

STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:
The Application for Certification of the
CHULA VISTA ENERGY UPGRADE
PROJECT

Docket No. 07-AFC-4

DOCKET	
07-AFC-4	
DATE	<u>JUN 10 2009</u>
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**OBJECTION OF INTERVENOR ENVIRONMENTAL HEALTH COALITION
TO APPLICANT'S REQUEST TO POSTPONE CONSIDERATION OF THE
PRESIDING MEMBER'S PROPOSED DECISION**

OSA L. WOLFF
KEVIN P. BUNDY
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
wolff@smwlaw.com
bundy@smwlaw.com

Attorneys for Environmental Health
Coalition

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Environmental Health Coalition (“EHC”) objects to the last-minute request by MMC Energy, Inc. (“Applicant”) to postpone consideration of the Presiding Member’s Proposed Decision (“PMPD”) and to suspend the Application for Certification proceeding for the Chula Vista Energy Upgrade Project (“Project”). The Applicant has not shown good cause for waiting until the eve of the full Commission’s consideration of the PMPD to file this request. On the contrary, the Applicant’s request contradicts a prior agreement among the parties regarding the hearing date, burdens other parties, and should be denied. The full Commission should consider the PMPD as scheduled on June 17, 2009, and should adopt the PMPD as its final decision in this proceeding.

As of May 13, 2009, all parties had expressly agreed that the PMPD would be considered by the full Commission at the June 17, 2009 business meeting. Members of the affected community—a community that has been deeply and actively involved in this proceeding at every opportunity for nearly two years now—have made travel plans in reliance on that agreement. Now, the Applicant has unilaterally decided to change course

without even consulting the other parties. For this reason alone, the request should be denied.

The Applicant also has failed to demonstrate that the pending sale of the company's assets constitutes good cause to postpone the proceeding. In fact, the Applicant agreed to the June 17 hearing date with full knowledge that negotiations to sell the company were nearing completion—knowledge that *only* the Applicant possessed at the time. As recent filings with the Securities and Exchange Commission reveal, the Applicant has been engaged in discussions with the prospective buyer, Wellhead Electric Company (“Wellhead”), for a full year. (See MMC Energy, Inc., Schedule 14A Information: Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (June 5, 2009), available at http://www.sec.gov/Archives/edgar/data/1312206/000114420409031327/v151668_prem14a.htm (hereafter “Schedule 14A”) at p. 22.) The Applicant and Wellhead executed a letter of intent regarding the pending sale on February 27, 2009, reached final agreement on May 21, 2009, and publicly announced the sale on May 27, 2009. (*Id.* at pp. 24-25.) Having agreed to the June 17 hearing date in the midst of these negotiations, the Applicant cannot now be heard to claim that those negotiations require postponement.

This timeline also indicates—contrary to the suggestions in the Applicant's request—that Wellhead has had plenty of time to figure out how to proceed in response to the “adverse PMPD” for this Project. Wellhead executed a letter of intent regarding purchase of the Applicant's Chula Vista assets in late February 2009, presumably with full knowledge that an “adverse PMPD” had been issued a month earlier. Interestingly,

among the few assets that Wellhead has *not* agreed to purchase from the Applicant are the two turbines that were intended for use in this Project. (Schedule 14A at pp. 27-28.) This suggests that both Wellhead and the Applicant have given considerable thought to how they might best proceed in response to the PMPD.¹

The Applicant's request cites only one specific reason for the postponement: to allow Wellhead to determine whether to request an override of the Project's LORS conflicts. Again, the parties were engaged in serious negotiations toward sale when the PMPD was released on January 23, 2009, nearly five months ago. The PMPD released on that date clearly stated that the record contained insufficient evidence to support an override. (See PMPD at p. 360.) Yet during the last few months, the Applicant has made

¹ Indeed, under the terms of its purchase agreement with Applicant, Wellhead has assumed responsibility for directing the Applicant's actions in this proceeding. Under the terms of the purchase agreement,

we [the Applicant] shall bear all costs, including the costs of Bingham McCutchen LLP, of applying for and otherwise seeking to obtain certification for the Chula Vista Energy Upgrade Project from the California Energy Commission (the "CEC Permits") through April 23, 2009. At, and to the extent of, Wellhead's request, we shall use commercially reasonable efforts to continue or discontinue the pursuit of the CEC Permits on behalf of the Acquired Companies; provided, however, that Wellhead shall be responsible for (regardless of any termination or expiration of the Purchase Agreement), and shall promptly reimburse us to the extent paid by us, all such third-party costs incurred in connection with the continuation of such pursuit from April 24, 2009 until the earlier of the receipt of such CEC Permits or the date upon which Wellhead requests us to discontinue pursuit of the CEC Permits, irrespective of whether the closing of the Asset Sale occurs[.]

(Schedule 14A at p. 34.)

no argument that an override is warranted here, and has made no effort to demonstrate that additional evidence—evidence that could not have been introduced earlier, in the exercise of reasonable diligence—exists to support an override. Just as good cause does not exist to support a postponement of this proceeding, good cause does not exist to support further consideration of an override. (Cf. Order Denying Applicant’s Motion to Reopen the Evidentiary Record, Application for Certification of the Eastshore Energy Center, Docket No. 06-AFC-6 (Aug. 8, 2008) at pp. 6-7.)

Finally, the Applicant’s request is unsupported by authority. The Applicant cites the Commission’s order suspending the Bullard Energy Center proceeding, but the order in that case does not discuss good cause. Furthermore, the Bullard proceeding was suspended very early on—before the release of the Preliminary Staff Assessment—not months after the release of the PMPD and mere days before final consideration at a Commission business meeting. Here, in contrast, the parties have invested nearly two full years in bringing this proceeding to the brink of a final conclusion. Nothing in the Commission’s order in Bullard, or elsewhere in the Applicant’s request, supports a finding of good cause to postpone this proceeding.

As the Commissioners well know, these proceedings are lengthy and costly, especially for members of the public and community organizations who must assume full responsibility for participating as intervenors. This particular proceeding has taken nearly two years, during which time the parties have litigated zealously and in good faith toward a final resolution. That resolution is now at hand, and it should not be delayed on the basis of an untimely, burdensome, and unsupported request for postponement.

Accordingly, EHC respectfully requests that the Applicant's request for postponement of the Commission hearing and suspension of this proceeding be denied.

DATED: June 10, 2009

Respectfully submitted,

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Kevin P. Bundy

OSA L. WOLFF

KEVIN P. BUNDY

Attorneys for Environmental Health Coalition

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PROOF OF SERVICE

APPLICANT

Harry Scarborough
Sr. Vice President
MMC Energy Inc.
437 J Street, Suite 305
San Diego, CA 92101
hscarborough@mmcenergy.com

**APPLICANT'S
CONSULTANT**

Douglas M. Davy, Ph.D.
Senior Project Manager
CH2M Hill
2485 Natomas Park Drive,
Suite 600
Sacramento, CA 95833
ddavy@ch2m.com

APPLICANT'S ENGINEER

Steven Blue
Project Manager
Worley Parsons
2330 E. Bidwell, Suite 150
Folsom, CA 95630
Steven.blue@worleyparsons.com

COUNSEL FOR APPLICANT

Jane Luckhardt, Esq.
Downey Brand Law Firm
621 Capitol Mall, 18th Floor
Sacramento, CA 95814
jluckhardt@downeybrand.com

INTERESTED AGENCIES

California ISO
e-recipient@caiso.com

INTERVENORS

California Unions for Reliable
Energy (CURE)
c/o Marc D. Joseph
Gloria Smith
Suma Peesapati
Adams Broadwell Joseph &
Cardozo
601 Gateway Boulevard
Suite 1000
South San Francisco, CA 94080
mdjoseph@adamsbroadwell.com
gsmith@adamsbroadwell.com
speesapati@adamsbroadwell.com

City of Chula Vista, California
c/o Michael Meacham
Director of Conservation &
Environmental Services
276 Fourth Avenue
Chula Vista, CA 91910
mmeacham@ci.chula-vista.ca.us

City of Chula Vista, California
c/o Michael J. Shirey
Deputy City Attorney
City Attorney's Office
276 Fourth Avenue
Chula Vista, CA 91910
mshirey@ci.chula-vista.ca.us

ENERGY COMMISSION

James D. Boyd
Vice Chair and Associate Member
jboyd@energy.state.ca.us

Raoul Renaud
Hearing Officer
rrenaud@energy.state.ca.us

Christopher Meyer
Project Manager
cmeyer@energy.state.ca.us

Kevin W. Bell
Staff Counsel
kwbell@energy.state.ca.us

Public Adviser's Office
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Kevin P. Bundy, declare that on June 10, 2009, I served and filed copies of the attached

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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: <http://www.energy.ca.gov/sitingcases/chulavista/index.html>. The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission’s Docket Unit, in the following manner:

(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 San Francisco, 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. 07-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.

/s/ Kevin P. Bundy

 Kevin P. Bundy