

DOCKET 08-SPPE-1	
DATE	MAY 27 2008
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State of California
Energy Resources Conservation
And Development Commission

In the Matter of:)	
)	Docket No. 08-SPPE-01
The Application for a Small Power)	
Plant Exemption for the)	
<u>RIVERSIDE ENERGY RESOURCE CENTER</u>)	
<u>UNITS 3 and 4</u>)	

**Staff's Brief in Response to the Committee's Questions
Regarding the Eligibility of Riverside Energy Resource Center Units 3 and 4
for a Small Power Plant Exemption**

I. INTRODUCTION

On May 16, 2008, the Riverside Energy Resource Center ("RERC") Units 3 and 4 Committee ("Committee") ordered all parties to submit briefs addressing whether the proposed addition by the City of Riverside for an additional 95 MW to the existing 96 MW Units 1 and 2 is eligible to be considered for exemption as a Small Power Plant (SPPE). The Committee further sought a discussion of the factual planning background for the RERC, a discussion of the environmental review the project would undergo by other agencies should the exemption be granted, and a history of Units 1 and 2 with respect to compliance with environmental laws, ordinances, regulations and standards.

The Riverside Public Utilities ("RPU") filed an application for Small Power Plant Exemption (SPPE) for RERC units 1 and 2 with the California Energy Commission ("Commission") on April 29, 2004 (Docket No. 04-SPPE-01). Units 1 and 2 were proposed as a 96 MW simple-cycle power plant on an industrial 12-acre fenced site adjacent to the City's

wastewater treatment plant. The entire project site had been previously disturbed when it was excavated for fill material for the City landfill. The Commission approved a Mitigated Negative Declaration and granted RPU's application for an exemption in December, 2004. The Mitigated Negative Declaration contained 36 Conditions of Exemption (COE). Construction was completed, and Units 1 and 2 came online in 2006.

RPU filed an application for an exemption for RERC Units 3 and 4 with the Commission on March 19, 2008 (08-SPPE-1). Units 3 and 4 are proposed to be constructed on the existing RERC site, immediately north of the existing units. The proposed Units 3 and 4 will provide an additional 95 MW of peaking capacity, bringing the total capacity of the RERC to 191 MW.

In response to the Committee's questions, staff has had concerns in the past that the Commission's jurisdiction not be inappropriately circumvented. Concerns have arisen not only about the appropriateness of an exemption, but also whether a future expansion is sufficiently foreseeable to be included in an initial application for certification, or whether two or more projects described to be outside the Commission's jurisdiction should be aggregated to be reviewed by the Commission as a single jurisdictional project. In this case, based on the law and the facts, the staff concludes that the proposed 95 MW addition is eligible to be considered for a small power plant exemption.

II. DISCUSSION

A. *The Proposed RERC Project is Eligible to be Considered for Exemption as a Small Power Plant.*

The Committee asks whether the proposed RERC Units 3 and 4 project is eligible to be considered for exemption as a small power plant, or whether it is ineligible for exemption

because the RERC facility will exceed 100 MW with the addition of Units 3 and 4. Based on the Warren-Alquist Act and Title 20 of the California Code of Regulations, the proposed RERC project (Units 3 and 4) is eligible to apply for an exemption.

Public Resources Code section 25541 authorizes the Commission to exempt certain power plants from the chapter that gives the Commission its exclusive permitting jurisdiction.

Section 25541 states:

The commission may exempt from this chapter thermal power plants with a generating capacity of up to 100 megawatts **and** modifications to existing generating facilities that do not add capacity in excess of 100 megawatts, if the commission finds that no substantial adverse impact on the environment or energy resources will result from the construction or operation of the proposed facility or from the modifications.

(Pub. Resources Code § 25541, emphasis added.) Section 25541 is mirrored by Title 20 of the California Code of Regulations, section 1936, which states:

A person who proposes a thermal power plant with a generating capacity not exceeding 100 megawatts, **or** proposed a modification to an existing thermal power plant which will add generating capacity not exceeding 100 megawatts may apply for exemption. (emphasis added.)

Thus, any proposed thermal power plant with a generating capacity of 50 to 100 MW megawatts, or the addition of 50 to 100 MW to an existing thermal power plant, is eligible to apply for an exemption as a small power plant. The proposed RERC project, whether considered to be a new thermal power plant or an addition to the existing thermal power plant, would have a generating capacity of 95 MW, and thus falls within the category of facilities eligible to apply for exemption.

B. *The Existing 96 MW Facility does not Disqualify the Proposed RERC Project from Applying for a Small Power Plant Exemption.*

The Committee asks for the factual planning background for the RERC in order to aid the Committee in determining whether the RERC should be considered as a single 191 MW project or an existing 96 MW project with a 95 MW proposed addition. The specific facts related to the planning for the projects are best left to the project applicant to discuss. Staff respectfully notes, however, that at the April 16, 2008, Business Meeting the Commission asked the applicant to explain why it was applying for an exemption of proposed Units 3 and 4 less than four years after receiving an exemption for Units 1 and 2. The applicant provided a credible explanation of the unforeseeable events that lead to its decision to propose the addition of Units 3 and 4 at this time. According to the applicant's explanation, the current need for two additional units was unforeseen in 2004 when Units 1 and 2 received an exemption as a Small Power Plant.

Transcript of April 16, 2008, Business Meeting, pages 6-9. The Commission apparently accepted the explanation and appointed this Committee to oversee the exemption proceeding.

In addition, in 2004, the Commission considered whether to terminate the exemption proceeding for Units 1 and 2, and instead require the filing of an application for certification. During evidentiary hearings, intervener California Unions for Reliable Energy ("CURE") motioned to terminate the SPPE process. RERC 1 and 2 Negative Declaration, pages 4-5. CURE made several claims, including a claim that the impacts from two additional generation units which were not part of the RPU resource plan (presumably Units 3 and 4), had not been analyzed as part of the project and would add significant impacts. The Committee found that the record did not contain any evidence to support CURE's arguments. *Id.* The Committee also stated:

The record shows that Applicant has merely designed the RERC so as not to preclude future expansion; RPU has not determined that it will undertake such expansion. (citation) Thus, expansion is mere speculation at this point and is not to be included in our cumulative analysis. *Id.*, page 44.

At the time the Commission exempted Units 1 and 2, there was no evidence to support a finding that the addition of Units 3 and 4 was foreseeable, or that the specifics of any future units were certain enough to evaluate. In the current application for exemption, applicant states that at the time of permitting and constructing Units 1 and 2, RPU did not anticipate needing further units. See RERC Units 3 and 4 Application for SPPE, pages 1-1 and 1-2. Since the exemption of Units 1 and 2, however, RPU load growth unexpectedly exceeded the maximum capacity available from the Southern California Edison Vista substation in 2006. Construction on a new transmission line and substation is not expected to be complete until at least 2012, hence the need for additional generation at this time. *Id.*

In considering the factual background of the applicant's resource plan, it is important to keep in mind that Units 1 and 2 are no longer under the Commission's jurisdiction. They were exempted from the Commission's jurisdiction in December, 2004. In its decision, the Commission agreed with staff's conclusion that, with the conditions of exemption, the project would not create significant adverse impacts on the environment or on energy resources. RERC 1 and 2 Negative Declaration, Finding No. II, page 76. Since the Commission has exempted RERC Units 1 and 2 from its jurisdiction, it is not clear upon what authority the Commission could now base a decision to rescind the exemption and require additional environmental review of a facility that: 1) has been permitted by the responsible agencies; 2) has been constructed; and 3) is operating.

Nevertheless, the Committee appears to be asking whether the proposed addition of 96 MW should be analyzed together with the already-permitted units. The question goes to the

concept of analyzing a “project” in its entirety under CEQA. For a comprehensive environmental review, the proposed units should be analyzed together with the existing units. The analysis of potential direct, indirect, and cumulative environmental impacts, however, may occur in the exemption proceeding. It need not require the denial of exemption and the filing of an application for certification (“AFC”). Just as a modification to an existing facility may be eligible for an exemption, so, too, may the addition of 96 MW to an existing site be eligible for an exemption. In either case, staff will assess the cumulative impact of the proposed project and the existing facility for its significance, and make a determination of whether the proposed project’s impacts are cumulatively considerable. So long as the findings required for an exemption under Public Resources Code section 25541 are made and supported by substantial evidence in the record, the Commission could exempt Units 3 and 4 as it could a modification to an existing facility. Pub. Res. Code §§ 25541, 25901.

CEQA has two fundamental purposes: To inform governmental decision makers and the public about the potential, significant environmental effects of proposed projects, and to avoid significant environmental damage wherever feasible by requiring mitigation and alternatives. CEQA Guidelines, Cal. Code Regs., tit. 14, § 15002(a); Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553. The purpose of CEQA is not to generate paper, and should be interpreted in such a manner to afford the fullest possible protection to the environment within the reasonable scope of the statutory language. CEQA Guidelines, Cal. Code Regs., tit. 14, § 5003; Bozung v. LAFCO (1975) 13 Cal.3d 263; Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247.

To require an AFC for a 191 MW project in this case would not be warranted under CEQA. The Commission has already completed an extensive environmental review of Units 1

and 2, and “an AFC proceeding would add nothing to what is already in the RERC (Units 1 and 2) Initial Study and the rest of the RERC (Units 1 and 2) record.” RERC 1 and 2 Negative Declaration, page 16. Requiring the RERC project to undergo the AFC process “would neither produce additional information nor result in any additional environmental protection.” *Id.* Staff will, as required by law, prepare a thorough environmental review on Units 3 and 4. That review will necessarily include an evaluation of the cumulative impacts, as required by CEQA. CEQA Guidelines, Cal. Code Regs., tit. 14, § 15064(h). The impacts of RERC Units 1 and 2 will be included in the cumulative impacts assessment. If the cumulative impact of RERC 3 and 4 is significant, or if the project’s incremental effect, though individually limited, is cumulatively considerable, this will be identified and discussed in staff’s environmental document.

The Commission should therefore avoid the unnecessary requirement that an AFC be filed for Units 3 and 4. Units 1 and 2 have already been the subject of extensive review and Units 3 and 4 will be similarly reviewed, together with the cumulative effects of Units 1 and 2, in an exemption proceeding.

C. Other Agencies will Use the Commission’s Environmental Document to Review the Project.

The Commission is the lead agency under CEQA for an SPPE, pursuant to Public Resources Code section 25519(c). Thus, in accordance with CEQA, staff will prepare an initial study to determine whether to prepare a negative declaration, a mitigated negative declaration, or an environmental impact report. Staff will then prepare that document. Following public review and agency review of the document, the Committee will conduct evidentiary hearings. After

that, the Committee will prepare a proposed decision for further public review, which is then adopted, with or without amendments, by the full Commission.

A Small Power Plant Exemption is not a permit or a license to build the project proposed. It is a lead agency's responsibility to consult with responsible agencies. Pub. Res. Code § 21104; CEQA Guidelines, Cal. Code Regs., tit. 14, § 15073. In order to facilitate other entities' use of the Commission's environmental document, it is staff's practice to work closely with those entities. For example, land use staff is working closely with City of Riverside planners to identify and resolve any land use issues. Biology staff is consulting with the California Department of Fish and Game, U.S. Fish and Wildlife Service, and the Western Riverside County Regional Conservation Authority to address any concerns regarding potential biological resource impacts, and will work with these agencies to develop the appropriate mitigation for such impacts. Hazardous materials management staff will confer with the City of Riverside Fire Department and its Hazardous Materials Incident Team to determine whether those entities are able to respond effectively to emergencies at the proposed power plant, or whether the project will have a significant impact on their ability to provide emergency response to the project or to the local community. Air quality staff will work with the South Coast Air Quality Management District to determine whether additional mitigation is required to meet applicable air standards. Finally, all responsible agencies are given notice of all hearings, workshops, and are invited to participate in the Commission's proceedings to the full extent they are able to do so.

Additionally, a responsible agency has obligations under CEQA. A responsible agency complies with CEQA by considering the environmental document prepared by the lead agency and reaching its own conclusions on whether and how to approve the project involved. *Id.*, at § 15096(a). A responsible agency must respond to consultation by the lead agency, and review

and comment on environmental documents in order to assist the lead agency in preparing adequate environmental documents for the project. *Id.* at § 15096(b), (d). Prior to reaching a decision on the project, a responsible agency must consider the environmental effects of the project as shown in the EIR or negative declaration. *Id.* at § 15096(f).¹

If the Commission grants an exemption, the applicant will then apply for the appropriate permits from local, state, and federal agencies, which act as responsible or trustee agencies pursuant to CEQA. Those agencies will use the Commission's environmental review document to issue the necessary permits. For example, the City of Riverside will rely upon the Commission's environmental document to issue permits necessary for construction of RERC 3 and 4. Additionally, the South Coast Air Quality Management District (SCAQMD) will use the document to review air quality impacts of the project and to issue a Facility Permit for the project. Thus, many agencies play roles in the permitting process once a plant has received an exemption.

D. RERC (Units 1 and 2) has Demonstrated Compliance with Environmental Laws, Ordinances, Regulations, and Standards.

The Committee asked for information of the history of Units 1 and 2 with respect to compliance with environmental laws, ordinances, regulations, and standards. To the best of Commission staff's knowledge, RERC 1 and 2 has been in compliance with all the Conditions of Exemption, and has submitted all required compliance reports. Staff is in possession of RERC's compliance reports, and is not aware of any instance where RERC has violated the

¹ If a responsible agency determines the environmental document prepared by the lead agency to be inadequate, the responsible agency has several courses of action it can take to remedy any inadequacies. See CEQA Guidelines section 15096(e).

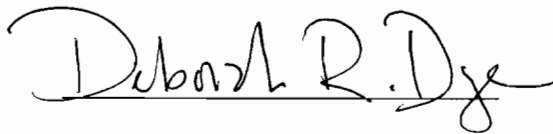
environmental laws, ordinances, regulations or standards applicable to Units 1 and 2. *See* Attachment A, Declaration of Donna Stone.

III. CONCLUSION

The RERC Units 3 and 4 project is eligible for an SPPE based on the plain language of the Warren-Alquist Act. Additionally, RERC Units 1 and 2 were properly granted an SPPE based on the plain language of the law. Requiring the applicant to file an AFC for the two projects combined is not only outside the jurisdiction of the Commission, but also would not advance the purposes of CEQA. Such a requirement would merely create needless delay. A cumulative impacts analysis will evaluate the effects of Units 1 and 2 in combination with the effects of Units 3 and 4, thus providing a comprehensive evaluation of the environmental impacts of the proposed project.

Dated: May 27, 2008

Respectfully submitted,

A handwritten signature in black ink that reads "Deborah R. Dyer". The signature is written in a cursive style with a horizontal line underneath the name.

Deborah R. Dyer
Senior Staff Counsel

ATTACHMENT A

DECLARATION OF DONNA STONE

**Regarding the History of
Riverside Energy Resource Center Units 1 & 2**

I, DONNA STONE, declare as follows:

1. I have been the California Energy Commission's ("Commission") Compliance Project Manager (CPM) for the Riverside Energy Resource Center (RERC), Units 1 & 2, since the project was exempted in December, 2004.
2. RERC has submitted required monthly and yearly compliance reports to my office during the construction and operation of Units 1 & 2.
3. To the best of my knowledge, RERC has remained in compliance with the substantive and reporting Conditions of Exemption contained in the Commission's decision granting exemption for Units 1 & 2.
4. To the best of my knowledge, RERC has not been in violation of any Conditions of Exemption governing Units 1 & 2.
5. I am not aware of any instance where RERC has violated the environmental laws, ordinances, regulations or standards applicable to Units 1 & 2.
6. In my experience, RERC has operated in full cooperation with the Energy Commission, and has been exemplary in their responsiveness to my office.

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

Executed this 22nd day of May, 2008, in Sacramento, California.

A handwritten signature in cursive script that reads "Donna Stone". The signature is written in black ink and is positioned above a horizontal line.

Donna Stone

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

APPLICATION FOR CERTIFICATION
For the RIVERSIDE ENERGY
RESOURCES CENTER UNITS 3 & 4

Docket No. 08-SPPE-1

PROOF OF SERVICE

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

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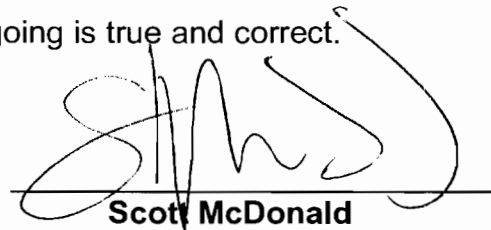
DECLARATION OF SERVICE

I, Scott McDonald, declare that on May 27, 2008, I deposited copies of the attached Staff's Brief in Response to the Committee's Questions Regarding the Eligibility of Riverside Energy Resource Center Units 3 and 4 for a Small Power Plant Exemption in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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



Scott McDonald