



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

09-AFC-3

DATE JUL 11 2011

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APPLICATION FOR CERTIFICATION FOR THE
MARIPOSA ENERGY PROJECT
MARIPOSA ENERGY, LLC

DOCKET No. 09-AFC-3

**[PROPOSED] ORDER DENYING PETITION FOR RECONSIDERATION
OF ADOPTION OF COMMISSION ORDER NO. 11-0518-16**

After having reviewed the Petition for Reconsideration and responses, the Chief Counsel's Office of the Energy Commission has prepared this draft Order, denying Robert Sarvey and Rob Simpson's Petitions for Reconsideration, for the Commission's consideration at the hearing on July 13, 2011.

On June 17, 2011, both Robert Sarvey and Rob Simpson filed Petitions for Reconsideration of the Energy Commission's May 18, 2011 Decision approving the Mariposa Energy Project (MEP).

On June 24th, 2011, Chairman Robert Weisenmiller issued an Order stating that the Commission would hear the Petitions at the July 13, 2011 business meeting, and allowing parties to the Mariposa Energy Project AFC proceeding to file responses on the Petitions prior to noon on July 6th, 2011. Responses were received from the Applicant and Staff only. Having reviewed the Petitions and the parties' filings, this Commission Order dismisses both Petitions for Reconsideration due to their failure to meet the threshold requirements identified in Title 20, California Code of Regulations, section 1720:

A petition for reconsideration must specifically set forth either: 1) new evidence that despite the diligence of the moving party could not have been produced during evidentiary hearings on the case; or 2) an error in fact or change or error of law. The petition must fully explain why the matters set forth could not have been considered during the evidentiary hearings, and their effects upon a substantive element of the decision.

(Cal. Code Regs., tit. 20, § 1720(a).)

Pursuant to section 1720(a), the following discussion provides the rationale for this ruling with respect to each issue raised by the Petitioners.

SARVEY PETITION

Bruns Road Reconstruction:

Petitioner Sarvey claims that since the May 5, 2011 Committee Conference on the Presiding Member's Proposed Decision (PMPD), construction of a solar project in the vicinity has caused degradation of one of the roads that will be used for project construction. Sarvey asserts that since this issue was only brought to the attention of the Energy Commission at the May 18, 2011 business meeting, that this is evidence of a new impact requiring reconsideration. (Sarvey Petition, p. 1-2.)

We disagree. Even if the new road deterioration were deemed to be significant new information, reconsideration is not required, because the Energy Commission's conditions of certification ensure that all damage to roadways caused by the MEP must be repaired. This provides complete mitigation of any such impacts. (See Condition of Certification **TRANS-2**.) CEQA does not require more. Therefore, there is no effect upon a substantive element of the Decision, and thus no reason to reopen the record or reconsider the Decision since the record establishes that the claimed impact has already been considered and fully mitigated.

School Impact Fee:

Petitioner Sarvey asserts that the record of the proceeding must be reopened to reflect that the Applicant is paying \$276.00 in school impact fees, rather than \$2,621.00, which is the amount identified in the Decision.

We note the clerical error but disagree that it constitutes grounds for reconsideration. The school impact fee has been paid, pursuant to Condition of Certification **SOCIO-1**, and the mere fact that the Decision misstated the school impact fee amount is not material to the substantive import of the Decision. The correct amount is clearly identified in the record. (5/5/11 RT 41:24-42:12.) The error has no effect upon a substantive element of the Decision; however, we shall order that the clerical error be corrected and that the Decision be modified to conform to the record that the school impact fee is \$276.00.

Operating Hours:

Petitioner Sarvey states that the eighth Finding of Fact in the Project Description section of the Decision erroneously concludes that the project may operate up to 4,000 hours per year. Mr. Sarvey's statement indicates confusion about how operating hours are denominated. As Mr. Sarvey's own footnote indicates, the Energy Commission distinguished the 4,000 operating hours from the startup and shutdown cycles, which together total 4,225 hours annually. (Sarvey Petition, p. 3.) The fact that the startup and shutdown hours were not included in the operating hours identified in Finding of Fact is not an error.

Air Quality:

Petitioner Sarvey correctly notes that sixth Finding of Fact in the Air Quality section of the Decision erroneously states that the Bay Area Air Quality Management District is

classified as non-attainment for the federal Annual PM2.5 standard. However, Mr. Sarvey failed to show how this clerical error could have any bearing on any substantive element of the PMPD. We find that it does not because the Final Determination of Compliance, the analysis in the Decision and the conditions of certification are based upon the correct designation of attainment. We hereby correct that error with this Order and find that the MEP is located in an area that is in attainment for the Federal Annual PM2.5 standard.

Land Use:

Petitioner Sarvey argues that the Energy Commission's conclusion that the MEP is a compatible use under the Williamson Act (Cal. Gov. Code §§ 51201(e); 51238(a)(1)) is flawed because the conclusion ignores the express terms of the Williamson Act contract itself, which limits uses to grazing and a small cogeneration/waste water distillation facility. Mr. Sarvey is simply re-arguing positions he supported during the pendency of the case and has not presented new evidence nor identified an error in fact or change or error of law. (Cal. Code Regs., tit. 20, § 1720(a), *supra*.)

As noted in the Energy Commission's Decision approving the MEP, Mr. Sarvey is correct that uses that are compatible under the Williamson Act can nonetheless be excluded pursuant to a Williamson Act contract. However, Mr. Sarvey ignores the subsequent discussion of this issue in the MEP Decision. As the Decision notes, "the contract itself is not a LORS, but an agreement between the landowner and the county. The Energy Commission is not a party to the contract, and has no role in the enforcement of the contract between the landowner and the county." (MEP Decision, Land Use, p. 11.) Notably, Williamson Act contracts are not immutable in any event and may be abrogated by the parties. Mr. Sarvey is therefore incorrect in saying that the Energy Commission's conclusion about compliance with the Williamson Act is an error. In fact, the MEP is consistent with the Act, and if the construction or operation of the MEP violates a Williamson Act contract, that issue will be addressed as a contract dispute, over which the Energy Commission has no jurisdiction.

Demographics:

Petitioner Sarvey argues that the 2000 census data relied upon by Staff is unreliable and the record must be re-opened. As with the Williamson Act issue, Mr. Sarvey is simply re-arguing positions he supported during the pendency of the case and has not presented new evidence nor identified an error in fact or change or error of law. (Cal. Code Regs., tit. 20, § 1720(a), *supra*.)

Moreover, he disregards the fact that the Energy Commission considered additional information submitted by other parties and in fact concluded that "there is enough evidence in the record to suggest that Mountain House may be close to having a 50 percent minority population. Therefore, we will assume just for purposes of this analysis, that Mountain House is a minority population." (MEP Decision, Socioeconomics, p. 11.) The Energy Commission then completed its Environmental Justice analysis by evaluating the evidence in the record to assess whether the MEP would cause high and adverse impacts which disproportionately affect minority or low-

income communities. As the MEP will not cause any significant impacts, the Energy Commission concluded that it would not disproportionately affect Mountain House.

SIMPSON PETITION

Treatment of Petition for Reconsideration:

Petitioner Simpson argues that the Energy Commission failed to abide by its own regulations in failing to address his April 8, 2011 Petition for Reconsideration filed in response to a Committee Ruling on Motion to Subpoena PG&E, dated March 28, 2011. Mr. Simpson argues that a response to his Petition was required pursuant to Sections 1716.5 and 1720 of the Commission's regulations. (Cal. Code Regs, tit. 20, § 1001 et seq.) We begin by observing that section 1716.5, by its own terms, applies to petitions to the Presiding Member of a Committee. As Mr. Simpson's Petition was clearly directed to the full Commission, section 1716.5 is not applicable.

In addition, although Section 1720 does state that the Commission shall hold a hearing on a petition for reconsideration, this section applies only to petitions to reconsider a final Energy Commission decision to approve a project. Notably, the language of Section 1720 expressly limits its applicability to "final" Energy Commission decisions or orders. Interlocutory appeals, such as Mr. Simpson's, are governed by Section 1215 of the Energy Commission's regulations. Section 1215 states that unless the Energy Commission acts on a petition within 30 days, it shall be deemed to have been denied. (Cal. Code Regs., tit. 20, § 1215(c).)

Finally, we note that Mr. Simpson has raised the PG&E subpoena issue in all briefs and comments, including a detailed statement to the full Commission about the need for PG&E testimony at the May 18, 2011 business meeting. In sum, the Energy Commission is completely aware of his position that the record of the MEP proceeding would be incomplete without the testimony of PG&E. The Energy Commission disagrees for the reasons more fully described in the March 28, 2011 Ruling on Motion to Subpoena PG&E. Mr. Simpson is simply re-arguing positions he supported during the pendency of the case and has not presented new evidence nor identified an error in fact or change or error of law.

Pipeline Safety:

Mr. Simpson reiterates an argument he made repeatedly throughout the MEP proceeding, that the record does not contain sufficient information on pipeline safety. Mr. Simpson is simply re-arguing positions he supported during the pendency of the case. He has not presented new evidence nor identified an error in fact or change or error of law. The Energy Commission notes that both Staff and the Applicant provided expert testimony on pipeline safety and that there is a seven page discussion of the pipeline safety issue in the Hazardous Materials section of the Commission Decision approving the MEP, as well as at the adoption hearing itself. Mr. Simpson's statements are nothing more than an attempt to re-litigate an issue for which the Energy Commission found his arguments unpersuasive.

Ex parte Communication:

Mr. Simpson contends that Commissioner Douglas should have been removed as the Presiding Officer of the MEP proceeding because of an ex parte communication between her and counsel for PG&E. We note that the applicable statute states that “[r]eceipt by the presiding officer of a communication in violation of this article *may* be grounds for disqualification of the presiding officer.” (Govt. Code, § 11430.60, emphasis added.) Mr. Simpson’s Petition contains no explanation of how the communication (a statement from PG&E’s counsel to Commissioner Douglas that PG&E would resist a Commission subpoena to testify regarding pipeline safety issues) could have created any prejudice or bias such that Commissioner Douglas’ objectivity should reasonably be questioned.

The substance of the communication is as follows:

10 MR. GALATI: Just one thing and then I can leave.
11 I just wanted to make absolutely clear to the record there
12 was an allegation of an ex parte communication between the
13 Committee and myself.
14 So that everybody is a clear exactly what
15 happened, when I showed up here, Mr. Celli and the
16 Committee came out and said, "Are you going to testify?"
17 And I said, "No. I am a lawyer I don't testify. I am not
18 a witness." They said, "What do you plan to do?" I said,
19 "I plan to come in and explain PG&E's position. Would
20 that be okay?" They said, "Yes." I came in and gave
21 that. That was the substance of our communication. There
22 was no ex parte comment about anything of substance.
23 I know how these things spread. I wanted to make
24 sure the Committee was not later on impeached and all
25 kinds of other horrible statements that are made in
1 business meetings there was an ex parte communication.
2 There was not.

3 HEARING OFFICER CELLI: Thank you. I just want
4 to add to that that we asked Mr. Galati in our
5 conversation what PG&E's position would be with regard to
6 a subpoena and Mr. Galati said they would oppose or resist
7 a subpoena. And so that was the subject matter of that
8 conversation. [3/7/11 RT 403:10-404-8.]

The record is clear that Mr. Simpson brought a motion to subpoena PG&E which the Committee took under submission. Shortly thereafter, counsel for PG&E arrived at the hearing and the Committee had a brief discussion with counsel for PG&E off the record. Immediately thereafter, the Committee went back on the record and had counsel for PG&E enter a statement into the record regarding PG&E's position on the subpoena and disclosing the entire substance of the conversation he had with the Committee. This disclosure is consistent with the applicable regulations (Cal. Code Regs, tit. 20, § 11430.50). We find that any error committed by the Committee when it engaged in these discussions was harmless because all parties were immediately apprised of the discussion's content on the record. The Committee's decision to deny the subpoena was fully explained in the Committee Ruling on Motion to Subpoena PG&E, dated March 28, 2011. Mr. Simpson has shown no bias or prejudice from the communication that would justify disqualification of a Committee member. (*Cf. Andrews v. Agricultural Labor Relations Bd.* (1981) 28 Cal.3d 781, 792 [the burden is on the moving party to "demonstrate concretely the actual existence of bias"].)

In addition, Mr. Simpson's Petition contains several factual errors about the events of the hearing at which the communication occurred. Counsel for PG&E did not testify as a witness but merely entered a statement on behalf of PG&E. Counsel for PG&E made himself available to answer questions of any of the parties at the hearing. No party offered testimony on Mr. Simpson's motion. And there is no communication that the Committee refused to make part of the record. In fact, Commissioner Douglas herself addressed the issue at the Energy Commission's adoption hearing for the MEP. (5/18/11 RT 155:18 – 157:2.) Again, we find that any alleged error was cured by the immediate disclosure of the content of the communications and, in the absence of evidence of bias or prejudice, was de minimus.

LORS Conformity and CEQA:

Mr. Simpson argues that the MEP will violate a Williamson Act contract. This is the same issue raised in Mr. Sarvey's Petition and, as noted above, the Energy Commission's licensing proceedings are not a forum for resolution of contract issues. The MEP Decision addresses the Williamson Act contract issue in full and Mr. Simpson's Petition does not identify new evidence or an error in fact or change or error of law necessitating reconsideration.

Mr. Simpson also states that the project does not comply with CEQA in “countless aspects,” identifying the Williamson Act contract issue as a *per se* significant adverse land use impact. Again, our response is the same as stated above: The Energy Commission’s licensing proceedings are not a forum for resolution of contract issues and Mr. Simpson has not presented new evidence nor identified an error in fact or change or error of law.

CONCLUSION

Because the Petitioners did not explain why the matters set forth in the Petition could not have been considered during the evidentiary hearings and have failed to establish an error in fact or law, the Petitions of Robert Sarvey and Rob Simpson are **DENIED**.

Dated: July 11, 2011, at Sacramento, California.

ROBERT B. WEISENMILLER
Chairman

JAMES D. BOYD
Vice Chair

KAREN DOUGLAS
Commissioner

CARLA PETERMAN
Commissioner



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(MEP)**

Docket No. 09-AFC-3

PROOF OF SERVICE
(Revised 5/16/2011)

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DECLARATION OF SERVICE

I, Muoi-Lyn Tran, declare that on July 11, 2011, I served and filed copies of the [PROPOSED] ORDER DENYING PETITION FOR RECONSIDERATION OF ADOPTION OF COMMISSION ORDER NO. 11-0518-16. 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/mariposa/index.html>].

The document has been sent to 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:

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I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Original Signed By:
Muoi-Lyn Tran
Chief Counsel's Office