IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

DFI FUNDING, INC. Petitioner, v. CALIFORNIA ENERGY COMMISSION, Respondent, and ORANGE GROVE ENERGY, L.P., and J-POWER USA DEVELOPMENT CO., LTD., Real Parties in Interest.	)	Case No.: S172819 California Energy Commission Docket No. 08-AFC-4

PRELIMINARY STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

Respondent California Energy Commission is not an "entity" pursuant to Rule of Court 8.208, subdivision (a)(2), because it is a government agency. Respondent is unaware of any person or entity in this proceeding that has a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Date: May 18, 2009

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To the Honorable Chief Justice and the Honorable Associate Justices of the Supreme Court of California:

STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF MANDATE

Respondent California Energy Commission respectfully requests that the Supreme Court deny the Petition for Writ of Mandate in this matter.

INTRODUCTION

This case involves a decision of the California Energy Commission ("Energy Commission" or "Commission"), formally denominated the State Energy Resources Conservation and Development Commission (Pub. Resources Code, § 25200), to license a powerplant, the Orange Grove facility, in San Diego County. Petitioner DFI Funding, Inc. ("DFI") challenges the Commission's (1) approval of the project and (2) refusal to delay the licensing proceeding to allow DFI to become a formal "party" after DFI petitioned to intervene just three days prior to the evidentiary hearing in the proceeding. DFI is not the record owner of any property adjacent to the project, but it has lent money to the owners of such parcels and has recorded deeds of trust on those parcels. DFI contends that even though it had knowledge of the existence of this project a year before it filed its late petition, the Commission was legally bound to allow it to intervene late because DFI had not received direct mailed notice from the Commission of the licensing proceedings. Although the Energy Commission did not allow DFI to intervene (and thereby to delay substantially the schedule of the proceeding), DFI was afforded a full opportunity to provide both oral and

written comments on the environmental analyses upon which the Commission's decision was eventually based.

DFI's assertions to this Court about alleged deficiencies in the Commission's environmental analyses indicate that it has simply overlooked what the Commission did. Petitioner's claims that the Commission did not calculate "greenhouse gas" emissions for construction and operation, that it did not consider renewable generation alternatives, and that it did not analyze traffic or water impacts are simply in error. The Commission's environmental analyses were thorough and the Commission's findings are supported by substantial evidence in the record.

ISSUES PRESENTED FOR REVIEW

I. Where the Energy Commission mailed direct notice of a power plant project licensing proceeding to legal owners of parcels within 1000 feet of the project but did not mail notice to the holders of equitable interests in those parcels, and where the holder of an equitable interest nevertheless obtained actual knowledge of the project well before the deadline for intervening in the proceeding as a party but failed to intervene on time, did the Energy Commission violate any due process rights by denying the late-filed petition to intervene, where granting the petition would have adversely affected other parties and delayed the schedule for the proceeding, and where the holder of the equitable interest was permitted to fully participate in the proceeding during its final four months as a member of the public through filing written comments and speaking at public hearings?

II. Did the Energy Commission's decision to license the Orange Grove project violate the California Environmental Quality Act?

JURISDICTION OF THE SUPREME COURT

Public Resources Code section 25531, subdivision (a), states that "The decisions of the [energy] commission on any application for certification of a site and related [power] facility are subject to judicial review by the Supreme Court of California."

SCOPE OF REVIEW

The scope of review of Energy Commission power facility licenses is set forth in Public Resources Code section 25531, subdivision (b), which provides the narrowest scope of review permitted by the California Constitution:

> No new or additional evidence may be introduced upon review and the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the United States Constitution or the California Constitution. The findings and conclusions of the commission on questions of fact are final and are not subject to review, except as provided in this article. These questions of fact shall include ultimate facts and the findings and conclusions of the commission.

(Pub. Resources Code, § 25531, subd. (b).)

STATEMENT OF THE CASE

The Energy Commission's Power Facility Certification Process

In California, the construction of any thermal power plant with a generating capacity of at least 50 megawatts ("MW," one million watts) requires a license ("certificate," in the language of the statute) from the

Commission. (Pub. Resources Code, §§ 25110, 25120, 25500.)[1] The Commission's certificate takes the place of all other state, regional, and local permits that otherwise would be required. (§ 25500.)

The Commission's Application for Certification ("AFC") process involves an extensive examination of all aspects of proposed power facilities, including environmental, health, safety, and other factors. (See §§ 25519 - 25523, 25525 – 25529; Cal. Code Regs., tit. 20, §§ 1741 – 1755.) The Commission serves as lead agency under the California Environmental Quality Act ("CEQA"). (§ 25519, subd. (c).) The process focuses on two critical findings that the Commission must make: (1) whether a proposed facility will comply with all applicable laws, ordinances, regulations, and other standards ("LORS") (§ 25523, subd. (d)(1)), and (2) whether it will cause any significant, unmitigable, adverse environmental impacts. (§§ 21080.5, subds. (d)(2)(A), (d)(3)(A), 21100, subd. (b).) The Commission may not approve a project that does not comply with applicable LORS, or that has a significant, unmitigable, adverse environmental impact, unless the Commission also determines that the project has overriding benefits. (§§ 21002, 25525; Cal. Code Regs., tit. 20, §§ 1752, subds. (b), (*l*), 1755, subds. (b) - (d).)

The AFC process consists of several phases, all of which are designed to foster full public involvement and to ensure that the decision-makers have all relevant information. The phases include (1) determining whether the AFC has enough information so that meaningful analysis may begin; (2) development and exchange of additional information by all parties, through

[1] Unless otherwise indicated, all statutory citations are to the Public Resources Code.

data requests and public workshops; (3) publication of a thorough, detailed assessment of all aspects of the project by the Commission's staff of independent technical experts; (4) evidentiary hearings on contested issues, in which any party may present direct and rebuttal testimony and may cross-examine witnesses; (5) publication of a proposed decision and comments thereon, with revisions in response to comments if appropriate; (6) adoption of a final decision by the Commission; and (7) if a party sets forth specific grounds for reconsideration addressing alleged errors of fact or law in the Commission's decision, an opportunity for reconsideration. (§§ 25523, 25525, 25530; Cal. Code Regs., tit. 20, §§ 1716, 1718, 1720, 1742.5 - 1755.) In AFC proceedings, the Commission staff functions as an independent party. (Cal. Code Regs., tit. 20, § 1712.5.)

During the first several months of an AFC proceeding—up to the Prehearing Conference on evidentiary hearings, or 30 days before those hearings, whichever is earlier—any person may file a petition to intervene as a party. (Cal. Code Regs., tit. 20, § 1207.) Party status confers rights and responsibilities including "the right to present witnesses, to submit testimony and other evidence, to cross-examine other witnesses, to obtain information . . . and to file motions, petitions, objections, briefs, and other documents relevant to the proceeding." (*Id.*, § 1712 subd. (b).) However, even persons who are not parties "shall be given an opportunity to make oral or written comments on any relevant matter at any hearing or information meeting . . ." (*Id.*, § 1711.) Thus while an AFC proceeding provides an adjudicative hearing that goes well beyond the typical opportunity to provide written comments in CEQA cases (see Cal. Code Regs., tit. 14, § 15088), both

parties and non-parties alike have the same opportunities to test the sufficiency of the Commission's CEQA analysis that they would have in the permit proceedings that would occur in the absence of the Commission's licensing jurisdiction.

For power plants under 100 MW, the developer may seek a "Small Power Plant Exemption" ("SPPE") from the Commission's licensing jurisdiction, thus leaving permitting in the hands of local government and any state or regional agencies that may have jurisdiction. (§ 25541.) Such an exemption may be granted only if the Commission finds that "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." (*Ibid.*)

The Orange Grove Power Plant Project

The Orange Grove Power Plant Project ("Orange Grove") is a 96-megawatt, natural-gas-fired power plant. It is proposed to be built near the town of Fallbrook in San Diego County by Real Party in Interest Orange Grove Energy, L.P., which is owned by Real Party in Interest J-Power USA Development Co., Ltd. The applicant proposed the project in response to a Request for Offers from the San Diego Gas & Electric Company ("SDG&E"), which needs additional "peaking" power to serve its customers' needs during high electricity demand periods. (RA 9, 21-22 [CEC Docket No. 08-AFC-4, Orange Grove Project Final Commission

Decision (April 2009) ("Decision"), pp. 1, 13-14].)[2] Peaking generators ("peakers") are necessary to maintain the reliability of the electricity system, because electricity demand on hot summer days spikes much higher than the baseload demand that exists throughout the year. (RA 1012 [CEC, 2007 Integrated Energy Policy Report, p. 42].) As a result, although peakers such as Orange Grove usually run only a few hundred hours annually, they are crucial for the reliable operation of the entire system. Peakers are also a key component of California's transition to renewable power generation, because they act as the necessary backup for wind and solar power, which are available only intermittently. (RA 28 [Decision p. 20].)

While the site for the Orange Grove project has many advantages, such as close proximity to fuel lines and to the transmission facilities necessary to deliver power to the SDG&E system, the site does not have access to water via pipeline. (RA 37, 294 [Decision, pp. 29, 286].) However, because the project will use relatively little water in comparison to most power projects and will operate only during periods of peak power demand, the necessary water can be obtained from the nearby Fallbrook Public Utility District and trucked to the site. (RA 19 [Decision, p. 11].)

The Orange Grove AFC Proceeding

The Orange Grove project was the subject of two proceedings at the Commission, requiring a combined total of 19 months of analyses and public hearings. In July 2007, the Orange Grove developer filed an application for

[2] Materials in the Respondent's Appendix are cited as "RA XXX [document and page number]." Materials in the Petitioner's Appendix are cited as "PA XXX."

a Small Power Plant Exemption. (RA 12 [Decision, p. 4].) The ensuing environmental analysis identified several difficult problems that suggested that an SPPE was inappropriate for the project, and that it should instead be subject to a full-blown AFC proceeding. Orange Grove withdrew its SPPE application in April 2008 and filed an AFC in June 2008. (RA 12-13 [Decision, pp. 4-5].) The AFC took advantage of the environmental analyses that had been developed during the SPPE process. (*Ibid.*)

Each AFC must include contact information for the legal holders of title of all land within 1000 feet of the proposed power plant, and within 500 feet of any linear facilities associated with the plant. (Cal. Code Regs., tit. 20, § 1704, subd. (b)(2) [referencing Appendix B of that chapter]; Appendix B, § (a)(1)(E).) In turn, the Commission uses the information to mail notice of the AFC proceeding to all such landowners. (Cal. Code Regs., tit. 20, § 1709.7, subd. (a); RA 882, 892-93, 897, 899 [CEC Docket No. 08-AFC-4, Evidentiary Hearing Transcript (Dec. 19, 2008) (hereafter "Evid. Hrg. Trans."), pp. i, 12-13, 17, 19].) This was done in the Orange Grove proceeding and the Commission also provided notice to all appropriate local and state agencies, local newspapers, civic organizations, and local libraries. (RA 394 [Decision, p. 386]; RA 882, 892-93, 897, 899 [Evid. Hrg. Trans., pp. i, 12-13, 17, 19].) In addition, Staff and the Commission's Public Advisor performed extensive public outreach, contacting community leaders, groups, schools, activist organizations, and various individuals, providing written notice in both Spanish and English. (*Ibid.*)

As a consequence of this broad noticing process, three members of the public petitioned for, and were granted, intervention. (RA 13 [Decision, p. 5].) One intervenor participated throughout the proceeding, as did many local and state agencies. (RA 13-14 [Decision, pp. 5-6].) The Commission staff filed data requests with the applicant, conducted public meetings and workshops with the applicant and other agencies, held site visits, and published its Staff Assessment (its environmental analysis). (RA 13 [Decision, p. 5].) On November 6, 2008, the two-commissioner committee conducting the proceeding ("the Committee," see § 25211) issued a notice that clearly and expressly established December 1, 2008, as the last day to request intervention. (PA 67.) An amended Staff Assessment was filed on December 11, 2008.[3] The Committee held a pre-hearing conference on December 1, 2008, and an evidentiary hearing on disputed issues on December 19, 2008. (RA 13 [Decision, p. 5].)

Petitioner DFI filed a request to intervene in the proceeding on December 16, 2008 (RA 724-837), and DFI filed comments on the Staff Assessment on December 18, 2008. (PA 83-100.) The December 19 evidentiary hearing began with full discussion of the late request to intervene. Orange Grove and the Commission Staff opposed the request and SDG&E expressed concern about it; all noted that the late intervention would disrupt the schedule for the project. (RA 882, 890-912 [Evid. Hrg. Trans., pp. i, 10-32].) The Orange Grove Committee denied the petition to

[3] All references to the Staff Assessment in this Opposition are to the December 11 document and not the November 6 version. Petitioner's Appendix contains, as Exhibit 4 [PA 53-62], an excerpt from the earlier, superseded version.

intervene as untimely, although Petitioner was invited to participate and provide public comment. (RA 911 [Evid. Hrg. Trans., p. 31].)

Petitioner appealed the denial to the full Commission, which, on January 28, 2009, held a hearing and denied the appeal in a written order. (RA 964-68 [CEC Docket No. 08-AFC-4, Order Denying DFI Funding's Appeal of Denial of Petition for Intervention (Jan, 28, 2009) ("Order Denying Appeal"), pp. 1-5].)

The Committee published a proposed decision on February 25, 2009, and held a hearing to receive comments on March 16, 2009. (RA 4 [Decision, p. 6].) The full Commission adopted the Final Decision approving the project on April 8, 2009. (RA 3-6 [CEC Docket No. 08-AFC-4, Commission Adoption Order (Apr. 8, 2009), pp. 1-3].) This litigation followed.

ARGUMENT

I. IN THE ENERGY COMMISSION'S ORANGE GROVE LICENSING PROCEEDING, PETITIONER DFI RECEIVED ALL THE DUE PROCESS TO WHICH IT WAS ENTITLED.

DFI asserts that the Commission erred by not providing notice of the Orange Grove project by mail to Petitioner, and by denying Petitioner's request to intervene in the AFC proceeding. DFI is wrong on both counts.

A. The Commission Was Not Required to Provide Notice to Petitioner DFI, and DFI Had Actual Knowledge of the Project.

The Energy Commission's power facility licensing proceedings are "quasi-adjudicatory" or "adjudicative": they involve the application of general rules, such as those found in the Warren-Alquist Act and CEQA, to individual facts. (See *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 613 - 614 ("*Horn*"); see also Gov. Code, §§ 11405.20, 11405.50, subd. (a).) When a project subject to an adjudicative license could "substantially affect" the "significant property interests" of adjacent landowners, those owners are constitutionally entitled to notice of, and an opportunity to be heard on, the project. (*Horn*, 24 Cal.3d at pp. 613, 615.) Thus 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," was entitled to notice. (*Id.* at p. 615.)

While the "substantial" effect on a "significant property interest" does not necessarily have to be at the level discussed in *Horn* in order to trigger due process requirements, DFI's interest here is much smaller. First, DFI does not own the potentially affected parcels; rather, it has only an equitable interest in the land. DFI cites no case law or other authority suggesting that such an interest is entitled to due process protection. Second, DFI has made no showing that construction or operation of the Orange Grove powerplant would (or even might) have any adverse effect on its security interests in the nearby properties. The Commission "conclude[d], 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." (RA 966 [Order Denying Appeal, p. 3].)

The Commission did provide the requisite notice to *landowners* potentially affected by the Orange Grove project. Shortly after the AFC was filed, the Commission mailed notice to all the owners of record of all the parcels within 1000 feet of the proposed powerplant site (and within 500 feet of the proposed transmission line and other associated linear facilities), and the Commission also posted notice at the project site itself. (See, e.g., RA 882, 892-94, 897, 899 [Evid. Hrg. Trans., pp. i, 12-14, 17, 19]; RA 838, 840-41 [Orange Grove Energy, L.P.'s Opposition to DFI Funding, Inc.'s Petition for Intervention (Dec. 19, 2008), first, third, and fourth unnumbered pp.].) The mailed notice went to the owners of record of all of the parcels in which DFI has a security interest. (*Ibid.*) This was sufficient to meet the due process requirements established in *Horn*.

DFI implies that any agency – state, regional, or local – making an adjudicative land use decision must provide notice not only to all owners of record of nearby land that would be substantially affected by a project, but also to all persons who have any sort of a security interest in such property. That would impose an unreasonable burden on government at all levels, which would have to search through title files potentially spanning decades for records of mortgages, deeds of trust, mechanics' liens, reconveyances, and so on; analyze those records to determine which of them represent currently existing financial obligations secured by nearby land; and notify every single holder of such an interest. (See RA 894-95 [Evid. Hrg. Trans., pp. 14-15].)

DFI cites no authority indicating that a government agency must shoulder such a burden in order to meet its due process obligations, and indeed *Horn* suggests the contrary: "[t] he extent of administrative burden is one of the factors to be considered in determining the nature of an appropriate notice." (*Horn*, 24 Cal.3d at p. 617.) The burden is unreasonable not only because of the time and resources it would require but also because lenders of money secured by real property may far more easily protect their own interests by requiring the underlying title holders, as a condition to lending them funds, to forward any notice of proceedings that the title holders receive concerning development of adjacent parcels.

Even if this Court were inclined to examine whether holders of equitable interests in real property should be entitled to notice of all development proposals on nearby lands, this case is not an appropriate one in which to address that question, because DFI suffered no harm from the alleged lack of notice. This is so for two reasons.

First, although DFI did not receive the same mailed notice from the Energy Commission that the company's underlying land owners received, it had actual knowledge of Orange Grove's proposed development. Well before the deadline for filing petitions to intervene in the AFC proceeding, the licensing Applicant and the owners of record of the relevant parcels (i.e., the holders of legal title to the property securing DFI's loans) exchanged several communications and two such communications were copied to DFI. (RA 949, 953, 957-58 [Orange Grove Energy, L.P.'s Opposition to DFI Funding, Inc.'s Appeal of Denial of Petition for Intervention (Jan. 20, 2009), p. 10, 14, Attach.

B].) DFI itself has admitted as much, both in the AFC proceeding ("DFI may have had general knowledge of the Orange Grove Project as far back as December, 2007" (RA 1013, 1014-15, 1018 [DFI Memorandum of Points and Authorities in Support of Appeal of Denial of Petition for Intervention (Dec. 31, 2008), pp. 1, 2-3, 6]), and in this Court ("Petitioner may have had general knowledge of the Orange Grove Project" (Petition, p. 5). DFI has not explained why it took no action to intervene in a timely manner.

Second, DFI suffered no harm because despite the lack of mailed notice to DFI (and the denial of its petition to intervene below), DFI participated in the Energy Commission's licensing proceeding. The next section of this Opposition elaborates on this point.

B. There Was No Harm To Petitioner DFI from the Denial of Its Petition To Intervene.

The Energy Commission denied DFI's petition to intervene in the AFC proceeding because the petition was late and because granting the petition would have delayed the proceeding and thereby harmed the parties in the case and the utility (SDG&E) that will be purchasing power from Orange Grove. (RA 964, 968 [Order Denying Appeal, pp. 1, 5]; RA 906-07 [Evid. Hrg. Trans., pp. 26-27].) Unlike non-parties in Commission powerplant proceedings, intervenors have the right to conduct discovery, present witnesses, and cross-examine other witnesses – although they cannot reopen matters already heard so as to delay the proceeding. (See Cal. Code Regs., tit. 20, § 1712.) DFI offers no showing that not engaging in these activities harmed it in any way. In fact, DFI's failure to become an intervenor hardly

prevented it from taking vigorous action to protect its security interests in the parcels close to the project. DFI provided 16 pages of written comments on the Staff Assessment at the December 19 evidentiary hearing and, later, seven more pages of written comments on the Commission's draft decision. (RA 969-94 [Letters from Best Best & Krieger, LLP, to CEC (Mar. 25, 2009 and Dec. 18, 2008].) The company also spoke at the evidentiary hearing. (RA 913-17 [Evid. Hrg. Trans., pp. 207-11].) The purpose of due process notice requirements is to provide those with a legally protectable interest an "opportunity to be heard." (E.g., *Horn*, 24 Cal.3d at p. 610.) DFI had that opportunity and took advantage of it. There was no due process violation.

II. THE ENERGY COMMISSION'S DETERMINATIONS ON ALL ISSUES IN THE ORANGE GROVE LICENSING PROCEEDING ARE IN ACCORDANCE WITH ALL APPLICABLE LAWS AND ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

DFI claims that the Energy Commission's analyses in four environmental areas – greenhouse gas emissions, water supply, traffic, and land use – were inadequate. DFI fails to show that the Commission's determinations are in any way contrary to law, and DFI ignores the large amounts of uncontroverted evidence supporting the Commission's Decision.

A. The Energy Commission's Environmental Analysis Adequately Addressed "Greenhouse Gas" Project Emissions.

Petitioner erroneously argues that the project's "greenhouse gas" (GHG) emissions were not adequately analyzed in the Commission Staff's Assessment or in the Commission's Final Decision. (Petition, pp. 16-20; PA 86 [Letter from Best Best & Krieger, LLP, to CEC (Dec. 18, 2008), p. 4].) In

fact, the Staff Assessment contains a lengthy discussion on that very issue. (RA 580-92 [Staff Assessment, pp. 4.1-91 to 4.1-103].) The Staff Assessment summarizes state laws and policies regarding GHG emissions, the Energy Commission's policy on the crucial role of gas-fired power plants in transitioning to a renewables future, how the efficiency of the Orange Grove project will probably result in a net reduction of GHG emissions, and why it would therefore be speculative to conclude that the project will cause an impact that is adverse rather than beneficial. (*Ibid*.) This evidence was undisputed by any party, and it was relied upon in the Commission's Final Decision. (RA 151-57 [Decision, pp. 143-49].)

While neither CEQA nor the implementing CEQA Guidelines address whether or how GHG should be addressed by lead agencies, the Energy Commission has assumed that GHG emissions should be part of its CEQA analyses. Therefore, contrary to Petitioner's assertion (Petition, p. 16), the Staff Assessment did quantify Orange Grove's GHG emissions, using the Climate Action Registry's reporting protocol, across a range of assumptions about how much the project will operate. (RA 584-85 [Staff Assessment, pp. 4.1-95 to 4.1-96].) Moreover, the Staff Assessment describes the role of the Project as a "peaker" power plant that is likely to run no more than three to four percent of the hours of the year, normally on the hottest days of the year when electricity demand is highest. (RA 526-27 [Staff Assessment, pp. 4.1-37 to 4.1-38]; see also RA 143-44 [Decision, p. 135-36].) Peaker power plants are essential not only to ensure that the electricity system can meet the highest demands placed on it, but also for the successful integration of the renewable generation that is a crucial part of the State's "strategy to meet greenhouse gas

emission reductions." (RA 28, 41 [Decision, pp. 20, 33]; RA 587 [Staff Assessment, p. 4.1-98].) This is because peakers are necessary to "firm up" generation from intermittent renewable generators such as wind turbines or solar panels, whose output fluctuates quickly and often, according to whether the wind blows or the sun shines. (See RA 721 [Staff Assessment, pp. 6-10].) Thus, peakers such as Orange Grove are an essential element of the State's transition to an electricity system based on greater renewable generation, which will result in *fewer* greenhouse gas emissions.

In addition to helping foster renewable generation in its role as a peaker, Orange Grove will also help reduce GHG, compared to "current conditions," by replacing the generation that would otherwise have to come from an older, less efficient powerplant. (RA 587 [Staff Assessment, p. 4.1-98]; RA 41-42 [Decision, pp. 33-34 (Findings 6-7, 9)].) Both San Diego Gas & Electric Company, the utility that will buy the power from Orange Grove, and the California Independent System Operator (CAISO), which operates most of California's electricity grid, stated that the Project would allow the closure of an older, less efficient, higher-GHG-emitting power plant "as early as 2010." (RA 25 [Decision, p. 17]; see also RA 1003-1010 [Letters from SDG&E (Apr. 3, 2008) and CAISO (Jan. 28, 2008 and Oct. 29, 2007)].) For these reasons the Staff, and ultimately the Energy Commission, concluded that the project will not cause a significant adverse GHG impact. (RA 41-43 [Decision, pp. 33-35]; see also RA 721-22 [Staff Assessment, pp. 6-10 to 6-11].)

Petitioner is equally wrong in contending that the discussion in the Decision of the Air Resources Board's AB 32 Scoping Plan requirements

shows that the Commission is engaging in improper "deferred mitigation." (AB 32 is the state's primary statute on GHG policy and regulation. (See Health & Saf. Code § 38500 et seq.)) There is *no* mitigation required for the project's GHG emissions because, as the discussion at pp. 16-17 above shows, it would be "speculative to conclude that [the] project results in a . . . significant adverse impact resulting from greenhouse gas emissions" (RA 156, 168 [Decision, pp. 148, 160]), and indeed, the project is likely to contribute to a system-wide *reduction* in GHG emissions (RA 28 [Decision, p. 20]). Petitioner's added contention that the Commission did not consider renewable alternatives in its analysis (Petition, p. 7) is simply incorrect; renewable alternatives were analyzed and determined to be infeasible, and substantial evidence supports that determination. (RA 29, 41-43 [Decision pp. 21, 33-35]; RA 719 [Staff Assessment, p. 6-8].)

Moreover, the Commission made clear that licensing Orange Grove will in no way insulate the project's GHG emissions from future regulation under AB 32: "The project will be subject to compliance with AB 32 requirements once they are determined by ARB. How the project will comply with these ARB requirements is speculative at this time but compliance will be mandatory." (RA 157 [Decision, p. 149].)

DFI's Petition in this Court also raises challenges to the Energy Commission's analysis that Petitioner failed to raise during the proceeding below (and that were raised by no other person). The new allegations are that the Commission (1) failed to calculate GHG emissions from the diesel trucks that will deliver water to the facility and (2) failed to calculate GHG emissions

from construction (as opposed to operation) of the plant. (Petition, pp. 17, 19-20.) Even though those challenges are not properly before the Court (see §§ 21177, subd. (a), 25531, subd. (c)), we will briefly explain why they are wrong.

Concerning truck and construction emissions, the Decision states that "water delivery traffic GHG emissions are also included in the operating emission GHG totals, although they are negligible in comparison to the gas turbine GHG emissions," and it describes (and quantifies) the comparatively minor GHG emissions that would result from construction. (RA 135-36, 154 [Decision, pp. 127-28, 146]; RA 583 [Staff Assessment, p. 4.1-94].) Moreover, the Commission adopted requirements for modern, more efficient, lower-emitting delivery trucks (RA 175 [Decision, p. 167]) and for emissions controls during construction activities, in order to minimize all the emissions, including GHG emissions, from the project. (RA 169-73 [Decision, pp. 161-65.)

B. Substantial Evidence Supports the Commission's Decision that Orange Grove Will Not Have a Significant Adverse Effect on Water Supply and Water Quality.

DFI's Petition makes three claims regarding Orange Grove's water use: water deliveries by truck are inappropriate, the Commission should not have allowed Orange Grove to use potable water for some of its needs, and the Commission failed to give an adequate description of the recycled water that will be used for the balance of the project's needs. (Petition, pp. 20-22.)

DFI discusses water delivery by truck under the topics of Greenhouse Gas Emissions, Traffic, and Land Use, and we follow suit here. Potable water and recycled water are discussed immediately below.

Potable Water. DFI asserts that Orange Grove will use "up to 62 acre feet of potable water per year" and argues that such use is unacceptable. (Petition, pp. 20-21.) That amount would be used annually if the Project operated up to the limit of its license, but the expected use is only 21 acre-feet per year. (RA 300 [Decision, p. 292]; RA 655 [Staff Assessment, p. 4.9-11].) Moreover, regardless of the number, DFI cites no authority suggesting that the Project's water use is illegal, nor does it point to any evidence in opposition to the Commission's determination that "the . . . potable water expected to be used by Orange Grove Project . . . will not likely create a significant adverse impact on water resources . . . ." (RA 300 [Decision, p. 292].) In fact, all of evidence in the record fully supports that determination. For example, after considering water supplies, drought conditions, other projects in the area, water efficiency measures, recycled water use, and input from water agencies and the public, the Commission Staff concluded that project's water use would not result in significant adverse impacts on either water resources or water quality. (RA 664-75 [Staff Assessment, pp. 4.9-20 to 4.9-31].) Furthermore, in the event of a drought, the project's potable water agreement with the Fallbrook Public Utilities District allows the District to provide recycled water in lieu of potable water. (RA 666 [Staff Assessment, pp. 4.9-22].) Finally, the Decision requires the project to implement water conservation measures that will save 6.1 acre feet a year of potable water, and to carry out an extensive water monitoring program to ensure that water use will not exceed the

amounts allowed by the Decision and to help identify, in advance, potential water use concerns (such as water supply interruptions or facility equipment considerations) that may require changes to project requirements. (RA 322 [Decision, p. 314].) In sum, the record contains substantial evidence supporting the Commission's decision that the facility's total water use will not result in significant environmental impacts to water resources. (RA 311-14 [Decision, pp. 303-06].)

Recycled Water. DFI claims that the Commission did not adequately describe the nature of the recycled water that Orange Grove will use. Not so. The Staff Assessment goes into substantial detail, as does the final Decision, in evaluating the use of recycled water. (RA 665, 679-81 [Staff Assessment, pp. 4.9-21, 4.9-35 to 4.9-37]; RA 297-99 [Decision, pp. 289-91].) In addition, the project is subject to state health and safety regulations stating that recycled water may be used only if it has been appropriately disinfected and treated. (RA 679 [Staff Assessment, p. 4.9-35]; RA 299 [Decision, p. 291].)

C. Substantial Evidence Supports the Commission's Decision that Orange Grove Will Not Have a Significant Adverse Effect on Traffic.

DFI erroneously claims that the Commission "ignored" both the allegedly dangerous conditions on SR-76, "a major thoroughfare for project service," and the potential impacts to that highway's traffic from the project's water delivery trucks. (Petition, pp. 23-24.) Actually, the Commission Staff hired an expert traffic consultant, who concluded that (1) "SR 76 . . . [has] a number of relatively sharp curves. However, the curves are clearly visible and well marked with advisory signs. Trucks can easily travel through these curves

as long as their drivers are using reasonable care"; and (2) "there [are] no sub-standard geometric features or conditions that would be incompatible with the types of trucks that will be using these roadways for the Orange Grove project." (RA 700-01 [Staff Assessment, Traffic and Transportation Technical Memorandum (Oct. 30, 2008), pp. 1-2].) The Staff also consulted with the California Department of Transportation, the California Highway Patrol, and the local school district to discuss truck traffic. Those independent agencies found no significant issues with the likely project-related traffic. (RA 690 [Staff Assessment, p. 4.10-6].) This consensus in the record is not surprising when one compares the project's maximum of two truck trips per hour (or 48 per day), during an expected operating period of approximately 60 days a year, to SR-76's current usage of 8,987 to 19,145 daily trips. (RA 379, 382 [Decision, pp. 371, 374].) The Decision concludes that the construction and operation of Orange Grove, as mitigated, will not result in any significant adverse impacts to the local or regional transportation system . (RA 376-90 [Decision, p. 368-82].) DFI points to nothing in the record that conflicts with the Commission's determinations.

D. Substantial Evidence Supports the Commission's Decision That the Orange Grove Project Will Not Violate Applicable Land Use Requirements.

DFI claims that the Orange Grove project cannot use water provided by the Fallbrook Public Utilities District ("FPUD") because the project site is located in territory served by the Rainbow Municipal Water District ("RMWD"). (Petition, pp. 24-25.) In reality, however, there is no law that prohibits the project from contracting with FPUD for water delivery by truck. (RA 297-99, 312 [Decision pp. 289-91, 304].) The RMWD imposes a rule on

itself that prohibits *RMWD-supplied* water from being used on a parcel other than the one where the water is purchased, but that rule is not relevant to water supplied by FPUD, and FPUD has no similar rule limiting the use of its water. (RA 673 [Staff Assessment, p. 4.9-29]].) Moreover, Orange Grove will use recycled water for some of its needs, but RMWD does not provide recycled water. (RA 294 [Decision, p. 286].)

DFI also claims that because water will be trucked in, the project is not consistent with Section 7358 of the San Diego Country Zoning ordinance. (Petition, p. 25.) That section requires the County Board of Supervisors to make various findings before issuing a Major Use Permit, the type of permit that Orange Grove would require absent the Energy Commission's exclusive licensing jurisdiction. (RA 365-66 [Decision, pp. 357-58]; see also Pub. Resources Code, § 25500.) One of the findings is that a project's "location . . . will be compatible with adjacent uses . . . *with consideration given to* [¶]. . . [t]he availability of public facilities, services and utilities . . . ." (RA 365 [Decision, p. 357], italics added.) DFI claims that utility service – i.e., water – is not available, thereby ignoring that (1) the ordinance requires only that "consideration [be] given to" such availability; (2) in any event, sufficient water will be available from FPUD, which "is able to meet both the potable and recycled water needs of the Project" (RA 299 [Decision, p. 291]); and (3) there is extensive analysis in the record demonstrating that Orange Grove will, in the words of Section 7358, "be compatible with adjacent uses." The generally sparse region has a former sand mine and existing electric transmission lines and gas pipelines; the Decision concludes that "[a]ccording to the evidence, the site is a suitable location for a power plant based on

physical conditions, land use designations, zoning vicinity of proposed uses (Solid Waste Facility zoning and plans for the Gregory Canyon Landfill), and the steep terrain in the area limiting potential development." (RA 366 [Decision, p. 358].)

CONCLUSION

The Energy Commission properly denied DFI's late-filed Petition to Intervene. Substantial evidence supports the Commission's Decision, particularly the supporting Staff Assessment regarding the Orange Grove peaker project. The Petition for Writ of Mandate should be denied

Dated: May 18, 2009 Respectfully submitted,

_____

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CERTIFICATE OF LENGTH OF BRIEF

Pursuant to Rule 8.204 subdivision (c)(1) of the California Rules of Court, I certify that this Preliminary Statement In Opposition To Petition For Writ of Mandate and/or Prohibition or Other Appropriate Relief, is 6,221 words long, not counting the Table of Contents, the Table of Authorities, and this Certificate.

_____

WILLIAM M. CHAMBERLAIN

Case Name: DFI Funding, Inc., Petitioner, v. California Energy Commission, Respondent; Orange Grove Energy, L.P., and J-Power USA Development Co., Ltd., Real Parties in Interest.

Case No.: S172819

Court: Supreme Court of the State of California

PROOF OF SERVICE

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. My business address is 1516 Ninth Street, Sacramento, California 95814. On May 18, 2009 I served the following:

PRELIMINARY STATEMENT IN OPPOSITION TO PETITION FOR WRIT OF MANDATE AND/OR PROHIBITION OR OTHER APPROPRIATE RELIEF
and
RESPONDENT'S APPENDICIES I - III

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at Sacramento, California, addressed as follows:

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BEST BEST & KRIEGER LLP
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San Diego, CA 92101

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 18, 2009, at Sacramento, California.

_____
CHESTER HONG

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APPLICATION FOR CERTIFICATION
ORANGE GROVE POWER PLANT PROJECT

DOCKET NO. 08-AFC -4
PROOF OF SERVICE
(Revised 2/17/09)

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DECLARATION OF SERVICE

I, Teraja` Golston, declare that on May 19, 2009, I served and filed copies of the attached Orange Grove (08-AFC-4) Preliminary Statement in Opposition to Petition for Writ of Mandate. 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:
[www.energy.ca.gov/sitingcases/orangegrovepeaker]. 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:

(*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 or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above 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
Attn: Docket No. 08-AFC-4
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.

Original Signature in Dockets
Teraja` Golston