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

Application for Certification for the Mirant Marsh Landing Generating Station Project	Docket No. 08-AFC-3

APPLICANT'S OPPOSITION TO THE LATE-FILED PETITIONS TO INTERVENE OF LOCAL CLEAN ENERGY ALLIANCE AND ROB SIMPSON

June 24, 2010

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I. INTRODUCTION

Pursuant to the Committee's direction issued on June 22, 2010, Mirant Marsh Landing, LLC, the applicant in this proceeding ("Mirant Marsh Landing"), submits this response in opposition to the late-filed petitions to intervene of the Local Clean Energy Alliance ("LCEA") and Rob Simpson. LCEA and Mr. Simpson filed their petitions to intervene on June 21, 2010, nearly three weeks after the June 1, 2010 deadline for petitions to intervene in this proceeding. Section 1207(c) of the Commission's regulations specifies that a late-filed petition to intervene can be granted only upon a showing of "good cause" by the petitioner. Because LCEA and Mr. Simpson have not met their burden to show good cause, their late-filed petitions to intervene must be denied.

II. DISCUSSION

A. LCEA and Mr. Simpson have not demonstrated that good cause exists to allow their late intervention.

The Committee recently denied the late-filed petition to intervene of Robert Sarvey on grounds that Mr. Sarvey failed to show good cause for allowing his late-filed petition. (Committee Order Denying Petition to Intervene dated June 21, 2010 ("Committee Order"), p. 2.) Mr. Sarvey filed his petition to intervene on June 4, 2010, which was three days after the deadline. LCEA and Mr. Simpson waited even longer to file, but their petitions present circumstances that are nearly identical to those presented in Mr. Sarvey's petition. Like Mr. Sarvey, both LCEA and Mr. Simpson acknowledge that they have long been aware of this proceeding and Mirant Marsh Landing's proposal to construct the Marsh Landing Generating

Station ("MLGS"), and they acknowledge that they have been participating in other proceedings where the MLGS is being addressed. With its petition to intervene, LCEA submitted copies of protests that two LCEA member groups filed in October and November 2009 with the California Public Utilities Commission ("CPUC") in the proceeding where the CPUC is reviewing the MLGS power purchase agreement.[1] The docket for the CPUC proceeding contains other filings by members of LCEA that discuss the MLGS and reference this proceeding.[2] Mr. Simpson acknowledged in his petition that he is a member of LCEA and a member of two of LCEA's member groups who are participating in the CPUC proceeding. Mr. Simpson also states that he is a member of CARE, which is the organization that Mr. Sarvey represents in the CPUC proceeding. As a member of three organizations who are active participants in the CPUC proceeding where the MLGS contract is being addressed, it seems likely that Mr. Simpson was aware of the positions being taken by those groups at the CPUC.

LCEA and Mr. Simpson also submitted with their petitions to intervene a copy of their respective comments to the Bay Area Air Quality Management District ("BAAQMD") regarding the Preliminary Determination of Compliance ("PDOC") for the MLGS. In its comments on the PDOC, LCEA references this proceeding in several places, indicating that it has examined "the permitting record, the CEC proceeding and other publicly available documents."[3] LCEA's and Mr. Simpson's participation at the BAAQMD demonstrates that they have been aware of the MLGS and the permitting process in this proceeding.

The Committee Order notes Mr. Sarvey's participation in the same CPUC and BAAQMD proceedings and concludes that Mr. Sarvey "could have petitioned to intervene at any

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[1] Protest of Pacific Environment in CPUC Docket No 09-09-021, filed October 30, 2009, and available at http://docs.cpuc.ca.gov/efile/P/109248.pdf; Protest of Sierra Club California in CPUC Docket No. 09-09-021, filed November 4, 2009, and available at http://docs.cpuc.ca.gov/efile/RESP/109512.pdf. A third member of LCEA, Communities for a Better Environment, also filed a protest in the CPUC proceeding. *See* Protest of Communities for a Better Environment in CPUC Docket No 09-09-021, filed November 4, 2009, and available at http://docs.cpuc.ca.gov/efile/P/109481.pdf.

[2] *See e.g.*, Pacific Environment's Opening Brief in CPUC Docket No 09-09-021, filed April 14, 2010, and available at http://docs.cpuc.ca.gov/efile/BRIEF/116523.pdf; Opening Brief of Community for a Better Environment in CPUC Docket No 09-09-021, filed April 14, 2010, and available at http://docs.cpuc.ca.gov/efile/BRIEF/116518.pdf; Pacific Environment's Reply Brief in CPUC Docket No 09-09-021, filed April 22, 2010, and available at http://docs.cpuc.ca.gov/efile/BRIEF/116932.pdf; Pacific Environment's Comments on the Proposed Decision of ALJ Farrar in CPUC Docket No 09-09-021, filed June 15, 2010, and available at http://docs.cpuc.ca.gov/efile/CM/119467.pdf.

[3] Comment Letter from The Local Clean Energy Alliance to Brian Lusher of Bay Area Air Quality management District, dated April 30, 2010, p. 5.

point in this proceeding, which has been active since September 2008." LCEA and Mr. Simpson also could have intervened at any time between September 2008 and the June 1, 2010 deadline. There have been numerous opportunities for comment and participation in this proceeding, including the December 2008 informational hearing and site visit, Staff workshops in December 2008, October 2009, and May 2009, the opportunity to submit comments on the Staff Assessment issued on April 26, 2010, and the May 12, 2010 Committee status conference. All of these events and comment opportunities have been publicly noticed on the Commission's website. LCEA and Mr. Simpson elected not to participate in any of the noticed events and did not submit comments on the Staff Assessment. Having allowed all of those opportunities to pass despite their knowledge of the project and their participation in the CPUC and BAAQMD processes, LCEA and Mr. Simpson have not shown good cause for allowing their late intervention.

Mr. Simpson offers the same excuse for his late filing that Mr. Sarvey unsuccessfully attempted to rely on in his response to the Committee's questions on June 8, 2010. Mr. Simpson asserts that he was waiting for a document labeled as the "Final Staff Assessment" to be published in this proceeding and alleges that his late intervention should be allowed because no document bearing that title has been issued. The Committee has already ruled that Mr. Simpson's excuse "fails" in light of statements in the April 2010 Staff Assessment specifying that a single Staff Assessment would be published in this proceeding. (Committee Order, p. 2.) The Committee ruled that Mr. Sarvey was on constructive notice that his assumption that a Final Staff Assessment would be published was incorrect. (Id.) The same principle of constructive notice applies to Mr. Simpson and LCEA.

Mr. Simpson's assertion that Section 1714 of the Commission's regulations requires publication of a document entitled "Final Staff Assessment" is also wrong. The Commission's regulations do not contain any such requirement. Section 1714 requires Staff to publish, at least 14 days prior to the start of the evidentiary hearing, reports required under Sections 1742.5 (Environmental Review), Section 1743 (Review of Safety and Reliability Factors), and Section 1744 (Review of Compliance with Applicable Laws) of the Commission's regulations as the final staff assessment. Staff published those reports in the Staff Assessment on April 26, 2010, which was more than 60 days before the start of the evidentiary hearing. That document clearly stated that it presented Staff's "final conclusions about potential environmental impacts

and conformity with LORS, as well as proposed conditions that apply to the design, construction, operation, and closure of the facility." (Staff Assessment, p. 2-1.) Staff has fully complied with the requirements of the Commission's regulations in this case.

LCEA also has not provided any valid excuse for its late intervention. LCEA asserts that intervening nearly three weeks after the deadline is "appropriate" because "the Commissions [sic] Draft Environmental analysis labeled the Revised Staff Assessment (RSA) has just been issued on June 10, 2010," and "as a CEQA equivalent process the issuance of the Draft EIR is the appropriate time to intervene." (LCEA petition, p. 2.) This is simply wrong. Section 1207(b) of the Commission's regulations specifies that the deadline for a petition to intervene in a licensing proceeding is no later than the prehearing conference or 30 days before the start of evidentiary hearings, whichever is earlier. (See also Committee Order, p. 1.) Moreover, the Commission's power plant certification program is exempt from the CEQA EIR requirement pursuant to 14 California Code of Regulations Section 15251(k). The Commission therefore is not required to publish a "draft EIR" as part of its licensing process.

LCEA also appears to be relying on misplaced notions that there is only one time to intervene in the Commission's licensing process and that intervention depends on issuance of a document that is equivalent to a draft EIR. These notions are also not correct. As stated in the Committee Order, LCEA could have intervened at any time between September 2008 and the June 1, 2010 deadline established by the Commission's regulations. Moreover, the deadline is the last permissible time for intervention, but it is not properly characterized as the "appropriate" time to intervene. As Mirant Marsh Landing explained in its opposition to Mr. Sarvey's late-filed petition, the Commission's *Public Participation in the Siting Process: Practice and Procedure Guide* emphasizes that "it is important to intervene as early as possible in the proceeding," and warns that late intervention may not be allowed.[4] Given that LCEA's member groups have been participating in the CPUC proceeding since last Fall, the appropriate time for LCEA's intervention in this proceeding has long since passed.

LCEA's and Mr. Simpson's misstatement of the laws and regulations applicable to Commission licensing proceedings do not constitute good cause for allowing their late

[4] Public Participation in the Siting Process: Practice and Procedure Guide, California Energy Commission, December 2006, p. 55.

intervention. Because LCEA and Mr. Simpson have not met their burden to show good cause for granting their late-filed petitions to intervene, their petitions must be denied.

B. Granting LCEA's and Mr. Simpson's late-filed petitions would prejudice Mirant Marsh Landing, undermine the integrity of the Commission's rules, and condone last minute interventions.

As Mirant Marsh Landing explained in its opposition to Mr. Sarvey's late-filed petition, allowing late interventions at this very advanced stage in the proceeding would unfairly burden Mirant Marsh Landing and could cause a delay in this proceeding, especially if LCEA and Mr. Simpson are allowed to participate as parties at the upcoming evidentiary hearing. This is unfair and prejudicial to the applicant in light of how much time LCEA and Mr. Simpson have had to participate.

Mirant Marsh Landing also previously explained that interested parties must be required to comply with deadlines and procedural rules. Excessive leniency in the application and enforcement of those rules, particularly when parties like LCEA and Mr. Simpson know about a proceeding and miss the deadline for intervention by nearly three weeks, threatens to undermine the integrity of the Commission's process.

Like Mr. Sarvey, LCEA and Mr. Simpson also suggest that they were waiting until the last possible moment to intervene in this case. LCEA states that "the Commissions [sic] long standing policy is to accept intervention up to prehearing conference" while Mr. Simpson states that "the Commissions [sic] has always allowed intervention up until the prehearing conference and in some cases later." LCEA and Mr. Simpson appear to have intended to intervene at the last possible time, which they expected would occur at the prehearing conference, or perhaps even later. As Mirant Marsh Landing explained in its opposition to Mr. Sarvey's late-filed petition, parties who wish to participate in a licensing case should be encouraged to intervene and present their comments and concerns at the earliest possible time so that staff and the applicant can consider those comments and concerns in an orderly fashion. This message is clear in the Commission's *Public Participation in the Siting Process: Practice and Procedure Guide*, as noted above. Waiting until the last possible moment to file an intervention seems intended to cause delay, rather than to provide a meaningful contribution to the analysis and decision making

processes. Allowing LCEA and Mr. Simpson to intervene at this late stage may encourage parties to intervene after the deadline in future proceedings.

III. CONCLUSION

As explained above, LCEA and Mr. Simpson have not met their burden to demonstrate that good cause exists to allow their late interventions. For the same reasons that the Committee denied Mr. Sarvey's late-filed petition to intervene, the Committee also should deny the late-filed petitions of LCEA and Mr. Simpson.

June 24, 2010

Respectfully submitted,

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DECLARATION OF SERVICE

I, Lisa A. Cottle, declare that on June 24, 2010, I served and filed copies of the attached ***Applicant's Opposition to the Late-Filed Petitions to Intervene of Local Clean Energy Alliance and Rob Simpson (Docket No. 08-AFC-3)***. The original document filed with the Docket Unit is accompanied by a copy of the most recent Proof of Service list, located at the web page for this project at **http://www.energy.ca.gov/sitingcases/marshlanding/index.html**. 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:

- For service to all other parties: Sent electronically to all email addresses on the Proof of Service list; and by depositing in the United States mail at San Francisco, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses **NOT** marked as "email preferred."

AND

- For filing with the Energy Commission: Sent an original paper copy and one electronic copy, mailed and emailed respectively, to the address below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 08-AFC-3
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.

Lisa A. Cottle

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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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