

DOCKET
01-AFC-21C

DATE June 29 2009

RECD. June 29 2009

June 29, 2009

California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

**Subject: PG&E'S INITIAL BRIEF IN SUPPORT OF ITS REQUEST FOR
EXTENSION OF CONSTRUCTION DEADLINE FOR
TESLA POWER PROJECT DOCKET NO. (01-AFC-21C)**

Enclosed for filing with the California Energy Commission is the original copy of **PG&E'S INITIAL BRIEF IN SUPPORT OF ITS REQUEST FOR EXTENSION OF CONSTRUCTION DEADLINE**, for the Tesla Power Project (01-AFC-21C).

Sincerely,



Marie Mills

Scott A. Galati
GALATIBLEK, LLP
455 Capitol Mall Avenue
Suite 350
Sacramento, CA 95814
(916) 441-6575

STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

TESLA POWER PROJECT

DOCKET NO. 01-AFC-21C

**PG&E'S INITIAL BRIEF IN SUPPORT
OF ITS REQUEST FOR EXTENSION
OF CONSTRUCTION DEADLINE**

INTRODUCTION

Pacific Gas & Electric Company (PG&E) hereby submits its initial brief in support of its Request for Extension of Construction Deadline as directed by the Siting Committee's Notice of Evidentiary Hearing and Committee Order dated June 9, 2009 (Order). The Order identified two legal questions related to the mechanism for expiration of the existing license and the standards that should be applied in determining whether good cause exists to extend a construction deadline.

Specifically, the Committee directed the parties to brief the following questions:

1. What are the consequences (e.g., expiration of the certificate), if any, of a failure to begin construction within the period established by Section 1720.3 (and any extensions granted thereunder)?
 - a) If expiration of the certificate is a potential consequence, does it occur automatically upon failure to meet the deadline, or must the Commission act affirmatively to revoke the certificate?
 - b) Do the construction-deadline provisions of Public Resources Code section 25534 have any effect here? Are those provisions applicable to any project that has been certified by the Commission? Can they be applicable to any future project?

2. In determining whether “good cause” exists for an extension under Section 1720.3, what factors may the Energy Commission consider in any given case? What factors should it consider? What factors must it consider?

EXPIRATION

1. A CERTIFICATE DOES NOT EXPIRE AS A MATTER OF LAW BUT RATHER MUST BE AFFIRMATIVELY REVOKED BY THE COMMISSION.

Title 20 of the California Code of Regulations (CCR) Section 1720.3 states:

Unless a shorter deadline is established pursuant to § 25534, the deadline for the commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

Section 1720.3 specifies a “commencement of construction deadline” of 5 years and does not specify a term for validity of the certification issued by the Commission pursuant to the *Warren Alquist Act* and specifically Public Resources Code Section 25500. The *Warren Alquist Act* does not specify an expiration date for the Commission’s certification. The Tesla Power Project Final Decision does not specify a date by which the Final Decision expires. Therefore, there is no specific term by which the Tesla Power Project certification automatically expires. There is only a “commencement of construction deadline.”

PRC Section 25534 states:

- a) The commission may, after one or more hearings, amend the conditions of, or revoke the certification for, any facility for any of the following reasons:
 - (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant.
 - (2) Any significant failure to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision.
 - (3) A violation of this division or any regulation or order issued by the commission under this division.
 - (4) The owner of a project does not start construction of the project within 12 months after the date all permits necessary for the project

become final and all administrative and judicial appeals have been resolved provided the California Consumer Power and Conservation Financing Authority notifies the commission that it is willing and able to construct the project pursuant to subdivision (g). The project owner may extend the 12-month period by 24 additional months pursuant to subdivision (f). This paragraph applies only to projects with a project permit application deemed complete by the commission after January 1, 2003

According to the legislative analysis, Section 25534 was enacted in response to the California Energy Crisis for the purposes of providing certainty that power projects would be constructed for the public good.¹ The legislature created the California Consumer Power and Conservation Financing Authority (Authority) and granted it the authority to acquire licenses issued by the Commission and to construct power plants under certain limited circumstances. Subsection (a) of 25534 sets a start of construction deadline of 12 months after all permits became final and administrative and judicial appeals are resolved (12-month deadline). However this 12-month deadline is applicable if and only if the Authority notifies the Commission that it is willing and able to construct the project pursuant to subdivision (g) and if and only if the Commission deemed an Application For Certification (AFC) data adequate after January 1, 2003. Such notice has not been provided by the Authority for the Tesla Power Project and the Tesla Power Project AFC was deemed complete prior to January 1, 2003.² Therefore, the 12-month deadline of Section 25534(a)(4) does not apply to the Tesla Power Project. Since the shorter deadline of Section 25534 does not apply to the Tesla Power Project, the 5-year commencement of construction deadline of Section 1720.3 of the Commission Regulations is the applicable deadline for the Tesla Power Project. That deadline was June 16, 2009, which was extended by the Commission at the request of PG&E on June 3, 2009, for 90 days. PG&E requests the deadline be extended further to June 16, 2014, for good cause pursuant to Section 1720.3 of the Commission Regulations.

¹ SB 1269 (Peace, 2002) Senate Floor Analysis

² January 9, 2002

Although the 12-month deadline is inapplicable to the Tesla Power Project, PRC 25534 (a) (3) authorizes the Commission to revoke a certificate for, "A violation of this division or any regulation or order issued by the commission under this division." This would include violation of the requirement to commence construction within the 5-year time frame of Title 20 CCR Section 1720.3 unless that construction deadline is extended upon a finding of good cause.

Since there is no provision of the *Warren Alquist Act* or the Commission's regulations that specifies that a valid certificate issued by the Commission expires within a specified timeframe by operation of law, the Commission must affirmatively act to revoke the certification under PRC 25534 for failure to commence construction within the applicable construction deadline. Section 1720.3 specifies that "Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause." As discussed above, PG&E timely requested this extension.

GOOD CAUSE STANDARD

2. PUBLIC RESOURCES CODE SECTION 25534 PROVIDES THE CRITERIA FOR DETERMINING WHETHER GOOD CAUSE FOR AN EXTENSION EXISTS

Section 1720.3 of the Commission's Regulations provides:

Unless a shorter deadline is established pursuant to § 25534, the deadline for the commencement of construction shall be five years after the effective date of the decision. Prior to the deadline, the applicant may request, and the commission may order, an extension of the deadline for good cause.

Section 1720.3 does not define the term "good cause." In order to establish the good cause standards the Commission should consider, we have analyzed past Commission extension requests and other provisions of the *Warren-Alquist Act*.

PRIOR COMMISSION DECISIONS

We offer the following Commission actions as illustrative of past Commission practices in considering whether good cause exists to extend a construction deadline. The most recent is the East Altamont Energy Center (EAEC) request for extension approved by the Commission approximately 10 months ago. The second is the Russell City Energy Center (RCEC) which was approved by the Commission

East Altamont Energy Center

East Altamont Energy Center, LLC requested an extension of the 5-year commencement of construction deadline for its East Altamont Energy Center (EAEC) on May 16, 2008. To address the issue of good cause, it stated:

The requested extension is necessary because the Project Owner will not be able to commence construction by August 19, 2008. Prior to commencing construction, the Project Owner must enter into a long term power purchase agreement with at least one purchaser for a significant portion of the output of the facility. Since the project was permitted, the Project Owner has been marketing the power to investor owned and municipal utilities in the region. In the past, the Project Owner has participated in solicitations and intends to participate in the most recent Pacific Gas and Electric Company ("PG&E") 2008 All Source Long-Term Request for Offers solicitation. PG&E is seeking to procure 800-1200 MW of new resources, with a preference to obtain new dispatchable, operationally flexible resources with on-line dates no later than May 2015. The Project Owner believes that the EAEC is uniquely qualified to meet the terms of PG&E's current solicitation and to meet the growing power needs of municipal utilities in the region.³

On August 13, 2008, the Commission approved the petition extending the construction deadline for a period of three years. Regarding good cause, the Commission stated:

The main issue under the applicable regulation here is whether petitioner has shown good cause for the requested extension. (Cal. Code Regs., tit. 20, § 1720.3.) Petitioner's request for a three year extension of the deadline to commence construction rests on

³ Petition For Extension of Deadline For Commencement of Construction For the East Altamont Energy Center (01-AFC-4C), dated May 16, 2008.

statements that it wishes to continue to market its project, participate in a utility solicitation, and compete for a power purchase agreement. Based on the reasons provided in the petition, the Commission finds that good cause for a three year extension has been shown.⁴

For EAEC, the Commission based its decision finding good cause on the Applicant's desire to continue to market the project and participate in future utility solicitations. It appears that the standard for good cause applied in the EAEC case is whether or not the Applicant desires to construct the project should future events allow the project to be constructed. In the case of the EAEC, the condition precedent to construction of the project would be success in competition for a power purchase agreement.

Russell City Energy Center

Russell City Energy Company, LLC petitioned for an amendment to essentially move the originally licensed project to a nearby location. While that amendment was being evaluated by the Commission it filed a petition to extend the start of construction deadline. In its petition, it stated:

The requested extension is necessary because the Project Owner will not be able to commence construction by September 10, 2007. Prior to commencing construction, the following three steps must be completed: (1) The Project Owner must receive a decision from the Commission approving Amendment #1, (2) PG&E must secure a Certificate of Public Convenience and Necessity ("CPCN") for construction of the transmission line that will connect the Russell City Energy Center to PG&E's transmission system, and (3) the Project Owner must complete financing of the Project. These steps will not be completed by September 10, 2007, but are likely to be completed in the last quarter of 2007. The Project Owner anticipates commencement of construction in the first quarter of 2008.⁵

⁴ Commission Order for East Altamont Energy Center granting extension of construction deadline, dated August 13, 2008.

⁵ Petition for Extension of Deadline For Commencement of Construction for the Russell City Energy Center (01-AFC-7C), dated July 25, 2007

On August 29, 2007, the Commission approved the petition extending the construction deadline for a period. Regarding good cause, the Commission stated:

Through its petition and these proceedings, petitioner Russell City Energy Company, LLC asserted that this extension is necessary because the project owner will not be able to commence construction by September 10, 2007 due to three steps needing first to be completed: 1) Energy Commission's approval of the proposed amendment to relocate the project, 2) Public Utility Commission approval of PG&E's application to construct a transmission line for the project and 3) project financing. No other person offered comments..... There being no objection and good cause having been shown by petitioner, the California Energy Commission hereby grants the petition to extend the start of construction of the Russell City Energy Center from September 10, 2007, to September 10, 2008.⁶

In the case of the RCEC the Commission applied a good cause standard that focused on the desire of the Applicant to construct the project subject to three contingent future events; successfully obtaining authorization to construct (Commission approval of the amendment and CPUC approval of the transmission line) and the ability to obtain project financing.

For both the EAEC and the RCEC the Commission focused on the Applicant's future desires and the necessity of the extension to achieve those desires. The Commission did not inquire whether the Applicant's desires would ultimately be in the public interest.

While PG&E understands that the Commission desires to clarify what types of evidence is necessary to establish good cause, the Commission should not adopt standards that conflict with its recent decisions.

⁶ Commission Order for Russell City Energy Center granting extension of construction deadline dated August 29, 2007

PUBLIC RESOURCE CODE SECTION 25534

While the 12-month deadline established by Section 25534 is not applicable to the Tesla Power Project, Subsection (d) of 25534 provides relief from the deadline upon a showing of good cause and Subsection (e) provides guidance on when the Commission shall determine that good cause for an extension exists.

Subsection (d) of 25534 provides:

(d) The failure of the owner of a project subject to the start-of-construction deadline provided by paragraph (4) of subdivision (a) to meet construction or commercial operation milestones, without a finding by the commission of good cause, shall be cause for revocation of certification or the imposition of other penalties by the commission.

(e) A finding by the commission that there is good cause for failure to meet the start-of-construction deadline required by paragraph (4) of subdivision (a) or any subsequent milestones of subdivision (c) shall be made if the commission determines that any of the following criteria are met:

(1) The change in any deadline or milestone does not change the established deadline or milestone for the start of commercial operation.

(2) The deadline or milestone is changed due to circumstances beyond the project owner's control, including, but not limited to, administrative and legal appeals.

(3) The deadline or milestone will be missed but the project owner demonstrates a good faith effort to meet the project deadline or milestone.

(4) The deadline or milestone will be missed due to unforeseen natural disasters or acts of God that prevent timely completion of the project deadline or milestone.

(5) The deadline or milestone will be missed for any other reason determined reasonable by the commission.

It is important to note that according to the plain language of Subsection (e) the legislature directed the Commission that it must find good cause exists, if the Commission can make one of the above findings. Not all findings need be made. In the case of the Tesla Power Project the Commission can make the following findings and therefore, must find that good cause exists for extension.

APPLICATION OF GOOD CAUSE STANDARD

THE FAILURE TO MEET THE START OF CONSTRUCTION DEADLINE IS DUE TO CIRCUMSTANCES BEYOND PG&E'S CONTROL.

As described in the Testimony of Fong Wan and William Manheim, in 2008 PG&E petitioned the California Public Utilities Commission (CPUC) for the authority to construct and operate the Tesla Power Project for the benefit of its customers. The CPUC denied PG&E's request which prevented PG&E from constructing the Project. This regulatory action satisfies the requirement that circumstances beyond PG&E's control prevented it from meeting the commencement of construction deadline.

THE START OF CONSTRUCTION DEADLINE WILL BE MISSED EVEN THOUGH PG&E MADE A GOOD FAITH EFFORT TO MEET IT

As described in the Testimony of Fong Wan and William Manheim, PG&E expended considerable time and effort in beginning design of the Tesla Power Project and in acquiring the major power island equipment components. PG&E believed in good faith that it would obtain CPUC authorization to construct and operate the Tesla Power Project pursuant to its interpretation of CPUC policy. The fact that the CPUC disagreed with PG&E's assessment does not negate the fact that PG&E was acting in good faith on behalf of its customers.

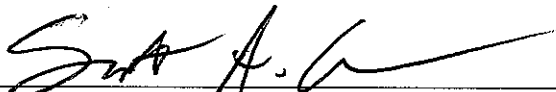
CONCLUSION

We believe the appropriate standard to apply in determining whether good cause exists for extending the commencement of construction deadline is the standard outlined in PRC 25534. That standard requires inquiry into why the deadline was missed and does not focus the inquiry into why the extension is needed. In the past the Commission has focused on the necessity of the extension and has not focused on the reasons why construction could not commence before the deadline. The Testimony of Fong Wan and William Manheim, clearly shows that the deadline cannot be met due to circumstances beyond PG&E's control despite its good faith effort to meet the deadline.

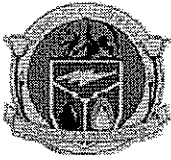
To be responsive to the Committee Order, PG&E has included testimony on each and every question presented although it believes the relevant inquiry is limited to those areas outlined in PRC 25534.

Respectfully Submitted,

Dated: June 29, 2009



Scott A. Galati
Counsel to Pacific Gas and Electric Company



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION
FOR THE *Tesla Power Project*

DOCKET No. 01-AFC-21C

PROOF OF SERVICE

APPLICANT'S COUNSEL

Scott Galati
Galati-Blek LLP
455 Capitol Mall, Ste. 350
Sacramento, CA 95814
sgalati@gb-llp.com

INTERESTED AGENCIES

Central Valley Regional Water
Quality Control Board
Attn: Micheal Kummer
3443 Routier Road, Suite A
Sacramento, CA 95827-3098
kummern@rb5s.swrcb.ca.gov

Bay Area Air Quality
Management District
Attn: Dennis Jang
939 Ellis Street
San Francisco, CA 94109
djang@baaqmd.gov

Alameda County Community
Development Agency, Planning
Department
Attn: Bruce H. Jensen, Planner
399 Elmhurst Street, Room 136
Hayward, CA 94544
Bruce.Jensen@acgov.org

City of Tracy
City Manager:
Leon Churchill, Jr.
City of Tracy, City Attorney:
Daniel Sodergren
333 Civic Center Plaza
Tracy, CA 95376
leon.churchill@ci.tracy.ca.us
daniel.sodergren@ci.tracy.ca.us

INTERVENORS

Robert Sarvey
501 W. Grantline Road
Tracy, CA 95376
SarveyBob@aol.com

CURE

Attn: Marc D. Joseph, Esq.
Adams Broadwell et al
651 Gateway Blvd.,
Suite 900
South San Francisco, CA 94080
mdjoseph@adamsbroadwell.com

Californians for Renewable
Energy (CARE)
Attn: Michael Boyd
5439 Soquel Drive
Soquel, CA 95073
MichaelBoyd@sbcglobal.net

San Joaquin Valley Air Pollution
Control District
Attn: Dave Warner
Director of Permit Services
1990 E. Gettysburg Ave.
Fresno, CA 93726-0244
Seyed.Sadredin@valleyair.org
Rupi.gill@valleyair.org

ENERGY COMMISSION

JEFFREY D. BYRON
Presiding Member
Siting Committee
jbyron@energy.state.ca.us

KAREN DOUGLAS
Associate Member
Siting Committee
kdouglas@energy.state.ca.us

Gary Fay
Chief Hearing Officer
gfay@energy.state.ca.us

Steve Munro
Compliance Project Manager
smunro@energy.state.ca.us

Jonathan Blees
Assistant Chief Counsel
jblees@energy.state.ca.us

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

Elena Miller
Public Adviser
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Marie Mills, declare that on June 29, 2009, I served and filed copies of the attached **PG&E'S INITIAL BRIEF IN SUPPORT OF ITS REQUEST FOR EXTENSION OF CONSTRUCTION DEADLINE** dated **June 29, 2009**. 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/tesla]. 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 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. **01-AFC-21C**
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.



Marie Mills