

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

**APPLICATION FOR
CERTIFICATION FOR THE
CHULA VISTA ENERGY UPGRADE
PROJECT**

DOCKET NO. 07-AFC-4
(AFC Filed 8/10/07)

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**MMC ENERGY, INC.'S REPLY TO OBJECTION OF INTERVENOR
ENVIRONMENTAL HEALTH COALITION
TO APPLICANT'S REQUEST TO POSTPONE CONSIDERATION OF THE
PRESIDING MEMBER'S PROPOSED DECISION**

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Dated: June 11, 2009

At its business meeting on June 17, 2009, the California Energy Commission (“Commission”) is currently scheduled to consider the Presiding Member’s Proposed Decision (“PMPD”) on the Application for Certification of the Chula Vista Energy Upgrade Project (“the Project”). On Tuesday, June 9, 2009, MMC Energy, Inc. (“MMC Energy”) filed a request to: (1) postpone the Commission’s consideration of the PMPD; (2) suspend this proceeding; and (3) schedule the filing of a status report by the applicant by no later than October 12, 2009. The Environmental Health Coalition (“EHC”) filed an objection to this request on June 10, 2009. Yesterday, the hearing officer for this matter granted MMC Energy’s request to file this reply.

EHC makes a series of arguments as to why MMC Energy’s pending request should be denied. On scrutiny, however, none are persuasive and certainly none addresses the fact that EHC is effectively asking the Commission to make a rush to judgment and remake state energy policy by denying an application for an upgrade project on a brownfield site (when State of California energy policy is to support brownfield site development) and an application which Commission Staff supports. Further, EHC’s arguments do not offset the good cause MMC Energy has demonstrated for postponement and temporary suspension of this proceeding. Indeed, about the only point on which EHC is correct is that the need to postpone and suspend this proceeding is the as yet unconsummated sale by MMC Energy of the Project to affiliates of Wellhead Electric Co (“Wellhead”). As EHC notes, the agreement to sell substantially all of the operating assets of MMC Energy, including the Project, to Wellhead was only signed three weeks ago, on May 21, 2009.¹

¹ MMC Energy publicly announced its plans on May 28, 2009, by filing a Form 8-K report with the Securities and Exchange Commission. The SEC filing is available at MMC Energy’s website in the Investor Relations section at <http://ir.mmcenergy.com/secfiling.cfm?FILINGID=1144204-09-29697&>.

What EHC neglects to mention, however, is that the transaction has yet to be consummated and will not close until multiple detailed conditions have been met on or before the Closing Date. The primary transactional agreement, which is titled the “Membership Interests Purchase Agreement by and among California Holdings McCall, LLC, Escondido II, LLC, Wellhead Electric Equipment, LLC and MMC Energy, Inc.” (“Purchase Agreement”) sets forth the detailed conditions that must be met before the closing date, which the Purchase Agreement specifies must occur, if at all, on or before August 31, 2009.²

EHC also neglects to mention the specific provisions in the Purchase Agreement regarding management of the existing Chula Vista Power Plant and associated Project prior to closing. The “Transition Asset Management Agreement by and between Wellhead Electric Equipment, LLC, and California Holdings McCall, LLC and MMC Energy, Inc., MMC Energy North America, LLC, and MMC Energy Chula Vista, LLC” (“Transition Agreement”) does not provide Wellhead the right to undertake maintenance, improvement, or, importantly, *upgrade of the equipment* or to assume operational and management control until July 1, 2009, *at the earliest*. Purchase Agreement at Section 4.16.

In light of the Purchase Agreement and associated Transition Agreement, MMC Energy requests that the Commission postpone consideration of the PMPD. As of June 17, 2009, the day currently scheduled for the hearing by the Commission on the PMPD, Wellhead will not be in a position to assert ownership rights over the Chula Vista Upgrade Project; MMC Energy will still be the owner of record.

² The conditions include, among others, obtaining shareholder approvals and authorizations from the Federal Energy Regulatory Commission. Purchase Agreement at Sections 4.4. and 4.6.

EHC tacitly acknowledges this point by suggesting that Wellhead has had ample time to consider its ownership strategy in the months since the PMPD was first issued in January. That assertion is flawed on multiple grounds. First, MMC Energy honestly believed the PMPD would be corrected after it, Commission Staff, and the City of Chula Vista submitted lengthy and exhaustive comments regarding why the PMPD is wrong. Unfortunately, the hopes of all three parties were unfulfilled with the issuance of the Errata to the PMPD on May 4, 2009, largely leaving the PMPD unchanged. Thus, the notion that Wellhead has had months to formulate its strategy at the Commission is simply wrong, particularly when it only signed the Purchase Agreement three weeks ago.³

More significantly, EHC ignores the unusual, indeed unprecedented, scenario presented by this proceeding. For *the first time*, at least in recent memory, the Commission will be considering a PMPD that recommends denial of certification because of an alleged failure to comply with laws, ordinances, regulations, and standards (“LORS”) even though MMC Energy, Commission Staff, and even the City of Chula Vista (whose law is the source of the alleged LORS violation) disagree with the PMPD’s conclusions. *See* Comments filed by MMC Energy, Commission Staff, and the City of Chula Vista on the PMPD on March 16, 2009. Moreover, because of the alleged LORS noncompliance, it is possible Wellhead will want to defer Commission action on the PMPD until such time as the Commission can also consider whether to override the alleged noncompliance with LORS pursuant to Public Resources Code § 25525. Given these unique

³ EHC observes that the two turbines owned by MMC Energy are not among the assets purchased by the buyer. That does not, however, indicate any specific plans by the buyer as to whether, when or how it intends to proceed with the Chula Vista Project.

circumstances, there is good cause to grant MMC Energy's request for postponement and temporary suspension.

EHC makes a number of additional arguments that also require response. It asserts MMC Energy has already had sufficient time to consider whether or not to seek an override and suggests that "good cause does not exist to support *further consideration* of an override." EHC Objection at 4 (emphasis added). This, of course, is not accurate since the applicant has not requested an opportunity to make the evidentiary case for override findings to be made. As EHC well knows, up until this point in the proceeding, MMC Energy and Commission Staff, with support from the City of Chula Vista, have vigorously argued that EHC and, later, the PMPD are incorrect about there being any LORS noncompliance. Indeed, evidence supporting an override was never introduced because MMC Energy, Commission Staff, and the City of Chula Vista still believe there is a sound basis for certifying the Project without having to make override findings.

In any event, the issue of LORS compliance must necessarily be decided before it becomes necessary for the Commission to consider whether or not the Commission can make override findings pursuant to Public Resources Code § 25525. The PMPD implicitly recognized this since it states: "[A]s the issue of override was not part of the evidentiary proceedings, we will refrain from making a final determination about it at this time. Should the Applicant wish to offer evidence on matters relevant to the issue of override, we would entertain a request to reopen the record." PMPD at 360. The issue of whether the Commission should make override findings simply is not yet before the Commission and, as noted, is another reason why the pending request should be granted so as to allow Wellhead an opportunity to present it.

Finally, we turn to the assertion of prejudice EHC suggests when noting its members have already made travel arrangements and that these costs and the time and expense associated with this proceeding to date justifies maintaining the current hearing date. With due respect, the sums EHC has expended in this proceeding are orders of magnitude less than the amount MMC Energy has spent to advance the Project. Given the consistent support MMC Energy received from Commission Staff, the PMPD came as an enormous surprise to MMC Energy and significantly impacted its ability to proceed with the Project. Indeed, the PMPD played a role in MMC Energy's decision to sell the Chula Vista Power Plant and Project. This Commission should allow the new owner a reasonable opportunity to decide how it wishes to proceed.

By contrast, holding the current hearing date in place will prejudice the buyer in ways far more significant than the airline ticket change fees EHC asserts its members may incur by a delayed hearing date. A Commission decision on the PMPD next week will trigger filing deadlines and obligations on Wellhead that it is neither legally entitled nor prepared to make at this time. As the PMPD makes plain, California is a difficult place to upgrade, let alone build, a power plant, even in locations, as here, that have a documented need for new capacity and have the support of Commission Staff and local government. MMC Energy has in good faith expended enormous time and resources to advance the Project over the past two and half years and has relatively little to show for those efforts. Granting the pending request for postponement and temporary suspension will at least allow the future owner an opportunity to determine how it will proceed with the Project. Further, and perhaps most important, given the significant state energy policy implications, there should be no rush to judgment, as EHC urges.

Accordingly, MMC Energy respectfully requests that the hearing on the PMPD be postponed and that the proceeding be temporarily suspended. As stated in its opening papers, MMC Energy suggests that the Commission order the buyer to file a status report on or before October 12, 2009, as to how it wishes to proceed.

Respectfully submitted,



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**PROOF OF SERVICE
(Revised 2/10/09)**

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Declaration of Service

I, Lois Navarrot, declare that on June 11, 2009, I served and filed copies of the attached **MMC Energy, Inc.'s Reply to Objection of Intervenor Environmental Health Coalition to Applicant's Request to Postpone Consideration of the Presiding Member's Proposed Decision**. 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/chulavista. 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 e-mailed respectively, to the address below (preferred method);

OR

_____ depositing in the mail an original and 12 paper copies as follow:

California Energy Commission
Attn: Docket No. 07-AFC-4
1516 Ninth Street, MS-4
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I declare under penalty of perjury that the foregoing is true and correct.

/s/
Lois Navarrot