

DOCKETED

Docket Number:	79-AFC-04C
Project Title:	Compliance - Application for Certification of DWR Bottlerock Geothermal Project
TN #:	201224
Document Title:	Intervenors' David Coleman and Friends of Cobb Mountain's Revised Pre-Hearing Statement
Description:	Pre-Hearing Statement
Filer:	Donald B. Mooney
Organization:	Law Office of Donald B. Mooney
Submitter Role:	Intervenor Representative
Submission Date:	11/15/2013 11:20:55 AM
Docketed Date:	11/15/2013

STATE OF CALIFORNIA

**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

In the Matter of the)
)
BOTTLE ROCK GEOTHERMAL)
POWER PLANT PETITION TO)
AMEND (79-AFC-4C))

Docket No. 79-AFC-4C

**DAVID COLEMAN AND FRIENDS OF COBB MOUNTAIN'S REVISED PRE-HEARING
STATEMENT RELATED TO THE NOVEMBER 18, 2013 COMMITTEE HEARING**

Donald B. Mooney
Law Office of Donald B. Mooney
129 C Street, Suite 2
Davis, CA 95616
Phone: 530-758-2377

Attorney for Intervenors David Coleman
and Friends of Cobb Mountain

STATE OF CALIFORNIA

**ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION**

In the Matter of the)
)
COMPLAINT AGAINST THE) **Docket No. 12-CAI-04**
BOTTLE ROCK GEOTHERMAL)
POWER PLANT (79-AFC-4C))

**DAVID COLEMAN AND FRIENDS OF COBB MOUNTAIN’S REVISED PRE-
HEARING STATEMENT RELATED TO THE NOVEMBER 18, 2013 COMMITTEE
HEARING**

I. INTRODUCTION

Throughout this proceeding, as well as in the Complaint proceeding, Bottle Rock has been less than forthcoming. Bottle Rock Power’s Pre-Hearing Statement, along with Brian Harms’ Written Testimony contains statements and assertions that are unsupported by the evidence in this matter. Bottle Rock’s Petition to Amend requests that the Energy Commission remove its bond requirement based on “faith” not substantial evidence. Bottle Rock’s Pre-Hearing Statement and Mr. Harm’s testimony makes numerous assertions about Bottle Rock’s performance operating the facility, Bottle Rock’s financial status and Bottle Rock’s Power Purchase Agreement with Pacific Gas & Electric. Bottle Rock, however, fails to produced evidence, let alone substantial evidence to support its assertions. As a result, Bottle Rock has failed to meet its burden of proof to support removal of the bond requirement.

II. DISCUSSION

**A. BOTTLE ROCK FAILS TO MEET ITS BURDEN OF PROOF TO HAVE THE
BOND REQUIREMENT REMOVED**

As the applicant for the Project and the Petition to Amend, Bottle Rock has the

burden of presenting sufficient substantial evidence to support the findings and conclusions required for the Commission to approve the Petition to Amend. (See 20 Cal. Code Reg. § 1748(d).) As demonstrated in Intervenors' Pre-Hearing Statement and in this Reply, Bottle Rock has failed to meet its burden of providing substantial evidence to support granting the Petition to Amend.

Bottle Rock argues that the basis and circumstances for the 2001 Order requiring a bond have substantially changed. Bottle Rock, however, fails to provide the evidentiary support for this contention. While Bottle Rock's Pre-Hearing Statement and Brian Harm's direct testimony make numerous assertions about Bottle Rock's financial status, the operation of the facility, the Power Purchase Agreement, Bottle Rock fails to provide any evidentiary support for these assertions.

Bottle Rock argues that other owner/operators are not required to have similar bond closures. First, Bottle Rock provides no evidence to support this contention. Secondly, other owner/operators such as Calpine and Pacific Gas & Electric ("PG&E") are large corporations doing business in California with significant assets and other projects covered by the California Energy Commission. Thus, if the situation arose to close one of their geothermal projects, those companies would have sufficient assets to pay for all closure and remediation. Bottle Rock, however, has failed to demonstrate that it has sufficient assets to pay for an unplanned closure or even a planned closure. This project is Bottle Rock's only facility in California and Bottle Rock appears to have no other additional assets. Bottle Rock was formed specifically for the operation of this facility and has provided no evidence that it possesses any other additional assets. Bottle Rock's parent companies, U.S. Renewables Group, RiverStone Holding, and the Carlyle Group have not stepped up to provide legal assurance that they would be responsible for any and all costs associated with plant closure and remediation. Thus, at the present time, Bottle Rock, with no known assets other than the Bottle Rock facility, is the party responsible for funding the plant closure. If the facility requires immediate closure,

Bottle Rock has not demonstrated that it possesses sufficient assets to meet its obligations. As such, a bond requirement must exist in order to provide financial assurances to the Commission and the public that sufficient assets exist for plant closure and remediation.

Bottle Rock also argues that it is more financially stable than in 2001 when the Commission issued the original order and bond requirement. Bottle Rock, however, has offered no evidence to support this assertion. Through the process involving the Complaint filed by David Coleman and in this Petition to Amend proceeding, Bottle Rock has continually refused to provide the Commission and the public information regarding its financial status. While Bottle Rock's president, Brian Harms, has made bold statements regarding Bottle Rock's financial health and status, Bottle Rock has provided no evidence, let alone substantial evidence, to support these statements. In fact, Bottle Rock has argued that it needs the bond requirement removed in order to access capital and credit so that Bottle Rock can move forward with its significant expansion plans. Thus, Bottle Rock, by its own admission, does not have sufficient assets to cover its expansion, let alone its closure of the facility. As such, the Commission must impose the bond requirement and environmental insurance.

Bottle Rock argues that the facility has a proven operating record and an estimate useful life of twenty to thirty years. Again, Bottle Rock provides no evidence to support these assertions. Nor does Bottle Rock identify what constitutes a "proven operating record."

B. BOTTLE ROCK'S TESTIMONY REGARDING THE POWER PURCHASE AGREEMENT VIOLATES CALIFORNIA'S SECONDARY EVIDENCE RULE

Bottle Rock's Pre-Hearing Statement and Brian Harm's Written Testimony both refer to a new Power Purchase Agreement ("PPA") between Bottle Rock and Pacific Gas & Electric. Bottle Rock, however, failed to provide a copy of the PPA. Bottle Rock's

oral testimony regarding the PPA violates California's Secondary Evidence Rule. (See Evid. Code, §§ 1520, 1521.)

California's Secondary Evidence Rule provides that a proponent may prove the content of a writing through an admissible original or a duplicate intended to be an original, admissible secondary evidence or oral testimony if an exception applies. (*Id.*, §§ 1520-1523.) Oral testimony is not admissible to prove the content of the writing unless otherwise permitted by statute. (*Id.*, § 1523.) Such exceptions are when the writing is lost or destroyed, or is not reasonably procurable. (*Id.* § 1523(b)(c),(d).) None of these exceptions apply to the instant case. While Commission hearings need not be conducted according to the technical rules of evidence, the Commission should not allow Bottle Rock to submit only oral testimony as to the content of critical documents that Bottle Rock claims as part of the basis for its Petition to Amend. (See 20 Cal. Code Regs., § 1212(a).) Without having access to the PPA, Intervenors are denied their right to effectively cross-examine Bottle Rock's witnesses regarding the PPA. (See 20 Cal. Code Reg. § 1212(c).)

Bottle Rock asserts that it needs additional capital to fund steam field expansion in order to satisfy the long-term obligations of the PPA. However, without the PPA, neither the Commission nor the Intervenors can evaluate the accuracy or reliability of that statement or what are the long-term obligations under the PPA. Bottle Rock also makes various representations regarding the lease agreement but only provides a severely redacted version of that document. Based upon the Secondary Evidence Rule, Intervenors object to any oral testimony regarding the PPA and request that such testimony be stricken from the record.

C. THE COMMISSION SHOULD REJECT THE SUBMISSION OF THE SEVERELY REDACTED LEASE AGREEMENT BETWEEN THE PROJECT OWNER AND THE LANDOWNER

Bottle Rock submitted a severely redacted version of the Amended and Restated Geothermal Lease and Agreement between V.V. & J. Coleman, LLC and Bottle Rock Power, LLC dated July 25, 2012. (Exhibit 15; TN 201127.) Unfortunately, the redacted provisions deprive interested parties and the Commission of critical information needed to evaluate the project and the decommissioning. For example, Bottle Rock redacted the entire section identified as “Lease Term and Rentals”. This deprives the parties of information about the length of the lease, which would affect when decommissioning and reclamation may take place. Bottle Rock also redacted information regarding payments and royalties. Information regarding payment and royalties goes to the economic viability of the project. If the payment and royalties are significant, that may affect Bottle Rock’s ability to pay for decommissioning at the cessation of operations. Bottle Rock also redacted most of the information regarding “Operations.” Current operations, or those activities allowed under the lease, may affect decommissioning and the scope of decommissioning. Without that information, the Commission and the public cannot adequately evaluate the activities on the leasehold and whether the decommissioning and reclamation will cover all such activities. As such, the information should be provided. Bottle Rock redacted the amount of the “put option”. The “put option” allows the Lessor to require the Lessee to purchase all of Lessor’s right, title and interest in the surface of the lands for an undisclosed sum. This may become an additional and significant cost that would come at the same time of decommissioning and reclamation. As such, the information must be provided in order for the Commission to evaluate the potential costs that Bottle Rock may incur at the time of decommissioning.

Nothing in the unredacted portions of the Amended Lease or in the headings of the various sections indicates that the document contains any sort of confidentiality clause. Thus, Bottle Rock’s claim of confidentiality is without basis.

Bottle Rock's submittal of the redacted document violates the Commission's Standing Order re: Proceedings and Confidentiality Applications – Procedural Requirements for Filing, Service and Docketing Documents with the Energy Commission (Docket No. 11-GEN ADMIN-01.) The Commission's Standing Order does not provide for the submission of redacted documents, but instead allows for a third party to submit an application to keep a record confidential. (See 20 Cal. Code Regs. § 2505.) As Bottle Rock failed to follow the procedures set forth in the Commission's regulation and Standing Order the Commission should direct Bottle Rock to provide an unredacted copy of the Amended Lease. Alternatively, the Commission should reject the Amended Lease as evidence and hold all oral testimony based upon the lease as inadmissible as it violates the secondary evidence rule as discussed above. (Evid. Code, § 1523.)

D. BOTTLE ROCK FAILS TO IDENTIFY ALL OF ITS FINANCIAL OBLIGATIONS ASSOCIATED WITH DECOMMISSIONING AND CLOSURE

Bottle Rock's Pre-Hearing Statement and proposed exhibits include the Use Permit Bonds and the Permit Bonds Related to Steamfield Project. (TN 20140 (Exhibit 16); TN 20148.) Bottle Rock purportedly has submitted these exhibits to demonstrate its bonds for decommissioning the area outside the California Energy Commission's jurisdiction. While the issue in this proceeding is for the amount of bond required for the area within the CEC's jurisdiction, the CEC cannot ignore the costs of decommissioning and closure for the entire project site. At the time of decommissioning and closure, Bottle Rock will have a finite amount of financial resources available. If this Commission's bond is insufficient to meet the closure obligations "within the fence", then Bottle Rock will need additional assets for the closure costs. If the bonds for the steamfield and other areas of the project site are insufficient, then Bottle Rock will need additional assets to meet those requirements. Thus, at the time of decommissioning and closure various decommissioning and closure activities will be competing for the finite amount of assets.

While Bottle Rock seeks to submit evidence of the amount of existing bonds, Bottle Rock submits no evidence, let alone substantial evidence, that these bonds are sufficient to meet all of the Bottle Rock's decommissioning and closure requirements and obligations. Without providing the decommissioning and closure estimates for areas "outside the fence", the existence of the bonds or the amount of the bonds has little meaning. The information that the CEC needs, and that Bottle Rock has failed to provide, is whether the Use Permit Bonds and the Permit Bonds Related to Steamfield Project are sufficient and what are the reliable and professional estimates for decommissioning and closure. Without that information, the amount of the bonds has little evidentiary value.

E. Intervenor's Position Regarding the Petition to Amend

1. The Desired Outcome

Intervenors request that the Committee denies Bottle Rock's Petition to Amend and retains Bottle Rock's bond requirement to ensure adequate assets are available at the time of closure and decommissioning. As stated previously, Intervenors support Staff's recommendation of a bond requirement in the amount of \$2,698,750.

2. Conditions of Certification

Intervenors support Staff's proposed Conditions of Certification as modified in Staff's October 28, 2013 *Response to Comments Received Regarding Staff's Analysis of the Bottle Rock Geothermal Power Plant (BRPP) Petition to Amend (79-AFC-4C)*.

3. Witnesses

As Intervenors support the Staff's recommendation of a bond in the amount of \$2,698,750, Intervenors do not intend to submit any direct testimony.

4. Cross-Examination

Intervenors intend to cross-exam the witnesses submitted by Bottle Rock and V.V. & J Coleman, LLC. Intervenors estimate that their cross-examination may take 20 to 30 minutes.

5. Amount of Time for Oral Argument

Intervenors request up to 15 minutes for oral argument.

6. Post-Hearing Briefs

Intervenors believe that the Committee’s decision will benefit from the filing of post-hearing briefs depending upon the arguments and evidence submitted by Bottle Rock Power. The suggested topics include whether Bottle Rock Power met its burden of proof to support a Petition to Amend.

7. Unofficial Compilation of the Conditions of Certification for Bottle Rock Geothermal Power Plant

The Unofficial Compliation of the Conditions of Certification for Bottle Rock Geothermal Power Plant (TN 200416) accurately reflects the originally approved Conditions of Certification as modified by subsequent amendments.

III. EXHIBITS

Exhibit	TN	Brief Description
200	51637	Letter to T. King - Managing Director USRG Management dated May 21, 2009
201	53427	Letter to Brian Harms from Bob James dated September 25, 2009
202	201166	David Coleman and Friends of Cobb Mountain’s Pre-Hearing Statement Related to the November 18, 2013 Committee Hearing
203		David Coleman and Friends of Cobb Mountain’s Revised Pre-Hearing Statement Related to the November 18, 2013 Committee Hearing
204	200419	Staff Analysis of Proposed Modifications to the Compliance Conditions of Certification dated September 6, 2013

IV. CONCLUSION

Intervenors support the Staff's recommendations regarding the bond requirement and environmental insurance and respectfully requests the Committee adopt Staff's recommendations.

Dated: November 15, 2013

LAW OFFICE OF DONALD B. MOONEY

By Donald B. Mooney
Donald B. Mooney
Attorney for David Coleman and
Friends of Cobb Mountain

DECLARATION OF SERVICE

I, Donald B. Mooney, declare that on November 15, 2013, I served and filed copies of the following:

**INTERVENORS DAVID COLEMAN AND FRIENDS OF COBB MOUNTAIN'S
PRE-HEARING STATEMENT RELATED TO THE NOVEMBER 18, 2013
COMMITTEE HEARING**

The most recent Proof of Service List, which I copied from the web page for this project at: <http://www.energy.ca.gov>, is attached to this Declaration.

For service to all other parties and filing with the Docket Unit at the Energy Commission:

 X I successfully uploaded the document to the Energy Commission's e-filing system and I personally delivered the document or deposited it in the US mail with first class postage to those persons for whom a physical mailing address but no e-mail address is shown on the attached Proof of Service List. [The e-filing system will serve the other parties and Committee via e-mail when the document is approved for filing.]

 I e-mailed the document to docket@energy.ca.gov and I personally delivered the document or deposited it in the US mail with first class postage to those persons for whom a physical mailing address but no e-mail address is shown on the attached Proof of Service List. [The e-filing system will serve the other parties and Committee via e-mail when the document is approved for filing.]

 Instead of e-filing or e-mailing the document, I personally delivered it or deposited it in the US mail with first class postage to all of the persons on the attached Proof of Service List for whom a mailing address is given and to the

California Energy Commission – Docket Unit
Attn: Docket No. _____
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

[The e-filing system will serve the other parties and Committee via e-mail when the document is received, scanned, uploaded, and approved for filing. The electronic copy stored in the e-filing system is the official copy of the document.]

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am over the age of 18 years.

Dated: November 15, 2013

Donald B. Mooney
Donald B. Mooney

Applicant

Brian Harms, General Manager
Bottle Rock Power, LLC
7385 High Valley Road, P.O. Box 326
Cobb, CA 95426
bharms@bottlerockpower.com

Applicant's Representative

John A. McKinsey
Locke Lord, LLP
500 Capitol Mall, Suite 1800
Sacramento, CA 95814
jmckinsey@lockelord.com

Kristen T. Castaños
Stoel Rives, LLP
500 Capitol Mall, Suite 1600
Sacramento, CA 95814
kcastanos@stoel.com

Intervener

David Coleman
3733 Canon Avenue
Oakland, CA 94602
redandcurly@yahoo.com

Hamilton Hess
Friends of Cobb Mountain
255 Ursuline Road
Santa Rosa, CA 95403
Hesshab@aol.com

Intervener's Representative

Donald B. Mooney, Counsel for David Coleman and Friends of Cobb Mountain
Law Office of Donald B. Mooney
129 C Street, #2
Davis, CA 95616
dbmooney@dcn.org

Mark Peterson, Counsel for Project Landowner, V.V & J. Coleman LLC, Counsel
for Project Landowner, V.V & J. Coleman LLC
Diepenbrock Elkin LLP
500 Capitol Mall, Suite 2200
Sacramento, CA 95814
mpeterson@diepenbrock.com

Commission Staff

Camille Remy Obad, Compliance Project Manager
California Energy Commission
Siting, Transmission & Environmental Protection Division, 1516 Ninth Street, MS-2000
Sacramento, CA 95814
camille.remy-obad@energy.ca.gov

efiling archive
California Energy Commission
Sacramento, CA
efilingPOSarchive@energy.ca.gov

Kevin W. Bell, Staff Counsel
California Energy Commission
Office of the Chief Counsel, 1516 Ninth Street, MS-14
Sacramento, CA 95814
kevin.w.bell@energy.ca.gov

Richard Ratliff, Staff Counsel
California Energy Commission
Office of the Chief Counsel, 1516 Ninth Street, MS-14
Sacramento, CA 95814
dick.ratliff@energy.ca.gov

Committee

Eileen Allen, Commissioners' Technical Adviser for Facility Siting
California Energy Commission
Sacramento, CA

Galen Lemei, Adviser to Commissioner Douglas
California Energy Commission
Sacramento, CA

JANEA A. SCOTT, Associate Member, Commissioner
California Energy Commission
Sacramento, CA

Jennifer Nelson, Adviser to Commissioner Douglas
California Energy Commission
Sacramento, CA

Jim Bartridge, Adviser to Commissioner Scott
California Energy Commission
Sacramento, CA

KAREN DOUGLAS, Presiding Member, Commissioner
California Energy Commission
Sacramento, CA

Paul Kramer, Chief Hearing Officer
California Energy Commission
Sacramento, CA

Public Adviser

Alana Mathews, Public Adviser
California Energy Commission
Public Advisers Office, 1516 Ninth Street, MS-12
Sacramento, CA 95814
publicadviser@energy.ca.gov

Public Agency

California ISO
Folsom, CA
e-recipient@caiso.com

Douglas Gearhart, Air Pollution Control Officer
Lake County AQMD
885 Lakeport Boulevard
Lakeport, CA 95453
dougg@lcaqmd.net

Elizabeth Johnson, Geothermal Officer
Department of Conservation, Division of Oil, Gas, & Geothermal Resources
801 K Street, MS 20-20
Sacramento, CA 95814
ljohnson@consrv.ca.gov

John Dunnigan, Senior Staff Counsel
Department of Water Resources
1416 Ninth Street, Room 1104
Sacramento, CA 95814
jdunniga@water.ca.gov

Richard Coel
Lake County Community Development Department-Planning Division
255 North Forbes Street
Lakeport, CA 95453
richard.coel@lakecountyca.gov

Will Evans
Lake County Community Development Department-Planning Division
255 North Forbes Street
Lakeport, CA 95453
will.evans@lakecountyca.gov