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01-AFC-21C	
DATE	<u>08/03/2009</u>
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STATE OF CALIFORNIA ENERGY RESOURCES CONSERVATION AND
DEVELOPMENT COMISSION

In the Matter of the)	Docket No. 01-AFC-21C
)	
Tesla Power Plant Extension)	Robert Sarvey's Post
)	Hearing Brief

Background

On July 20, 2009 the Committee held an evidentiary hearing on whether good cause existed to extend the license for the 11169 MW Tesla Power Project. On July 21 the Committee issued an order for the parties to file post hearing briefs answering by August 3, 2009. The committee ordered the Parties to respond to the following six questions. Pursuant to the July 21, 2009 order Robert Sarvey respectfully submits the following brief.

I Time limit on extensions

1. Section 1720.3 of the Commission's regulations sets a 5-year deadline for the "commencement of construction," but it does not establish a limit on the extension timeframe. When a project owner requests a license extension under section 1720.3, what is a reasonable time to extend a license? Could the Commission grant an extension for 5 years, 10 years, 20 years?

The most recent construction extensions granted by the Commission have been for two years for the Russell City Project, and three years for the East Altamont Energy Center. Whether a certain extension time frame is reasonable depends on the facts and circumstances surrounding the Extension.

In the Russell city case the project was granted a two year extension because, “the project owner's inability to commence construction is due to multiple past appeals related to the Commission's decision and a pending appeal of the project's PSD permit a federal air permit, at the Environmental Appeals Board of the U.S. Environmental Protection Agency.”

The EAEC was granted a three year extension, “for the limited purpose to allow petitioner to market the project and compete in solicitations for new capacity and, in any event, for the project owner to file a timely petition for modification to address the issues identified in staff's analysis and other issues as may arise depending on the circumstances at the time petitioner has successfully marketed the project or entered into a power purchase agreement.”

PG&E has asked the Commission for a five year extension. This would be unprecedented for the Commission to grant such a long period for an extension. It is unusual for any agency to grant such a long time frame for construction. The California Uniform Building Code Section 105.5 states: “Every permit issued shall become invalid unless the work on the site authorized by such permit is commenced within 180 days after its issuance, or if the work authorized on the site by such permit is suspended or abandoned for a period of 180 days after the time the work is commenced. The building official is authorized to grant, in writing, one or more extensions of time, for periods not more than 180 days each. The extension shall be requested in writing and justifiable cause demonstrated.”¹

The County of Alameda building code where the Tesla Project is located states:

¹ . http://bulk.resource.org/bsc.ca.gov/title24_part02_vol02.pdf Volume 2 page 613

“The permit holder may renew a permit for a period of no longer than one year beyond the original expiration date, provided that the request for renewal is submitted to the building official prior to the said expiration date, and provided all of the following, 1. No changes have been made or will be made in the original plans and specifications. 2. No laws, regulations, rules, or ordinances have been changed in such a manner as to prohibit the completion of the proposed work. The renewed permit shall require that all incomplete work conform to the laws, regulations, rules, and ordinances in effect at the time of renewal. 3. Receive the payment of an established renewal fee.”²

The FERC is governed by the Federal Power Act³ which requires a licensee to commence construction of a newly licensed hydroelectric facility within two years of license issuance but allows the Commission to extend the deadline once for a maximum of two additional years. If the licensee does not commence construction within the statutory time frame, then “the license shall . . . be terminated” by the Commission after notice to the licensee. *Id.*; see 18 C.F.R. § 6.3 (requiring 90 days’ notice to the licensee before termination).⁴

The FERC has already addressed the issue of construction extensions where the sole purpose of the extension is that the power project is waiting for a power purchase agreement. Elizabeth Moler chairman of the FERC made these comments to Congress about extending a license to support a project waiting for a power purchase agreement.

STATEMENT BY ELIZABETH A. MOLER, CHAIR, FEDERAL ENERGY REGULATORY COMMISSION

*I would not support legislation to amend Section 13 of the Federal Power Act to extend the four-year statutory deadline. **Holding a license without commencing construction constitutes “site banking,” which in the long-held view of the Commission, as affirmed on judicial review, is contrary to the intent of the Act. Nearly all failures to commence timely project construction have been due to the lack of a power purchase contract. If the project owner cannot find a market within four years, then the site should***

² <http://www.acgov.org/pwa/BEPMH%20to%20BOS%20v4.pdf>

³ Section 13 of the FPA, 16 U.S.C. § 806

⁴ http://www.ferc.gov/legal/court-cases/opinions/2009/08-1005_opinion.pdf

*be made available for other uses.*⁵

Obviously the Commission is not bound by other agencies determinations on construction extensions but the discussion above sheds some light on other agencies construction extension policies and experiences. The Commission ultimately can grant an extension for a five year period but it would be poor policy in the current environment where laws, regulations, and environmental conditions are changing so rapidly. The FERC policy would seem to be the most reasonable template for the Commission since their hydro electric projects are as complex and difficult to site as a natural gas fired power plant and rely on a power purchase agreement to build. A two year extension should be the longest time frame the Commission grants. Additional extensions can be granted for good cause.

2. If PG&E's position on section 1720.3 is correct, the license would not expire even if construction did not commence within 5 years unless the Commission acted affirmatively to terminate the license. What are the implications of allowing certification to last in perpetuity?

The implications of letting a license last into perpetuity are that when the project is licensed the project complies with all LORS. If the project waits 5, 10 or 20 years or more the LORS and baseline conditions change over time. For example a project could utilize a 10 or 20 year old license and avoid utilizing the Best Available Control Technology that exists today. For Example the Gateway project licensed in 2001 and recently operational does not comply with current BACT standards for NOx of 2ppm as it was licensed at 2.5ppm a 20 % difference. The projects CO emissions are limited to 6ppm by the original decision, current BACT is 2ppm for CO a 300% difference. The Gateway Project

⁵ <http://ftp.resource.org/gpo.gov/reports/104/sr108.104.pdf>

was licensed in May of 2001 and was operational in 2008 a difference of only seven years.

Another problem that exists with granting a license into perpetuity is that permits not administered by the CEC may not be properly updated resulting in LORS non compliance. The Gateway Project owned by PG&E does not have a valid PSD permit according to the BAAQMD. The Air district is required to update the authority to construct and the PSD permit every two years. The BAAQMD extended the ATC permit and at the same time believed according to their testimony that they were extending the PSD permit.⁶ Later they found thorough communications with the EPA they had not met the Federal requirements for extending the PSD permit.

Granting a license into perpetuity could lead a project to violate a new ambient air quality standard. For instance the Gateway Projects original FDOC indicated that the project fails to comply with the new one hour NO₂ ambient air quality standard for the State of California.

Allowing a project license to last in perpetuity could allow a project to build in an area where interim source growth in the area may have occurred and caused significant degradation of air quality. The project area around the Tesla Project has experienced a large increase in source growth. In FPL's amendment request to the CEC, which is in this compliance docket, FPL performed a PSD analysis of the project area.⁷ Over 31 major sources and 26 minor sources were identified for the PSD increment analysis. The maximum modeled 24-hour average PM₁₀ increment consumption was 140 µg/m³, and the annual average PM₁₀ increment consumption was 30 µg/m³.⁹

A project with an old license could employ a technology that is no longer acceptable such as once through cooling. A project could use fresh water for cooling purposes instead of recycled water. The Commission currently does not

⁶[http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/0E7FD6B0DCAC7CBD852575EC00450927/\\$File/BAAQMD%20Brief%20...37.pdf](http://yosemite.epa.gov/OA/EAB_WEB_Docket.nsf/Filings%20By%20Appeal%20Number/0E7FD6B0DCAC7CBD852575EC00450927/$File/BAAQMD%20Brief%20...37.pdf) page 3

⁷http://www.energy.ca.gov/sitingcases/tesla/compliance/amendment/TPP_Petition_for_Post_Cert_Amendments_Nov_2006.pdf page 10.

require updating to current LORS unless an amendment is filed for that particular topic.

The applicant could have an outdated mitigation agreement which no longer reduces a significant impact to insignificance. This has occurred with the Tesla Projects AQMA with the San Joaquin Pollution Control District.

3. PG&E has identified the reasons for requesting the license extension. What general factors should the Commission consider in determining “good cause” for a license extension?

In their briefs, Staff and PG&E have identified the only factors necessary to demonstrate good cause are the project’s lack of a power purchase agreement and the applicants pledge to continue seeking a contract. Staff and the applicant point to the last two extensions granted by the Commission the Russell City Project and East Altamont Energy Center (EAEC).

First, the commission orders in the Russell City and EAEC proceeding are not decisions that can be relied upon as precedent under California law. Government Code Section 11425.60 provides that “a decision may not be expressly relied upon as a precedent unless it is designated as a precedent decision by the agency.” None of the Commission orders in the Russell City or East Altamont proceedings were designated as precedent decisions.

Secondly, there are factual differences in the EAEC and Russell City case. In the Russell City case the project had just completed a thorough amendment review bringing the project up to current LORS and evaluating the projects impacts under the current environment. Here in the Tesla case the project review was completed with the final staff assessment in 2003, over six years ago. If the Tesla Project is granted a 5 year extension and moves forward without an amendment the majority of environmental review could be 15 years old.

The Russell City project also was seeking approval of its amended power purchase agreement with PG&E at the CPUC. The Tesla Project has no power purchase contract and PG&E was recently rejected at the CPUC in a failed attempt to get a CPCN. The Tesla Project is also not a good fit for the State's current stated need for 800 to 1200 MW of fast ramping dispatchable power.

The EAEC construction extension involved a merchant power generator seeking an extension so it could pursue a power purchase agreement. The major difference is that the Tesla Project is not owned by a merchant generator but is owned by PG&E, the utility that evaluates and selects the contracts for procurement in the current regulatory scheme. PG&E evaluates its own projects over a thirty year period while other competitor's projects are limited to a 10 year power purchase agreement. Obviously PG&E's market value is much higher for its own generating assets since the capital cost can be spread over 30 years not just ten years. Utility owned generation will always look better in market valuation under those circumstances. The CPUC has identified this problem and is supposed to generate a mechanism in the current procurement activities to evaluate utility projects on an even playing field with merchant generator projects but that process has not been completed. PG&E not only selects the projects but has many competitive advantages over other market participants. PG&E can ask for expediated approval for its projects, while merchant generators cannot. PG&E can ask for cost recovery from ratepayers on abandoned projects like it is currently doing in its 2010 ERRRA filing, but independent power producers must shoulder the burden of failed projects. PG&E can ask ratepayers to fund capital costs for projects held for future use, but independent generators must pass these costs on to shareholders. PG&E can claim a reliability need to get its projects approved quickly. PG&E has access to all confidential information while other competitors are denied access to the very information that PG&E uses for its analysis in selecting projects. Because PG&E owns the Tesla Project it is very much different form the East Altamont Energy Center.

While staff and applicant have focused on the projects lack of a power purchase contract as a good cause for extension of its license, they have ignored

more recent Commission guidance on the factors which define good cause. At the Commission Business meeting on June 3, 2009 Commissioner Douglas advised the parties to examine its recent decision on what constitutes good cause for the Beacon Solar Project.⁸ That order opined:

“Good cause” is a flexible concept. As the courts have noted, the term “is not susceptible of precise definition [and] its definition varies with the context in which it is used” (Zorrero v. Unemployment Ins. Appeals Bd. (1975) 47 Cal.App.3d 434, 439); it is “largely relative in [its] connotation, depending upon the particular circumstances of each case” [R.J. Cardinal Co. v. Ritchie (1963) 218 Cal.App.2d 124, 144]. The nature and extent of the showing necessary to satisfy the good cause requirement for an extension must, of necessity, vary with the circumstances of every case (Chalco-California Corp. v. Superior Court of Los Angeles County (1963) 59 Cal 2d 883). There are no hard-and-fast rules that apply in our proceedings.”

PG&E and staff in their good cause briefs have apparently failed to understand the fluid nature of a good cause decision and have relied on a hard and fast rule that pursuit of a power purchase agreement demonstrates good cause. The committee in this proceeding has outlined the factors it considers to demonstrate good cause in its hearing order dated June 9, 2009.⁹

3 A&B) Is the public interest is served?

The testimony in the record is that PG&E’s holding of the Tesla License hurts the competitive market and harms the public interest. (Exhibit 210, 200 pages 2-7) Granting PG&E an extension instead of requiring a new AFC will costs the public hundreds of thousand of dollars. The fee to apply for a new AFC application for 1169 MW is \$462,426 but if a an extension is granted only the annual compliance fee of \$19,800 a year would be assessed.

3C) What are the reasons for the extension?

⁸ Commission business meeting June 3, 2009 RT pages

⁹ NOTICE OF EVIDENTIARY HEARING AND COMMITTEE ORDER RE: APPLICANT’S PETITION FOR EXTENSION OF LICENSE http://www.energy.ca.gov/sitingcases/tesla/notices/2009-07-20_Notice_of_Evidentiary_Hearing.PDF

The record reflects that PG&E is holding the license on the outside chance that the CPUC will grant them a CPCN. They requested the extension because the CPUC denied them a CPCN in October of 2008. (Exhibit 3 pages 5,6)

3 D) What efforts were made by the previous and current Project Owner to meet pre-construction requirements contained in the Conditions of Certification?

CEC staff's testimony is that nothing has been done by either PG&E or FPL to meet the pre construction requirements contained in the Conditions of Certification. (Exhibit 100 page 1)

3 E) Will the Project Owner have the financial ability to build the Project if an extension is granted?

The record indicates that PG&E has the financial ability to build the project (Exhibit 3 page 6) but the question is irrelevant because without CPUC approval PG&E cannot build.

3 F) What plans does the Project Owner have to market the Project to other power plant developers?

PG&E will consider marketing the project to other developers if it is in the best interests of its customers. (Exhibit 3 page 6)

3 G) What aspects of the Tesla Decision are still applicable? If the Project goes forward (using a reasonable estimate of when that would occur), what aspects would require revision or updating with additional evidence or argument, because

3 G-1) The Project no longer corresponds with the project description in the Decision;

PG&E has already attempted to build only 560 MW of the project at the CPUC. Jack Caswell's testimony at the evidentiary hearing is that according to

his meeting with PG&E he believes the project description will change. PG&E's testimony is that it is foreseeable that PG&E or some other developer could construct a portion of the Tesla Project. (Exhibit 3 page 5) The applicant's attorney made it clear that they don't even know what size the project will be.¹⁰ Current portfolio needs for the State are for 800 to 1200 MW of fast ramping power plants.

3 G-2) Applicable laws, ordinances, regulations, or standards ("LORS") have changed;

Numerous LORS have changed since Tesla received its license. The EPA has adopted a lower 24 hour PM 2.5 standard. The 1 hour ozone and PM-10 standards have been eliminated. The State has reduced the 1 hour Nitrogen Oxide standard, adopted a new annual PM 2.5 standard and reduced the 8-hour ozone standard. (Exhibit 3 page 6)

New Greenhouse Gas emission standards have been adopted. New rules for procurement of electricity have dramatically changed since the project was approved. Nitrogen deposition has emerged as an important biological concern. The EPA finalized its regulations to implement the New Source Review (NSR) program for fine particulate matter on July 15, 2008. (Exhibit 203 Page 10)

3 G-3) Environmental conditions in the site area have changed;

In FPL's amendment request to the CEC, which is in this compliance docket, FPL performed a PSD analysis of the project area. Over 31 major sources and 26 minor sources were identified for the PSD increment analysis. The maximum modeled 24-hour average PM10 increment consumption was 140 µg/m³, and the annual average PM10 increment consumption was 30 µg/m³. That analysis did not include two projects currently undergoing CEC review the expansion of the

^{10 10} Business Meeting RT 6/3/09 pages 26,27 lines 23-14

Tracy Peaker Plant and the construction of the Mariposa Energy Center. (Exhibit 200 page 8)

3 G-4) The record upon which the Decision is based is stale;

Most of the analysis for this project was completed in April of 2003 over six years ago. Background conditions at the site have changed dramatically since the project was evaluated, as evinced by the PSD increment analysis performed in November of 2006 which is in this compliance docket. Numerous LORS have changed and the majority of the analysis is stale. (Exhibit 200 page 10)

3 H) Would a major amendment modifying the original license meet CEQA requirements to provide the public “with detailed information” about the Project’s environmental impacts if the revised Project is presented in a piecemeal manner? (See Pub. Resources Code, § 21061.)

With the approach PG&E is advocating, a piecemeal analysis would result because PG&E will propose a different project description but will want to utilize the original Tesla analysis of an 1169 MW project in violation of Public Resources Code Section 21061.

3 I) How much money, calendar time, and person-years of effort would need to be expended (by the Energy Commission, the Project Owner, or others) to do the revision and updating described under 3.g.?

Staffs testimony at the evidentiary hearing is that the revisions would take 12 months or more. The applicant has testified that it will take 6 to 12 months just to comply with LORS and renew the ATC and the PSD permit. (Exhibit 3 page 10) The applicant testimony states that it would cost \$150,000 – \$250,000 just for the air permits. The applicant’s testimony is that the other permits would take \$200,000 to \$400,000 (Exhibit 3 page 12). Staff provided no cost estimate since they believe that without an amendment they can’t predict the time and money it would take to update the permit. The record demonstrates that the only

reimbursement the CEC would receive would be the annual compliance fee of \$19,823. It could cost hundreds of thousands of dollars of taxpayer money to process this project if an extension is granted.

3 J) Would the revisions and updating described in 3.g. require the filing of a petition to amend the Tesla Decision or a new AFC?

The Applicant failed to answer this question. Since the time to amend this project's license and get a contract with the CPUC would take 12 to 24 months and the project would require extensive revisions it would seem likely that a new AFC is in order for this project. PG&E will not even commit to building an 1169 MW project so a new AFC should be required. A new AFC would benefit the taxpayers since the project owner would have to pay the CEC for the review.

3 K) What permits must still be obtained (or renewed) for the Project? How much money, calendar time, and person-years of effort will need to be expended (by the Project Owner or others) to obtain those permits?

The applicant estimated that the cost to renew these permits would be about \$200,000 to \$400,000. The applicant offered no time frame for the question of the timing on these permits.

4. If a project owner applies for another license extension when an existing extension expires, when should the request be filed and what time period would be appropriate for a second extension?

A timely petition shall be one that is filed in sufficient time to allow for analysis and decision prior to the granting of the extension. An appropriate time period would depend on the facts and circumstances surrounding the extension request.

5. If the Commission decides to grant PG&E's request for an extension of the Tesla Power Plant license, what conditions should be attached to such an order?

The Commission should require that the applicant reimburse the Commission's expenses related to processing the amendment. Nearly every government agency requires a reimbursement agreement for all development costs. The Commission should require that PG&E renegotiate the AQMA with the SJVUAPCD. The project needs an AFC level review since LORS and conditions have changed markedly and the project owner will be proposing basically a new project. A full analysis of all topic areas should be required in a complete amendment because the environmental review is stale.

6. Any other issues that the parties believe were not adequately addressed at the evidentiary hearing.

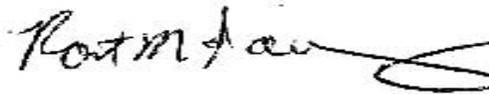
Because the Commission grants five years to begin construction, most requests for extensions of time to commence construction involve a stale analysis. LORS and environmental conditions are changing much more rapidly than they were in the 1980's and 1990's. The Commission should consider adopting a licensing policy similar to the FERC where the initial time to commence construction is two years and extension requests are limited to two years. Further extension requests may be granted for good cause.

Conclusion

The Committee has outlined the factors which it believes demonstrate good cause for the extension of time to construct this project. Staff and PG&E have stubbornly stuck to previous Commission decisions in the EAEC and the Russell City Project in which the pursuit of a power purchase agreement demonstrates good cause. The commission is not bound by these decisions as the other parties have suggested. The nature and extent of the showing necessary to satisfy the good cause requirement for an extension must, of necessity, vary with the circumstances of every case. The committee is correct in its assessment of the factors for good cause for this project.

The Tesla Project in the hands of PG&E will chill the competitive market and create further opportunities for PG&E to claim unique circumstances or reliability needs. PG&E has not committed to build the 1169 MW Tesla Project and in fact has no proposed project description for this extension request. PG&E and staff have estimated that the time required to amend this project and gain all project approvals will be 12 months or more. Baseline conditions in the project area are changing rapidly and a new AFC level assessment of the Tesla Project's environmental impacts is warranted. PG&E's request for an extension of time to commence construction should be **DENIED**.

Respectfully Submitted,

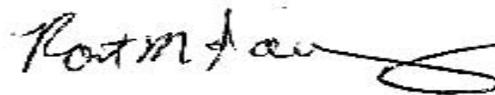
A handwritten signature in black ink, appearing to read "Robert M. Sarvey", with a long horizontal flourish extending to the right.

Robert M. Sarvey

DECLARATION OF SERVICE

I, Robert Sarvey , declare that on August 3 , 2009, I served electronic copies of the attached, **Robert Sarvey's Post Hearing Brief**, dated August 3, 2009 to all parties on the proof of service list.. 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: [\[www.energy.ca.gov/sitingcases/tesla\]](http://www.energy.ca.gov/sitingcases/tesla).

I declare under penalty of perjury that the foregoing is true and correct.



Robert Sarvey



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APPLICATION FOR CERTIFICATION
FOR THE *Tesla Power Project*

DOCKET NO. 01-AFC-21C

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