

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

**APPLICATION FOR CERTIFICATION FOR
THE AVENAL ENERGY PROJECT**

DOCKET NO. 08-AFC-1

**AVENAL POWER CENTER, LLC'S RESPONSE TO MR. ROB SIMPSON'S APPEAL
OF COMMITTEE ORDER DENYING HIS REQUEST TO STAY PROCEEDING**

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June 24, 2009

STATE OF CALIFORNIA

ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:) Docket No.: 08-AFC-1
)
Application for Certification for the)
Avenal Energy Project)
_____)

**AVENAL POWER CENTER, LLC'S RESPONSE TO MR. ROB SIMPSON'S APPEAL
OF COMMITTEE ORDER DENYING HIS REQUEST TO STAY PROCEEDING**

The California Energy Commission ("Commission") Committee ("Committee") for the Application for Certification for the Avenal Energy Project correctly denied Mr. Rob Simpson's "Request to Stay Proceedings Pending Commission Posting of Final Determination of Compliance (FDOC)" ("Request to Stay Proceedings"). Avenal Power Center, LLC ("Avenal Power") hereby files this Response to Mr. Simpson's Appeal of Committee Order denying his Request to Stay Proceeding.

I. Procedural Background

Avenal Power filed its Application for Certification for the Avenal Energy Project (AFC) on February 21, 2008. The Commission deemed the AFC data adequate on April 16, 2008. The Commission Staff ("Staff") filed the Preliminary Staff Assessment on February 2, 2009. The Commission Staff held a workshop in Avenal on February 18, 2009. The Committee held a Status Conference on March 23, 2009 and issued a revised scheduling order on April 24, 2009 containing the current schedule for this proceeding. On April 29, 2009 Mr. Simpson filed with the San Joaquin Valley Air Pollution Control District an "Informal Request to Reopen Public Comment Period" for the preliminary determination of compliance for the Avenal Energy Project ("Project"). The Staff filed the Final Staff Assessment (FSA) on June 2, 2009. On June 8, 2009, Mr. Simpson submitted to the Committee a Petition for Intervention in this AFC proceeding as well as a Request to Stay Proceedings. On June 11, 2009, the Committee issued its Order Denying Rob Simpson's Request to Stay Proceedings ("Committee Order"), but

granted him intervenor status. On June 15, 2009, Mr. Simpson submitted his “Appeal of Decision, Rebuttal Testimony, Request for new schedule” (“Appeal”).

II. Intervenor Status is Requested to Take the Record as it Stands at the Time They Intervene

California Code of Regulations Section 1712 provides the rights and duties of those individuals who petition to become a party in siting proceedings. (Title 20.) Section 1712 specifically states, “No person who becomes a party shall be permitted to reopen matters or reopen discovery dealt with in the proceeding prior to the time when such person became a party, without a showing of good cause.” This regulation clearly establishes the presumption that intervenors must take the record where it stands when they intervene or show good cause to overcome the presumption.

This AFC proceeding is not just beginning. The Staff has issued the FSA and the Committee has scheduled hearings for July 7th. By filing his petition to intervene on June 8th, Mr. Simpson is intervening at the last possible moment in this proceeding, over a year after Avenal Power filed the AFC. In addition, it is clear Mr. Simpson has been aware of this AFC proceeding since at least April 29th of this year when he filed his “Informal Request to Reopen Public Comment Period”. And yet, Mr. Simpson waited over a month to petition to intervene in this proceeding. As more fully discussed below, Mr. Simpson’s stated reason for requesting a stay in the proceeding, because the Final Determination of Compliance was not posted on the documents and reports section of the Commission’s website for this AFC proceeding, does not establish good cause to overcome the presumption that intervenors must take the record as it is when their petition is granted.

III. The Deadline for Data Discovery Has Long Since Passed

In his Appeal, Mr. Simpson repeatedly questions the date on which the period for data discovery closed, under what authority and how the public was informed¹. (Appeal at 1 and 3.) Section 1716 of the Commission’s Regulations provides a straightforward regimen for pursuing discovery. The data discovery period closes “180 days from the date the [C]ommission

¹ Mr. Simpson also characterizes Avenal Power’s May 14, 2009 filing evaluating the system greenhouse gas impacts from the Project as an “amendment to the AFC”. This characterization is inaccurate. Avenal Power’s filing is an analysis of the Project, not a change or amendment to the Project.

determines an application is complete, unless the committee allows requests for information at a later time for good cause shown.” (20 C.C.R. § 1716(e).) The Commission determined Avenal Power’s AFC to be complete on April 16, 2008, therefore, the deadline for an intervenor to file data requests expired on October 13, 2008.

These regulations have been in place since this proceeding began, have not changed and are publicly available. In addition, “statutory requirements for public notice are fulfilled if the public agency makes a good faith effort to follow the procedures prescribed by law for giving notice.” (*Newberry Springs Water Assoc. v. County of San Bernardino*, 150 Cal.App.3d 740, 746 (1984).) The Commission abided by its notice procedures in informing all parties to the proceeding and adjacent property owners of the first information presentation on the Avenal Energy Project. (20 C.C.R. § 1709.7.) The Commission also properly arranged for timely public notice of the prehearing conference. (20 C.C.R. § 2331(b).) All other documents were posted in a timely manner upon the online Docket Log (see discussion below). The Commission has therefore, made a good faith effort to satisfy all of its statutory notice requirements. The Commission cannot be expected to notify a non-intervenor (up until June 11, 2009) resident of Hayward, approximately 180 miles away, of every facet of this proceeding.

Although it is not immediately clear from Mr. Simpson’s Appeal whether he wishes to reopen the data discovery period, Mr. Simpson claims the current analysis does not adequately address “alternative energy sources,” “transmission capacity strain” and the Project’s PM10 impacts. (Appeal at 3 and 5.) Mr. Simpson describes himself as a “consultant in Power [sic] plant licensing cases”, and as such, he should be well aware of the statutorily-prescribed deadlines. (Petition for Intervention at 2.) His interest in power plant siting cases across the state demonstrates a familiarity with the Commission siting process therefore, rendering any request by Mr. Simpson to stay the proceedings here that much less credible.

IV. None of the Issues Raised by Mr. Simpson Provide Sufficient Cause to Stay the Proceeding or Reopen Discovery

A. Mr. Simpson Will Have the Opportunity to Participate in the Remainder of the Proceeding

As confirmed by the Committee in its Order, which also granted Mr. Simpson intervenor status, “[p]arties may participate in all remaining events in the case as shown on the attached

schedule” This means Mr. Simpson has the right to file a prehearing conference statement, attend the prehearing conference, and present and respond to testimony during the evidentiary hearing. Mr. Simpson will therefore, have sufficient opportunity to voice the concerns contained in his Appeal during the remainder of this proceeding. Therefore, neither further discovery nor a stay of the proceedings is warranted.

B. The Timing of Document Posting to the Commission’s Website is Irrelevant

Mr. Simpson takes issue with when and why certain documents were posted to the Avenal Energy Project page of the Commission’s website. Mr. Simpson first questions why the “Notice of Final Determination of Compliance” was not posted until June 9, 2009. (Appeal at 1.) He complains that Avenal Power’s evidentiary hearing testimony and exhibits are not available on the website and were not sent to him. (Appeal at 3.) Mr. Simpson also alleges that his own testimony and petition for intervention, as well as Staff Reports 3 and 4, were not posted either on the docket log or the documents page.

Mr. Simpson fails to realize that certain documents are posted to the Commission website as a courtesy, all others are available via the Docket Log, which is updated every Friday. It would be too time consuming and inefficient to post every single document generated by the Commission or parties during the course of an AFC proceeding. It is clearly stated on the Docket Log page for the Avenal Energy Project that “[n]ot all documents are available on line. The major documents for this proceeding are on the ‘documents page.’”² The Docket Log page also clearly states that the Docket Log is updated every Friday. Therefore, Mr. Simpson should not expect each and every document related to the Avenal Energy Project, including his own, to be immediately available, if at all. If he is seeking a certain document, Mr. Simpson can request it from the Dockets Unit. As a non-party until June 11, 2009, he should not have expected the Commission to have predicted his need for Avenal Power’s hearing testimony and exhibits. Those documents were only sent to those on the service list as of the date they were filed, June 8, 2009, three days before Mr. Simpson was granted intervenor status. The Preliminary Determination of Compliance (PDOC) and FDOC were posted and available through the Commission Dockets Unit as of the following week after July 11, 2008 and November 4, 2008,

² Avenal Energy Project, Dockets Page accessed on June 17, 2009 at http://www.energy.ca.gov/dockets/docket_redesign.php?docketNo=08-AFC-01.html.

respectively. Mr. Simpson's "Informal Request to Reopen Public Comment Period" was posted and available through the Dockets Unit as of the week following April 29, 2009.

Avenal Power points out that Mr. Simpson has been aware of these proceedings since at least April 29, 2009, the day he filed his "Informal Request to Reopen Public Comment Period." Therefore, he has had ample time to inspect the Docket Log and request and review documents of interest to him. Avenal Power adds that Mr. Simpson's "interest in California Energy production and power plant licensing before the Commission" and participation as a "consultant in Power [*sic*] plant licensing cases" should make him well-aware of the Commission's information availability process. (Petition for Intervention at 2.)

Mr. Simpson's complaints regarding what documents and when they were posted on the Commission's website has no bearing on whether the Commission should grant a stay of the proceeding or reopen discovery.

C. The Commission Has Properly Conducted this AFC Proceeding

Mr. Simpson's Appeal next accuses the Commission of improperly continuing with the AFC process despite the lack of Federal documents, adequate analysis of "alternative energy sources" and line loss. (Appeal at 2 and 5.) Mr. Simpson also alleges that the PM10 emission limit for the project "is not best available control technology (BACT)" and that the Preliminary Determination of Compliance "does not contain any discussion of PM10 emission levels" (Appeal at 5.)

Mr. Simpson first claims that the Commission has not properly included "Federal Agency draft or final determinations," specifically the United States Fish and Wildlife Service (USFWS) Biological Opinion and the United States Environmental Protection Agency (USEPA) PSD permit. (Appeal at 2.)

Mr. Simpson has neglected to verify his statements against any of Staff or the San Joaquin Valley Air Pollution Control District's analysis of the Avenal Energy Project. If he had, he would have readily discovered that the Biological Opinion is currently being drafted by USFWS and will be available prior to project certification. (FSA at 4.2-20.) As Mr. Simpson himself acknowledges in his Request to Stay Proceedings, the PSD is in fact addressed in the

FSA, as well as in the FDOC. (FDOC at 2 and Attachment K; FSA at 4.1-3, 4.1-26 and 4.1-36.) In fact, the FSA specifically states that the PSD will be based on the FDOC and that Condition of Certification AQ-SC6 was included to ensure that Avenal Power amends the Commission license as necessary to incorporate changes triggered by the PSD permit, if any. (FSA at 4.1-36.) Thus, Staff is fully aware that a PSD has not yet been issued, but has included a safeguard Condition of Certification to ensure that the project will not be certified without it.

With regard to Mr. Simpson's comments regarding the alleged deficiency of Staff's analysis of alternative energy sources and transmission line loss, Avenal Power again refers Mr. Simpson to the FSA. The FSA addresses alternative generation technologies, including renewable resources, in the Alternatives Chapter. Staff plainly states that it analyzed various alternative technologies and found that geothermal, wind and hydroelectric generation options do not exist in the area; that biomass would produce substantially greater emissions; and that solar and wind technology would require far greater amounts of land to generate the same amount of energy as the proposed Avenal Energy Project. (FSA at 6-19 to 6-20.) Mr. Simpson's issue with alleged transmission line loss is rendered moot by Staff's statement that the project will "enhance reliability in the grid and may reduce system losses in the PG&E system" as well as the substantial discussion of the project's ability to reduce greenhouse gas emissions by generating locally-consumed energy. (FSA at 4.1-84 and 5.5-14.)

With regard to the project's compliance with BACT, it is discussed in the FDOC at 34-38 and also in the FSA at 4.1-36 and 38. PM10 emission levels are thoroughly discussed in the Air Quality Chapter of the FSA (4.1-13 to 37) and throughout the FDOC, particularly at 54 and 77-79. Any comparison to other generation projects is irrelevant for purposes of deciding whether a stay of the proceedings should be granted.

D. The Committee's April 24, 2009 Revised Schedule is Reasonable

The Appeal alleges that the Revised Schedule prevents informed participation. (Appeal at 4.) Mr. Simpson supports this statement with the claim that Staff required a month to prepare testimony while the public was only given three days. (*Id.*) This is incorrect. Mr. Simpson had from the date of the Revised Schedule to June 8th to prepare his testimony. All parties had until

June 15 to file rebuttal testimony. Therefore, Mr. Simpson had almost two weeks to prepare rebuttal testimony.

The project was deemed data adequate more than one year ago, and the Evidentiary Hearing is scheduled for July 7, 2009 therefore, the proceeding has progressed at a pace sufficient to allow ample time for interested members of the public to comment or intervene and provide testimony. In fact, the Commission is statutorily required to abide by a 12-month siting review process, which begins the date the project is deemed data adequate. (Public Resources Code § 25540.6.) This project has so far greatly exceeded that timeline. Mr. Simpson has had well over a year to intervene and participate in this proceeding, his delay in joining the AFC process should not prevent the Commission from continuing with the schedule as planned. Mr. Simpson's request for a stay of the proceeding or, alternately, a "reasonable schedule" should be denied by the Commission.

E. Mr. Simpson's References to Other Proceedings Are Irrelevant

Mr. Simpson's Appeal makes disconnected and barely discernable references to the Russell City Energy Center proceeding, the PG&E Gateway Generating Station, the Carlsbad Energy Center, the Blythe Energy Project, the Los Medanos Energy Center and the Inland Empire Energy Center. (Appeal at 2-5.) After much difficulty in separating quotations and whole passages extracted from various documents concerning these projects, Avenal Power finds that Mr. Simpson's references are specific to those projects and are therefore unrelated to the Avenal Energy Project. For these reasons, they have absolutely no bearing on Mr. Simpson's request for a stay of the proceedings.

V. Mr. Simpson's Appeal May Be Improperly Before the Commission

Avenal Power questions whether Mr. Simpson followed statutorily-prescribed procedure in submitting his Appeal to the Commission. Section 1215, of Title 20, California Code of Regulations governs "Interlocutory Orders and Appeals" and sets out the procedure for bringing interlocutory appeals before the Commission. Avenal Power does not believe Mr. Simpson has followed the appropriate process set forth in Section 1215 and questions whether Mr. Simpson's Appeal should even be before the Commission in the first place.

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DOCKET NO. 08-AFC-1

PROOF OF SERVICE
(Revised 6/17/09)

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Declaration of Service

I, Lois Navarrot, declare that on June 24, 2009, I served and filed copies of the attached **AVENAL POWER CENTER, LLC'S RESPONSE TO MR. ROB SIMPSON'S APPEAL OF COMMITTEE ORDER DENYING HIS REQUEST TO STAY PROCEEDING**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: www.energy.ca.gov/sitingcases/avenal. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service List) and to the Commission's Docket Unit, in the following manner:

(check all that apply)

For Service to All Other Parties

sent electronically to all email addresses on the Proof of Service list;

by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service List above to those addresses **NOT** marked "email preferred."

AND

For Filing with the Energy Commission

sending an original paper copy and one disk copy by hand delivery to the address below;

OR

_____ depositing in the mail an original and 12 paper copies as follow:

California Energy Commission
Attn: Docket No. 08-AFC-1
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

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

/s/
Lois Navarrot