p> <p>Public Adviser's Office pao@energy.state.ca.us</p>

DECLARATION OF SERVICE

I, Linda Topacio, declare that on April 1, 2008, I deposited a copy of the attached Orange Grove's Energy's Response to the Committee's Request for Briefs in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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



Linda Topacio