BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION FOR THE
ORANGE GROVE POWER PLANT PROJECT
BY ORANGE GROVE ENERGY, LP

DOCKET NO. 08-AFC-4
ORDER NO. 09-128-1

Order Denying DFI Funding, Inc.'s Appeal of Denial of Petition for Intervention

I. Introduction and Summary

In the Orange Grove Application for Certification ("AFC") proceeding we are considering a proposed powerplant in the San Diego area. The Committee conducting the proceeding (Vice Chairman James D. Boyd, Presiding Member, and Commissioner Arthur H. Rosenfeld, Ph.D., Associate Member) denied a petition to intervene submitted by DFI Funding, Inc. ("DFI"). DFI has appealed the denial to the full Commission.

Having considered all of the relevant matter in the record, we deny the appeal and thereby uphold the Orange Grove Committee's denial of DFI's petition to intervene.

II. Background

DFI is a lending company in Emeryville, California. DFI loaned money to Tesla Gray and Prominence Partners, who own several parcels "adjoining to and/or near . . . the proposed location for the Orange Grove Power Plant." (Docket No. 08-AFC-4, Declaration of Steve Anderson in Support of Petition To Intervene (Dec. 17, 2008), pp. 1 - 3.) The loans were, and are, secured by various deeds of trust on the parcels that name DFI as trustee. DFI, then, has an equitable interest in the parcels, but it is not their owner.

Our regulations provide that petitions to intervene in power facility cases must, in general, be filed "no later than the Prehearing Conference or 30 days prior to the first [evidentiary] hearing . . . whichever is earlier . . . ." (Cal. Code Regs.,

tit. 20, § 1207, subd. (b).) In the Orange Grove case, the Committee established a Prehearing Conference date of December 1, 2008, and an evidentiary hearing date of December 19, 2008. (Docket No. 08-AFC-4, Notice of Prehearing Conference and Notice of Evidentiary Hearing (Nov. 6, 2008), p. 1.) As a result, the deadline to file petitions to intervene was, nominally, 30 days before December 19 – that is, November 19. However, acting pursuant to its authority under our regulations to modify deadlines, the Committee gave interested persons more time and established December 1, the Prehearing Conference date, as the deadline for petitions to intervene. (*Id.*, p. 3; see also Cal. Code Regs., tit. 20, §1203, subd. (f).)

DFI submitted a Petition for Intervention on December 16, 2008, over two weeks after the deadline established by the Committee. Our regulations allow a Committee to "grant a petition to intervene filed after the deadline . . . *only* upon a showing of good cause by the petitioner." (Cal. Code Regs., tit. 20, § 1207, subd. (c), italics added.) The only "good cause" offered by DFI was an alleged "lack of notice of the proposed project and hearings . . . ." (Docket No. 08-AFC-4, Petition for Intervention, p. 1 (Dec. 16, 2008).)

The Committee heard evidence and argument on the Petition at the December 19 hearing. (12/19/08 RT, pp. 4 - 30.) Following presentations by all interested participants, the Committee denied the Petition. (*Id.* at pp. 31 - 32.) On December 31, 2008, DFI submitted to the full Commission an Appeal of Denial of Petition for Intervention ("Appeal").

On January 8, 2009, we issued a procedural order that (1) invited parties to submit responses to the Appeal and invited DFI to submit a reply to the responses, and (2) stated that we would hold a hearing on the appeal at our January 28, 2009 Business Meeting. The Applicant and the Commission Staff submitted responses, but DFI did not submit a reply. We heard oral arguments on January 28.

III. Analysis: The Alleged Lack of Notice to DFI Is Not Good Cause for DFI's Failure To Submit a Timely Petition To Intervene.

As noted above, DFI relies solely on its alleged failure to receive adequate notice of the Orange Grove proceedings as "good cause" for the lateness of its attempted intervention. However, DFI was not legally entitled to *any* notice of the proceeding, and, moreover, it actually did receive notice that would have enabled it to file for intervention before the deadline had it exercised reasonable

diligence. In addition, allowing intervention would substantially prejudice the parties.

A. Notice Requirements.

Our power facility certification proceedings involve the application of general rules, such as those found in the Warren-Alquist Act and the California Environmental Quality Act, to particular sites considering individual facts. Therefore, such proceedings are "quasi-adjudicatory" or "adjudicative." (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 613 - 614 (hereafter "*Horn*"); see also Gov. Code, §§ 11405.20, 11405.50, subd. (a).) Due process rights inhere in adjudicatory proceedings; in particular, "persons affected by [quasi-adjudicatory] decisions are . . . constitutionally entitled to notice and an opportunity to be heard . . . ." (*Id.* at p. 612.)

However, this right has limits: only those persons who could suffer damage to a "significant property interest" are entitled to notice. (*Horn*, 24 Cal.3d at pp. 612, 615.) Thus, even "land use decisions which 'substantially affect' the property rights of *owners* of adjacent parcels *may*" – i.e., do not necessarily – "constitute 'deprivations' of property within the context of procedural due process." (*Id.* at p. 615, italics added.) In *Horn*, the court held that the owner of an adjacent parcel who alleged that a proposed development would "substantially interfere with his use of the only access from his parcel to the public streets, and [would] increase both traffic congestion and air pollution," was entitled to notice if his allegations proved true. (*Id.* at p. 615.)

While an interest does not necessarily have to rise to such a level to trigger due process requirements, it is clear that DFI's interest, if any, is at a much lower level. DFI does not own the potentially affected parcels, and DFI presented no evidence on the effects that construction or operation of the powerplant would have on its security interests. We conclude, therefore, that DFI has failed to show that it has a "significant property interest" (*Horn*, 24 Cal.3d at p. 612) that is entitled to due process protection.

B. The Notice That Is Required, and the Notice That DFI Received.

Not every person with a "significant property interest" is entitled to actual notice of a proceeding that could damage that interest. Rather, notice must be "*reasonably calculated* to afford affected persons the realistic opportunity to protect their interests." (*Horn*, 24 Cal.3d at p. 617, italics added.) "The general application of due process principles is flexible," so the courts have "refrain[ed]

from describing a specific formula which details the nature, content, and timing of the requisite notice." (*Id.* at pp. 617, 618.) However, "depending on the magnitude of the project, and the degree to which a particular landowner's interests may be affected, acceptable techniques might include notice by mail to the owners of record of property situate [sic] within a designated radius of the subject property, or by the posting of notice at or near the project site, or both." (*Id.* at p. 618.)

It is undisputed that in the Orange Grove proceeding the Commission has done "both:" shortly after the AFC was filed, the Commission mailed notice to all owners of record of all parcels within 1000 feet of the proposed powerplant site and within 500 feet of the proposed transmission line and other associated linear facilities; the Commission also posted notice at the project site. (See, e.g., Docket No. 08-AFC-4, Orange Grove Energy, L.P.'s Opposition to DFI Funding, Inc.'s Petition for Intervention (Dec. 19, 2008), pp. 2 - 3.) The mailed notice went to the owners of record of the parcels in which DFI has a security interest. (*Ibid.*) This was sufficient to meet all applicable due process requirements.

DFI argues that the Commission should have searched title records and sent notice to all lienholders associated with property near the site. DFI cites no authority indicating that an agency must shoulder such a burden; indeed, the applicable authority is to the contrary. (See *Horn*, 24 Cal.3d at p. 617 ["The extent of administrative burden is one of the factors to be considered in determining the nature of an appropriate notice."].)

Finally, we note that even if our noticing had somehow been inadequate, that would not have mattered here, for DFI had actual notice of the proceeding. The Applicant and the owners of the relevant parcels exchanged several communications both before and during the proceeding (well before the deadline for intervention), and two such communications were copied to DFI. (Orange Grove Energy, L.P.'s Opposition to DFI Funding, Inc.'s Appeal of Denial of Petition for Intervention (Jan. 20, 2009), p. 10, Attachs. A & B.) DFI itself admits as much: "DFI may have had general knowledge of the Orange Grove Project as far back as December, 2007 . . . ." (Memorandum of Points and Authorities in Support of Appeal of Denial of Petition for Intervention (Dec. 31, 2008), at p. 6; see also *id.* at p. 3.)

C. Harm to the Parties.

In determining whether "good cause" exists for a late intervention it is appropriate for us to consider the extent to which the existing parties to the proceeding would be harmed if intervention is granted, and the extent to which

DFI would be harmed if intervention is denied. (See *San Bernardino County v. Harsh Cal. Corp.* (1959) 52 Cal. 2d 341, 346 [litigation].) Here, as we noted above, DFI petitioned to intervene in this proceeding on December 16, 2008, just three days before the beginning of the evidentiary hearings that had been planned by the Committee and the existing parties at a Prehearing Conference over two weeks earlier. DFI did not proffer written testimony that it wished to present at the evidentiary hearing nor did it make any effort to demonstrate that granting its late-filed petition to intervene could be accommodated without delaying the proceeding. If DOE wishes to engage in a party's opportunity for discovery and evidentiary presentations, substantial delay will occur and substantial extra work will be required. DFI did not explain how any delay in the proceedings could be limited or how any alleged harm to its security interests would outweigh the harm to the Applicant and other parties. (If DFI wishes only to comment, it has the opportunity to do so without intervention.) Indeed, as noted above, DFI did not even make a showing that its security interest would necessarily be affected in any way by this project. For these additional reasons, the Committee was correct in finding that DFI did not establish good cause for its late intervention petition.

IV. Conclusion

DFI lacks a significant property interest that would require notice, DFI received adequate notice anyway, and granting DFI's Petition for Intervention would unduly prejudice the parties. For each of those reasons, there is no good cause for the untimeliness of DFI's Petition for Intervention. Therefore, we deny the appeal and affirm the Orange Grove Committee's denial of DFI's intervention.

January 28, 2009

JAMES D. BOYD
Acting Chairman

ARTHUR H. ROSENFELD, Ph.D.
Commissioner

[Absent]
JEFFREY D. BYRON
Commissioner

KAREN DOUGLAS
Commissioner