STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Order Instituting an Informational (OII) Proceeding on Issues that are Critical to the Licensing of Thermal Power Plants.	Docket No. 10-SIT-OII-1

ELLISON, SCHNEIDER & HARRIS L.L.P. COMMENTS ON THE SITING COMMITTEE'S INFORMATIONAL PROCEEDING ON ISSUES THAT ARE CRITICAL TO THE LICENSING OF FUTURE POWER PLANTS

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INTRODUCTION

Ellison, Schneider & Harris ("ESH")[1] is pleased to offer these comments on the Order Instituting Informational Proceeding on the lessons learned and issues that are critical to the licensing of future power plants (hereinafter "Lessons Learned OII"). We applaud the Commission for opening the Lessons Learned OII, especially following an unprecedented siting year. Commission Staff, in particular, is to be commended for their hard work during this past year, despite furloughs and other staffing constraints.

ESH represents numerous power plant applicants at the California Energy Commission ("CEC" or "Commission"), both conventional and renewable facilities. These comments do not represent the views of any particular client of ESH, but rather are the observations that attorneys at the firm have formed from both practicing at the Commission as staff counsel and representing applicants before the Commission. Based on our collective experience with the Commission (totaling more than 75 years), we offer the following recommendations which are discussed in further detail below. We recommend that the Commission: (1) Employ an independent third party to evaluate how the Commission's siting process has changed over that past thirty years, and examine how the process can be improved; (2) Eliminate rules prohibiting ex-parte communications between Staff and applicants; (3) Increase Committee involvement in the siting cases; (4) Streamline conditions of certification; and (5) Make compliance documents available online.

DISCUSSION

I. The Commission Should Have An Independent, Third Party Review The Siting Process.

The OII will "explore the lessons learned" from the Commission's review of American Recovery and Reinvestment Act ("ARRA") solar thermal projects and natural gas-fired power plants during 2009 and 2010.[2] While applicants, Staff, and other stakeholders may have many useful insights, we urge the Commission to hire an independent third party that is not involved in the siting process to determine how the process can be recalibrated to be simpler, shorter, and more efficient. We suggest that the report be undertaken by an objective, outside non-governmental party without ties to any stakeholder. We would be pleased to offer suggestions for an independent third party.

This third party review should determine whether there are aspects of the siting process that can be made more efficient. Review of the Commission's process should consider and evaluate the following:

[1] ESH is a boutique law firm providing legal advice and representation to a variety of water and energy companies. More information about Ellison, Schneider & Harris is available at www.eslawfirm.com.

[2] CEC, *Order Instituting Informational Proceeding Examining Issues Related to Commission Processing of Applications for Thermal Power Plant Projects*, Order No. 10-1201-20, Docket 10-SIT OII-1 (Dec. 1, 2010).

- how local agencies process non-thermal power plants and thermal power plants under 50MW;

- how other state agencies license similar projects;

- compare the above processes, and any others selected for comparison to the Commission's licensing process, in terms of the following: (1) cost to the applicant, stakeholders, and the agency; (2) timing of the licensing process; (3) post-licensing challenges including the time required to resolve the challenge and the frequency of the challenge being successful; (4) the percentage of licensed projects that are successfully financed and constructed; (5) perceived value and satisfaction with the process through an anonymous survey of applications, other agencies and stakeholders that have participated in the process; and (6) the cost and environmental impacts of the projects that are successfully licensed. This comparison should include objective information regarding the key procedural and other differences between the processes that may account for any differences in the above;

- whether there is duplication with other state agencies and entities such as the CPUC, Air Districts, Regional Water Boards, and the CAISO; and

- how thresholds of significance for power plants compare to those used in environmental review of other large industrial projects.

Comparisons with the review processes of other agencies will enable the Commission to evaluate what works from the Commission's current process, and which aspects can be improved. The independent, third party's report should present concrete recommendations for improvements or changes to the Commission's process to make it more efficient and less costly for all participants while still meeting all applicable legal requirements. The Commission should then accept comments from stakeholders regarding the report.

Additionally, we urge the Commission to expand the analysis to look beyond just 2009 and 2010 projects, and examine how the siting process has changed over the last thirty years. The process has become longer and more costly over the last thirty years, and the level of detail and complexity has grown exponentially. Staff assessments have become progressively longer, and more detailed. Every year, the Commission's analyses build on analyses from the prior year. As a result, the staff assessments have become more and more voluminous and the time required to prepare each staff assessment has necessarily become longer as well. The same can be said of the conditions of certification included within the Commission's license, which have become increasingly more detailed and complex over the years. A third party evaluation would provide an unbiased assessment of whether the level of detail currently contained in staff assessments is

necessary to inform the public and comply with the Warren Alquist Act and the California Environmental Quality Act ("CEQA"). Furthermore, the third party review can evaluate whether the level of complexity and detail in the conditions of certification in recent siting decisions actually mitigate significant impacts when compared to the conditions of certification in earlier siting decisions.

II. The Ex-parte Rules Prohibiting Communications Between Staff and Other Parties Should Be Eliminated.

The rule restricting communications between Commission Staff and other parties, where the communication concerns modifying the Staff's recommendations, significantly hampers the siting process by placing unnecessary procedural requirements on communications between Staff and the parties, including applicants.[3] This rule is unnecessary because Staff is not a decisionmaker, and as such should not be subject to the same ex-parte rules as Commissioners and Commissioner staff. The rule significantly restricts candid conversations between Staff and other parties, and hampers efficient resolution of issues and concerns by requiring that a formal noticing delay of at least 10 days take place before a dialogue between Staff and another party may occur. The rule should also be eliminated because it is unevenly enforced. It is our perception that the rule is not applied as strictly to communications between Staff and intervenors, as it is applied to communications between Staff and applicants.

To our knowledge, no other state agency has a rule prohibiting communications between parties and agency staff who are not decisionmakers.

III. The Commission's Siting Process Would Benefit From Increased and Early Siting Committee Involvement.

Increased participation by the siting committee, especially early in the siting process, would greatly improve the Commission's processing of applications. The Commission should consider instituting a mandatory, monthly status conference or teleconference in every siting case. Currently, only Staff has the ability to attend siting committee meetings and update the Commissioners on the status of siting proceedings. Instituting a mandatory status conference would ensure equal access to the Commissioners by all parties to a proceeding.

The issuance of documents that are critical path items to keeping schedule, such as production of a PSA or an FSA, are often delayed by Staff in instances where the Staff and Applicant disagree about how much detail is required by CEQA or other applicable "LORS." In these circumstances, Staff believes that it needs more information in order to complete its analysis, while the Applicant believes that Staff seeks more information than is required by law.

[3] Rule 1710(a) provides in part: "All hearings, presentations, conferences, meetings, workshops, and site visits shall be open to the public and noticed as required by subsection (b); provided, however, these requirements do not apply to communications between parties, including staff, for the purpose of exchanging information or discussing procedural issues. Information includes facts, data, measurements, calculations and analyses related to the project. *Discussions between the staff and any other party to modify the staff's position or recommendations regarding substantive issues shall be noticed*. The staff may also meet with any governmental agency, not a party to the proceedings, for the purpose of discussing any matter related to the project without public notice."

The resulting, good-faith stalemate results in delays in scheduling that are often invisible to the siting committees.

Having the siting committees involved early and often to broker such disagreements will facilitate the more efficient processing of applications. The committees' involvement will also help focus participants and narrow issues, making the evidentiary process smoother and simpler.

The committee and the hearing officer definitely do the bulk of the "heavy lifting" at the end of these complex siting proceedings. By participating earlier and more often, there is no doubt that the committee's heavy lifting will be eased.

IV. The Commission Should Reevaluate Both Its Data Adequacy Requirements and the Level of Detailed Analysis in Certain Disciplines.

The Commission should re-visit its Data Adequacy requirements and question whether the level of detailed analysis sought by Staff is required by law.

As for the Data Adequacy requirements in "Appendix B" of the Commission's regulations, the most-recent iteration of those requirements greatly increased the Data Adequacy informational requirements. In some instances, the Commission has moved items that are better suited to the "discovery" phase into Data Adequacy. The Commission should compare its initial data requirements to those of other state agencies, including the State Lands Commission, and the CPUC. Rather than casting a broad net for all applicants in Data Adequacy, the Commission should, as its regulations provide, use the discovery process to tailor information requests to the specific facts of each project.

Similarly, the Commission should make a careful examination of the analyses for certain subject matters that appear to be overly detailed and overly prescriptive. As noted in our oral comments, the Conditions of Certification in Commission decisions have become increasingly lengthy. In one case, a single Condition of Certification is thirteen (13) pages long. We are aware of no projects of any nature in the State or the nation that are subject to so many lengthy "standard" conditions.

Duplication of analyses completed by other governmental agencies or requests for information beyond those required by any other governmental entities are equally troublesome. In particular, we urge the Commission to examine the lengthy Conditions of Certification for the following disciplines (presented in alphabetical order):

- Air Quality [wherein Staff's "AQ-SC" Conditions are added to the local air district's FDOC]
- Biological Resources [wherein Staff's recommendations are added onto the recommendations of CDFG and other resource agencies]
- Cultural Resources [wherein Staff's Conditions are unprecedented in both scope and detail to any other State or local agency approvals]
- Transmission System Engineering [wherein Staff re-run and re-analyze the studies performed by the CAISO and other Balancing Authorities]

- Soil & Water Resources [wherein Staff adds to the analyses performed by the Regional Water Boards, local water purveyors, and local flood control agencies]
- Visual Resources [wherein Staff's Conditions are unprecedented in any other State or local agency approvals]

The above are the disciplines that immediately come to mind as requiring close examination. Of course, given that the Commission's decisions have grown from less than 100 pages two decades ago to several thousand pages today, all disciplines require some degree of "zero-base" scrutiny by the Commissioners.

V. Compliance Documents Should Be Made Available Online.

At the December 14, 2010 OII Workshop, numerous parties recommended that compliance documents should be made available online. We agree with this recommendation, and believe that making these documents available to the public will provide the public with a better understanding of how compliance measures are satisfied, the requirements for constructing a project, and how environmental safeguards are implemented and enforced.

CONCLUSION

We thank the Commission for creating this opportunity for comments on the Commission's siting process and the lessons that we have all learned in the past year. We look forward to actively participating in this OII, and welcome any questions regarding any of the recommendations that we have put forward in these comments.

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