

**DOCKET**  
**08-AFC-3**

DATE JUN 24 2010  
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STATE OF CALIFORNIA  
ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of: ) Docket No. 08-AFC-3  
)  
Application for Certification for the ) STAFF'S OPPOSITION TO PETITIONS  
Marsh Landing Generating Station ) FOR INTERVENTION OF THE  
Project ) LOCAL CLEAN ENERGY ALLIANCE  
) AND ROB SIMPSON  
)

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**INTRODUCTION**

On May 26, 2010, the Committee for the Marsh Landing Generating Station Application for Certification (AFC) proceeding (Committee) issued a Notice of Prehearing Conference and Evidentiary Hearing, stating that the deadline to file a Petition to Intervene in this case was 5 p.m. on Monday, June 1, 2010, 30 days prior to the scheduled Evidentiary Hearing. On June 4, 2010, Robert Sarvey filed a Petition to Intervene. On June 21, 2010, the Committee issued an Order Denying Petition to Intervene, making findings in part that the Petitioner's interests are not relevant to the Marsh Landing proceedings, the Petition was untimely, and that the Petition did not show good cause for allowing his late filed Petition. After close of business on June 21, 2010, the Local Clean Energy Alliance (LCEA) and Rob Simpson each filed a Petition for Intervention in the AFC proceeding and what they termed "testimony". California Energy Commission Staff respectfully requests the Committee deny both petitions because as with Mr. Sarvey's Petition, both petitions are untimely, their interests are not relevant to this proceeding, and they failed to show good cause for late intervention. Furthermore, the deadline to file testimony was June 21, 2010. Both Petitioners failed to meet the deadline for filing testimony as well.

**PETIONERS MUST SHOW GOOD CAUSE FOR LATE INTERVENTION**

California Code of Regulations, title 20, section 1207(b) states that in a power plant siting case, the petition to intervene shall be filed "no later than the Prehearing Conference or 30 days prior to the first hearing held pursuant to sections 1725, 1748, or 1944 of this Chapter, **whichever is earlier...**" (Cal. Code Regs., title 20, §1207(b), emphasis added.) Furthermore,

section 1207(c), states that the presiding member may grant “a petition to intervene filed after the deadline provided in subsection (b) only upon a showing of good cause by the petitioner.” (Cal. Code Regs., title 20, §1207(c).) Both petitions were filed 21 business days after the due date ordered by the Committee in accordance with regulation. Moreover, neither petition has made a showing of good cause as to why they were filed three weeks after the deadline and why they should be granted late intervention.

The AFC for the Marsh Landing Generating Station was filed over two years ago on May 31, 2008. Both LCEA and Mr. Simpson were aware of the Marsh Landing AFC as they provided extensive comments on the Bay Area Air Management District’s (Air District) Preliminary Determination of Compliance (PDOC) for Marsh Landing prior to the end of the comment period on April 30, 2010. (Simpson, Attachment to Petition; LCEA, Letter to Brian Lusher, Senior Air Quality Engineer, BAAQMD, April 30, 2010.) LCEA and Mr. Simpson even reference the Energy Commission’s process in their letters to the Air District. The applicant provided a detailed response to the three sets of comments received by the Air District (including LCEA and Mr. Simpson), which was docketed on June 4, 2010. Yet, neither Petitioner participated in the Energy Commission’s proceedings.

LCEA claims they have “good cause” to intervene late “since the Commissions Draft Environmental analysis labeled the Revised Staff Assessment (RSA) has been issued on June 10, 2010. As a CEQA equivalent process, the issuance of the Draft EIR is the appropriate time to intervene. The Commission’s long standing policy is to accept intervention up to the pre hearing.” (LCEA Petition, p. 2.) Mr. Simpson indicates that the Energy Commission failed to file a Preliminary Staff Assessment or Draft Environmental Report and failed to provide adequate notice and opportunity for public comment (Simpson, p. 8). Also, LCEA indicates that the Energy Commission’s proceeding is an extension of the Air District’s proceeding (LCEA, p. 2) and Mr. Simpson states that he should have received direct notice of the availability of the staff document because “the record for this proceeding clearly indicates that I am an ‘interested person’ Through [sic] my participation in that aspect of this proceeding known as the PDOC...” (Simpson, p. 6.) Both LCEA and Mr. Simpson are confused in their understanding of the Energy Commission’s siting process and when petitions to intervene are required to be filed.

First, the Energy Commission's regulations are silent as to whether Staff must file a "Preliminary Staff Assessment" and Staff is not required to prepare a Draft EIR. In regards to a final staff document, Section 1747 states:

At least 14 days before the start of the evidentiary hearings pursuant to section 1748 or at such other time as required by the presiding member, the staff shall publish the reports required under sections 1742.5, 1743, and 1744 as the final staff assessment, and shall distribute the final staff assessment to interested agencies, parties, and to any person who requests a copy. (Cal. Code Regs., title 20, §1747.)

There is no requirement under section 1747 that Staff must title the compilation of the reports required under that section as "Final Staff Assessment". It merely refers to Staff's completed analysis. In this proceeding, the Revised Staff Assessment is Staff's completed analysis and final staff assessment. It was timely filed and served over 14 days prior to the scheduled evidentiary hearings on July 1, 2010.

Second, Staff provided ample notice that a Staff Assessment (SA) and possibly a Revised Staff Assessment would be filed. It also provided several opportunities for both Petitioners to participate in the Energy Commission's process. Energy Commission Staff filed two status reports, one on February 17, 2010, and the second on April 15, 2010. Both status reports refer to Staff filing only a Staff Assessment for this project and contain no reference to a Preliminary or Final Staff Assessment. Staff published the Staff Assessment (SA) on April 26, 2010. The first page of the SA under "Executive Summary" states, "The SA serves as staff's official sworn testimony in evidentiary hearings ...." Furthermore, it states in the Introduction, "Staff typically prepares both a preliminary and a final staff assessment. However to adhere to agreed upon timelines for this project, staff will prepare an SA only." Finally, the SA indicates that there might be revisions to the SA following the receipt of the Final Determination of Compliance from the Bay Area Air Quality Management District. (*Staff Assessment, Marsh Landing Generating Station*, April 26, 2010, pp. 1-1, 1-7, 2-3.)

Staff accepted comments on the SA for 30 days following its publication, and held a workshop to discuss the SA on May 4, 2010. On June 10, 2010, Staff issued a Revised Staff Assessment which incorporated mostly minor comments and edits received during the comment period. Petitioners neither provided comments on the SA during the 30-day comment period nor attended the Staff Workshop or Committee's Status Conference on May 12, 2010.

Third, LCEA chose a date to intervene based on a limited understanding of the Energy Commission's process. On May 26, 2010, the Committee issued a Notice of Prehearing Conference and Evidentiary Hearing clearly outlining how a person or organization can intervene and setting a deadline of 5 p.m., June 1, 2010, as the filing deadline for petitions to intervene. This deadline is 30 days prior to the prehearing conference and is in accordance with section 1207(b) of the Energy Commission's regulations.

Finally, LCEA contends that the Energy Commission's proceeding is an "extension" of the Air District's proceeding and Mr. Simpson states that he should have received direct notice of Energy Commission documents because he was an "interested party" in the Air District's proceeding. (LCEA, p. 2; Simpson, p. 6.) Both are incorrect in their characterization of the Energy Commission's siting process. Although Staff relies on the input of the Air District and includes the Air District's Conditions of Certification in its assessment, the Energy Commission's proceeding is wholly separate from the Air District's. Mr. Simpson, by his own admission, is an experienced intervenor in the Energy Commission's process and should have a clear understanding that the two agencies are separate entities. (Simpson, pp. 1-4.)

#### **THE COMMITTEE SHOULD NOT ADMIT LCEA'S AND MR. SIMPSON'S LATE-FILED TESTIMONY**

In the event the Committee grants intervenor status to either Petitioner, Staff requests that the Committee not allow the filings attached to the petitions in the evidentiary record as testimony in this case. First, both were untimely filed. In accordance with the Committee Notice of Prehearing Conference and Evidentiary Hearing, all testimony was due by June 21, 2010. Both filed their documents on June 21, 2010, after the close of business. Second, none of the attached documents have attached declarations of the witnesses or their qualifications as experts. Third, the documents attached were filed in other proceedings and are not relevant to the current proceeding.

#### **LCEA AND MR. SIMPSON WILL CONTINUE TO HAVE AMPLE OPPORTUNITY TO PARTICIPATE AND COMMENT AS PUBLIC MEMBERS**

LCEA and Mr. Simpson have not made a showing of good cause as to why they should be granted late intervenor status in this case. Based on their active participation on the PDOC for Marsh Landing, it is clear that they both knew that the Marsh Landing project was moving forward, but chose not to become actively involved in the Energy Commission's process until

three weeks after the deadline had passed, and after Mr. Sarvey's late Petition to Intervene was denied by the Committee. They had ample opportunity to bring up any issues during the Staff Workshop and during the comment period for the SA, but chose not to. Mr. Simpson is also one of the most experienced intervenors in the Energy Commission's siting cases. (Simpson, pp. 1-4.) He is fully aware of how to receive timely notices and publications and how to check the website for details and deadlines on specific cases. Furthermore, extensive comments filed by LCEA and Mr. Simpson on the PDOC were received and addressed by Staff in the Revised Staff Assessment. Moreover, they will continue to have ample opportunity for public comment before the Committee at the evidentiary hearing, as well as at hearings on the proposed decision before the Committee and full Commission. Thus, denying these late petitions for intervention would not deny them the continued opportunity to participate and comment in this proceeding.

#### **CONCLUSION**

For the above reasons, Staff respectfully requests that the Committee deny LCEA's and Mr. Simpson's untimely petitions to intervene for lack of showing of good cause.

DATED: June 24, 2010

Respectfully submitted,

/s/ Kerry A. Willis  
KERRY A. WILLIS  
Senior Staff Counsel



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**APPLICATION FOR CERTIFICATION  
FOR THE MARSH LANDING  
GENERATING STATION**

**Docket No. 08-AFC-3**  
**PROOF OF SERVICE**  
*(Revised 6/21/2010)*

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DECLARATION OF SERVICE

I, Rhea Moyer, declare that on June 24, 2010, I served and filed copies of the attached *Staff's Opposition to Petitions For Intervention of the Local Clean Energy Alliance and Rob Simpson*. 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: [http://www.energy.ca.gov/sitingcases/marshlanding/index.html].

The documents have 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;

by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

**AND**

For filing with the Energy Commission:

sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

**OR**

depositing in the mail an original and 12 paper copies, as follows:

**CALIFORNIA ENERGY COMMISSION**

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1516 Ninth Street, MS-4

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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

/s/ Rhea Moyer

Rhea Moyer