BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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California Energy Commission
DOCKETED
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APPLICATION FOR CERTIFICATION FOR THE HIDDEN HILLS SOLAR ELECTRIC GENERATING SYSTEM

Docket No. 11-AFC-02

ORDER RE: APPLICANT'S MOTION IN LIMINE

Introduction and Summary

On August 31, 2012, the Committee designated to conduct proceedings on the above-captioned Application for Certification (AFC) received Applicant's Motion In Limine For A Committee Ruling To Ensure The Final Staff Assessment Conforms To Substantive Requirements Of The California Environmental Quality Act ("CEQA") (hereinafter "Motion").

On September 24, 2012, the Committee received reply briefs from Energy Commission staff (Staff), Intervenor Center for Biological Diversity (CBD), and Intervenor Cindy MacDonald (MacDonald), all opposing the Motion.

The Motion seeks an Order clarifying which party determines the project objectives, a finding regarding the feasibility of certain project alternatives, a ruling on the necessary content of the "No Project Alternative" analysis, and a ruling on whether project components located across the state line in Nevada are exempt from CEQA. We are mindful that we are still in the preliminary stages of the AFC process and that we must necessarily limit our review to questions of law and defer consideration of questions of fact until they can be tested openly and fairly in an evidentiary hearing.

Issues Raised in the Motion

Applicant's Motion seeks resolution of the following four issues:

1. Whether the Preliminary Staff Analysis (PSA) arbitrarily and improperly rejects Applicant's project objectives.
2. Whether the PSA analyzes and promotes alternatives that are legally infeasible, in contravention of CEQA.

3. Whether the Alternatives section of the PSA violates CEQA because the "No Project Alternative" arbitrarily fails to consider the project site's existing land use entitlements and what would reasonably be expected to occur in the foreseeable future if the project were not approved.
4. Whether the PSA improperly analyzes environmental impacts of project components located in Nevada that are expressly "exempt" from CEQA.

Discussion and Analysis

1. *Whether the Preliminary Staff Analysis arbitrarily and improperly rejects Applicant's project objectives.*

According to Applicant's Motion, on May 25, 2012, Staff released the PSA which included a set of project objectives significantly different than the "objectives sought by the project, in the AFC. Applicant alleges that several key objectives constituting the underlying purpose of the project were eliminated, including the use of BrightSource's proprietary technology in a utility-scale project, compliance with power purchase agreement (PPA) provisions, and achievement of a targeted first/second quarter 2015 commercial on-line date." (Applicant's Motion, p. 5, citing PSA Alternatives, pp. 6.1-2 – 6.1-3 (citations omitted).)

Instead, Applicant alleges that Staff included an altered set of project objectives "to facilitate Staff's analysis of a reasonable range of potentially feasible alternatives, including alternatives that may not be preferred by the project Applicant." In so doing, Staff's stated purpose was "to fulfill [the California Energy Commission's] role in implementing California's Renewables Portfolio Standard (RPS) program." (Applicant's Motion, p. 5, citing PSA Alternatives, pp. 6.1-2 – 6.1-3 (citations omitted).)

The basic requirement of the CEQA alternatives analysis is to identify ways to "attain most of the basic objectives of the project but [ ] avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Cal. Code Regs., tit. 14, 15126.6(a).)

CEQA requires the applicant to include in the AFC's project description a "statement of the objectives sought by the proposed project. A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the Environmental Impact Report (EIR) and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project. (Cal. Code Regs., tit. 14, § 15124(b).)

Section 15124(b), above, clearly obligates the Applicant to identify its objectives in the project description. Section 15126.6(a) obligates the lead agency to select a range of project alternatives and (Cal. Code Regs., tit. 14, 15126.6(a)) implicitly allows Staff to alter, add or delete *alternatives* offered by the Applicant in order to

"develop" a reasonable range of alternatives for the decision makers' consideration. Indeed, since the list of alternatives is expressly limited to those which "would feasibly attain *most* of the basic objectives of the project," then Section 15126.6(a) allows Staff to disregard *some* of the basic objectives of the project. However, Section 15126.6(a) is silent as to whether Energy Commission staff may alter the Applicant's *objectives*.

There appears to be no case law directly on point. There are several cases where courts have upheld an agency's adherence to the objectives as a basis to reject alternatives (see *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1st Dist. 1993) 23 Cal. App.4th 704, 713-715; *Sierra Club v. County of Napa* (1st Dist. 2004) 121 Cal. App.4th 1490; *In re Delta Programmatic Envt'l Impact Report* (2008) 43 Cal.4th 1143, 1165-1166) and at least one case where the court rejected a project description which was defined too narrowly to enable an adequate discussion of alternatives (*City of Santee v. County of San Diego* (4th Dist. 1989) 214 Cal. App.3d 1438). In *In re Delta (supra),* the California Supreme Court admonished that "…a lead agency may not give a project's purpose an artificially narrow definition" (*In re Delta, supra,* at page 1166*).* However, in both *City of Santee* and *In re Delta* the "applicant" was a public agency, hence, the applicant and lead agency were one and the same.

According to the Remy & Thomas *Guide to the California Environmental Quality Act,* "when a project is privately sponsored the applicant often drafts the project objectives, and the CEQA Guidelines provide no guidance on whether and to what extent the lead agency should accept the applicant's objectives rather than drafting its own to satisfy section 15124." (Remy & Thomas, *Guide to the California Environmental Quality Act* ((11th ed. 2007) p. 590.)

We note that CEQA charges the agency, not the applicant, with the task of determining whether alternatives are feasible. The circumstances that led the applicant in the planning stage to select the project for which approval is sought and to reject alternatives cannot be determinative of their feasibility. The lead agency must independently investigate, review, analyze and discuss the alternatives in good faith. (*Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal. App.3d 893, 908-910; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App.3d 692, 736).

The hearing record, including the evidentiary record of the AFC proceedings, is the exclusive basis for the Presiding Member's Proposed Decision (PMPD). (Cal. Code Regs., tit. 20, § 1751(a); see also Pub. Resouces Code, § 25523, subds. (a), (d)(1).) The applicant's reasons for deciding upon the project as proposed are merely a part of the evidence to be considered. The CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal. (*County of Inyo v. City of Los Angeles, supra,* 71 Cal. App.3d at p. 199.) Environmentally superior alternatives must be examined whether or not they

would impede to some degree the attainment of project objectives. Otherwise, CEQA's mandate to consider alternatives would be meaningless (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App.3d 692, 736-37).

The cases cited above indicate the courts' abhorrence of overly narrow descriptions of a project's objectives. Accordingly, we find that enabling Energy Commission staff to reasonably enlarge the scope of the project objectives to facilitate a legally adequate alternatives analysis is consistent with the law. To summarize, the law clearly allows Staff to disregard some of the project objectives in its alternatives analysis and the law allows Staff to reasonably broaden the definition of objectives which are so narrowly defined as to preclude an adequate alternatives analysis.

Finally, to specifically address the three objectives raised by the Applicant's Motion (proprietary technology, the power purchase agreement and the commercial startup date), we believe that we have now provided a clear framework for the parties to apply to the project objectives and alternatives analysis in this AFC proceeding. We caution the Applicant that although they may enter into contracts, agreements and purchases prior to the completion of the environmental review process, such agreements or purchases cannot be used to avoid the scrutiny envisioned by CEQA (see *Kings County Farm Bureau v. City of Hanford, (1990)* 221 Cal. App.3d 692, 737).

In *Kings County Farm Bureau (supra),* the court found that the applicant's objective in using coal powered technology could not be used to prevent an analysis of a natural gas alternative. Similarly, we find here that Applicant's objective in using its solar tower technology must not prevent Staff from analyzing other technologies as alternatives that may attain most of the project's other objectives. We also note that the PPA is not irrelevant. It must be considered in the review process. However, it does not preclude consideration of otherwise feasible alternatives. Renegotiation of the contract may become necessary and if that is not possible, the record must indicate the reasons for that conclusion. Nevertheless, environmentally superior alternatives must be examined whether or not they would impede to some degree the attainment of project objectives. (see *Kings County Farm Bureau v. City of Hanford (1990)* 221 Cal. App.3d 692, 737.)

2. *Whether the PSA analyzes and promotes alternatives that are legally infeasible, in contravention of CEQA.*

Applicant correctly states:

> "CEQA defines the term "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." (Cal. Code Regs., tit. 14, § 15364.) In short, CEQA requires that project alternatives analyzed in the [Final Staff

> Assessment] FSA be both reasonable and feasible." (Applicant's Motion, p. 10.)

We agree with the Applicant's statement. However, unless there is a law or rule that mandates a finding of unreasonableness or infeasibility, we are hard-pressed to imagine a scenario where reasonableness and feasibility would ever be anything other than a question of fact. Therefore, we must defer this question until we receive the relevant evidence at the evidentiary hearing.

3. *Whether the Alternatives section of the PSA violates CEQA because the "No Project Alternative" arbitrarily fails to consider the project site's existing land use entitlements and what would reasonably be expected to occur in the foreseeable future if the project were not approved.*

Here, again, we find it difficult, if not impossible, to imagine a circumstance where the resolution of what is a "reasonably foreseeable" land use, would be anything other than a question of fact. We defer this question until we can hear the relevant evidence at the evidentiary hearing. However, we offer the following guidance by highlighting important language in Section 15126.6(b):

> If disapproval of the project under consideration would result in predictable actions by others, such as the proposal of some other project, this "no project" consequence should be discussed. In certain instances, the no project alternative means "no build" wherein the existing environmental setting is maintained. However, where failure to proceed with the project will not result in preservation of existing environmental conditions, the analysis should identify the practical result of the project's non-approval and not create and analyze a set of artificial assumptions that would be required to preserve the existing physical environment.

California Code Regulations, Title 14, § 15126.6(b) (emphasis added).

4. *Whether the PSA improperly analyzes environmental impacts of project components located in Nevada that are expressly "exempt" from CEQA.*

Public Resources Code section 21080(b)(14) clearly states:

> (b) This division does not apply to any of the following activities: …
>
> (14) Any project or portion thereof located in another state which will be subject to environmental impact review pursuant to the National Environmental Policy Act of 1969 (42 U.S.C. § 4321 et seq.) or similar state laws of that state. Any emissions or discharges that would have a significant effect on the environment in this state are subject to this

> division. (Pub. Resources Code, § 21080(b)(14); also see Cal. Code Regs., tit. 14, § 15277.)

This law is clear on its face: a project (or the components of the project) located outside of California in an area subject to the National Environmental Policy Act (NEPA) is exempt from CEQA unless the out-of-state emissions or discharges from the project would have a significant impact inside California. This exempts from our analysis only those projects and their components in another state that have no significant impacts in California. This does not exempt in-state project activities whose impacts are only felt out-of-state. For example, if a project dug a well inside California and the project's water consumption from the well caused an impact in another state but not in California, then that out-of-state impact must be analyzed under CEQA because the impact was generated in California.

As a matter of law, if the project's linears are located in Nevada on land that is subject to NEPA analysis and assuming those linears have no significant impact that would be felt in California, then those linears are exempt from CEQA consideration.

Conclusion

This Order was carefully drafted to answer legitimate questions of law raised in the Applicant's Motion. We deliberately put off addressing questions of fact until they can be heard at the evidentiary hearing. Although Staff overstates the case, we would agree that it is not the Committee's role to "micro-manage" the drafting of the Final Staff Assessment which will ultimately become Staff's expert testimony at the evidentiary hearing. Finally, while we agree with the Applicant that the environmental assessment must identify the objectives sought by the project, we disagree that CEQA requires the lead agency to treat the objectives as immutable while it develops its alternatives analysis. If project objectives are so circumscribed that a reasonable range of alternatives cannot be developed, the lead agency has the discretion, and indeed, the obligation to use project objectives that are less narrow.

In summary, Applicant's Motion sought guidance on legal issues that it believed would better enable the parties to conform to the relevant requirements of CEQA. We believe this Order has fulfilled the basic purpose of the Motion.

Dated: October 2, 2012, at Sacramento, California.

Original Signed By:

KAREN DOUGLAS
Commissioner and Presiding Member
HHSEGS AFC Committee

Original Signed By:

CARLA PETERMAN
Commissioner and Associate Member
HHSEGS AFC Committee

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DECLARATION OF SERVICE

I, RoseMary Avalos, declare that on October 2, 2012, I served and filed copies of the attached ORDER RE: APPLICANT'S MOTION IN LIMINE, dated October 2, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: www.energy.ca.gov/sitingcases/hiddenhills/index.html.

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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

____ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California 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:
RoseMary Avalos
Hearing Advisers Office