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

APPLICATION FOR SMALL POWER PLANT EXEMPTION FOR THE ORANGE GROVE PROJECT	DOCKET NO. 07-SPPE-2 ORDER NO. 08-507-15

COMMISSION ORDER TERMINATING PROCEEDING

I. BACKGROUND AND SUMMARY

On April 25, 2008, the Applicant filed and served a properly executed written notice of withdrawal of the Small Power Plant Exemption (SPPE) application. The Commission's regulations require the Presiding Member of the Committee to "immediately issue a written order to terminate the . . . proceeding and close the docket" upon receipt of such a withdrawal [Cal. Code Regs., tit. 20, § 1709.8(b).] This Order terminates the Orange Grove SPPE proceeding and directs the closing of Docket Number 07-SPPE-2.

II. DISCUSSION

Given the withdrawal of the application, all of the issues are moot. Nevertheless, our experience in this proceeding compels us to make several observations about SPPE proceedings in general.

We start with a difficult legal issue. SPPE proceedings are not part of the Commission's certified regulatory program under the California Environmental Quality Act (CEQA) [Pub. Resources Code, § 25541; Cal. Code Regs., tit. 14, § 15251(k)]. Therefore, a Negative Declaration or Environmental Impact Report ("EIR") must be prepared as part of each SPPE proceeding.

In light of the current record in the Orange Grove proceeding, it is very unlikely that a Negative Declaration, as opposed to an EIR, would have been legally adequate here. Some of the parties have argued that the law allows an EIR (as opposed to a Negative Declaration) to be the basis of a finding that "no substantial adverse impact on the environment . . . will result from the construction or operation of the proposed facility," which is a prerequisite for granting an SPPE (see Pub. Resources Code, § 25541). Several considerations strongly suggest that it would be unwise policy to use an EIR in an SPPE proceeding. (This discussion also applies to some extent to the use of a "mitigated Negative Declaration.")

First, as noted above, the Commission must find that a project's construction and operation will result in "no substantial adverse impact on the environment" before granting an SPPE. Yet under CEQA, a project for which an EIR is prepared may be

permitted even if it has substantial, adverse, unmitigable environmental impacts, if the permitting agency makes specified findings concerning the project's overriding benefits. (Cal. Code Regs., tit. 14, § 15093.) Therefore, it is entirely possible that in an SPPE proceeding, the Commission could prepare an EIR and, many months later, be unable to grant the SPPE (even though the local agency that would have had permitting jurisdiction might be able to grant a license based on the Commission's EIR). This would be an enormous and unnecessary waste of time and resources.

Second, even if an EIR were to conclude that there would be "no substantial adverse impact on the environment," the Commission would still have the discretion to deny the SPPE. This is because the applicable statute allows, but does not require, the Commission to grant SPPEs upon the making of the requisite findings: "The commission *may* exempt . . . if the commission finds . . . ." (Pub. Resources Code, § 25541 [italics added].) The same is true, obviously, for SPPE proceedings for which a Negative Declaration is prepared. Sound policy and prudent governance will sometimes require the Commission to retain jurisdiction over more complex small power plants, even when all the impacts are mitigated. In such cases, the applicant runs a significant risk that the Commission could spend many months preparing an EIR (or a mitigated negative declaration) and still deny the SPPE. We believe that this is not a fruitful use of the SPPE process.

This situation leads us to a more general observation. Before granting an SPPE, the Commission must decide (at least implicitly) that the circumstances are appropriate for approval. We believe that the Commission should grant SPPEs only for projects that are essentially "no-problem" facilities. This conclusion is supported not only by the sound principle of avoiding the risks inherent in difficult or controversial projects, as the previous paragraphs indicate, but also by the statutory timeline for SPPE proceedings – 4 ½ months – and the consideration that a Commission's SPPE proceeding will always be followed by at least one, and probably several, permitting proceedings at other agencies. It seems unlikely that the Legislature created the SPPE process so that the Energy Commission would take many months to process an SPPE, only for the applicant to turn around and spend considerably more time seeking what it could have gotten from the Commission in a single AFC proceeding. This problem is only exacerbated in cases where a project undergoes substantial changes during an SPPE proceeding, as Orange Grove did. We urge applicants to avoid the temptation to file an SPPE for any project unless it is clear-cut that the process is appropriate.

The Potential AFC Proceeding

The Orange Grove applicant has stated that it intends to file an AFC for the project. If it does so, the Commission will appoint this same Committee and the same Hearing Adviser to the AFC proceeding. The Commission will direct the Staff to use its best efforts to process the AFC as quickly as is reasonably possible, in light of all of the Commission's priorities, with the goal of a final decision by April 1, 2009.

III. ORDER

The Application for a Small Power Plant Exemption proceeding for the **Orange Grove project** is hereby terminated. The docket in this case, **07-SPPE-2,** is closed. No further filings in this matter shall be accepted by the Energy Commission's Docket Unit.

Dated: April 28, 2008, at Sacramento, California.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

JACKALYNE PFANNENSTIEL
Chairman

JAMES D. BOYD
Vice Chair

ARTHUR H. ROSENFELD
Commissioner

JEFFREY D. BYRON
Commissioner

KAREN DOUGLAS
Commissioner