

BEFORE THE HEARING BOARD  
OF THE  
BAY AREA AIR QUALITY MANAGEMENT DISTRICT  
STATE OF CALIFORNIA

**FILED**

FEB 28 2008

HEARING BOARD  
BAY AREA AIR QUALITY  
MANAGEMENT DISTRICT

Vanessa Johnson  
Acting Clerk  
Hearing Board  
Bay Area Air Quality  
Management District

In the Matter of the Appeal of )  
ROB SIMPSON from the ) Docket No. 3546  
Issuance of an Authority to )  
Energy Center (App. No. 15487) )  
\_\_\_\_\_ )

**AMICUS BRIEF OF THE CALIFORNIA ENERGY COMMISSION  
IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION**

The Air Pollution Control Officer (“APCO”) for the Bay Area Air Quality Management District (“District”) has moved for dismissal of the above captioned appeal. The California Energy Commission (“Commission”) has already granted the only permit that the Legislature has permitted to be appealed for power plant certifications, and that permit has been upheld after challenge in the California Supreme Court. The Commission thus supports the APCO motion to dismiss, as the Hearing Board is without jurisdiction to take any action that would invalidate the power plant license granted by the Commission.

**I. SUMMARY**

The Russell City Energy Center was originally licensed in 2002 after a proceeding that lasted nearly a year and involved extensive public outreach and public participation. There is no record of appellant having participated or commented in that proceeding. In November 2006 Russell City Energy Company LLC (“Real Party in Interest”) applied to the Commission to

amend the original license to re-locate the project a short distance from the site originally licensed. The amendment proceeding was broadly noticed and triggered significant public participation, including both workshops and Commission hearings in Hayward. Appellant did not participate or comment at these hearings. Commission staff held workshops on air quality issues and on the APCO's Preliminary Determination of Compliance ("PDOC"). (Declaration of J.Mike Monasmith, APCO Exh. 2.) Appellant did not attend these workshops or comment on air quality. (*Ibid.*) Appellant was simply a "no show" in both the original licensing proceeding and the amendment proceeding.<sup>1</sup>

Appellant could have raised air quality issues in the Commission's proceedings, but he did not. Appellant could have raised issues of air quality, consistent with the District's rules, to the District in the PDOC comment period, but again it appears that he was a "no show." After these significant participatory opportunities had lapsed, the Commission licensed the Russell City project, including in its license all District-recommended licensing conditions. Appellant's confederates appealed this decision to the California Supreme Court, the only tribunal which may review the Commission's decision, and the Supreme Court has rejected their claims. After years of public process, the Russell City license train has left the station, and appellant never even made it to the platform.

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<sup>1</sup> In his appeal to U.S. EPA's Environmental Appeals Board ("EAB"), appellant claims that he participated in the Commission proceeding through counsel Jewel Hargleroad. Ms. Hargleroad was hired by several parties, but notably did not attend or participate in any Commission proceeding until after the Final Decision for Russell City was adopted. At the one post-Decision hearing she did attend, the Commission denied untimely petitions for intervention (and for reconsideration). Even in these untimely post-Decision representations, Ms. Hargleroad did not purport to represent this appellant.

Appellant now belatedly would raise challenges in this forum on substantive air quality issues that were decided (or could have been decided) by the Commission's Final Decision. He may not legally do so. The legal bars to his efforts are several, and have been very capably and thoroughly briefed by counsel for the APCO and the Real Party in Interest. This brief will avoid repeating the many points of this previous thorough briefing, and focus on fundamental jurisdictional issues that bar this invalid appeal.

## II. THE JURISDICTIONAL BAR OF THE COMMISSION'S LICENSE

Public Resources Code section 25500 provides that the Commission's license is "in lieu of any permit, certificate, or similar document required by any state, local, or regional agency . . . and shall supercede any applicable statute, ordinance, or regulation of any state, local, or regional agency . . . ." Thus, under state law, there can be only one state discretionary permit for air quality limits on power plants, and that is the Commission license.<sup>2</sup>

The 1979 memorandum of understanding between the Commission and the California Air Resources Board ("MOU")<sup>3</sup> recognized the preemptive nature of the Commission license. The MOU requires the Commission license to include all the air quality requirements and findings and conclusions of the air districts. (MOU, pp. 7-8.) If the Commission does so, the Commission license "shall confer the same rights, privileges, and enforcement powers as an

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<sup>2</sup> The Prevention of Significant Deterioration ("PSD") permit is a federal, EPA-issued permit, even when issued by a delegate local agency which "stands in the shoes" of EPA. Thus, the Commission license does not preempt the PSD permit function of delegated air districts, and permits issued in this manner are subject to review by the EAB and then the federal courts of appeal. (See APCO Motion to Dismiss, pp. 9-10.)

<sup>3</sup> The actual title of this document is "Approved ARB-CEC Joint Policy Statement of Compliance with Air Quality Laws by New Power Plants." It was signed by the chairmen of each agency in 1979.

Authority to Construct,” and the APCO “shall issue a permit to operate if the facility complies with the conditions contained in the CEC certificate.” (MOU, p. 8.) Thus, the MOU does not even contemplate or require an Authority to Construct (“ATC”) subsequent to the Commission license.

Even so, the ATC is commonly still required by air districts, presumably (as the APCO brief describes it) because some form of air district permit is required by the Health and Safety Code if the air district is to assume compliance and enforcement responsibilities with regard to the power plant. The air districts are much better situated to effectively assume that role, and they have over time assumed it. But such ATC permits are by their very nature not discretionary; rather, they address only the very limited issue of whether the Commission has included in its decision the findings and conditions of the District’s Determination of Compliance, as required by the MOU. The APCO has made this ministerial determination and issued the ATC. Such ministerial function is not properly the subject of any appeal process regarding substantive air quality issues, as it does not (and can not) involve agency discretion. This is reflected in the very terms of Rule 2-3-405: “[If] the Certificate contains all applicable conditions . . . the APCO *shall* grant an authority to construct.” (Emphasis added.)

To go beyond this ministerial role and consider substantive issues already determined (or capable of having been determined) by the Commission license would be contrary to the Warren-Alquist Act. Once the Commission has issued a final decision, that decision can only be reviewed by the California Supreme Court. (Pub. Resources Code, § 25531, subd. (a).) No other state tribunal can review the Commission’s determinations: “Subject to the right of judicial



**PROOF OF SERVICE**

I am a citizen of the United States, over the age of 18 years, and not a party to or interested in the within entitled cause. My business address is 1516 Ninth Street, Sacramento, California 95814. On this date February 27, 2008, I served the following:

**AMICUS BRIEF OF THE CALIFORNIA ENERGY COMMISSION  
IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION  
Docket No. 3546**


By placing a true copy thereof enclosed is a sealed envelope with postage thereon fully prepaid, in the United States Post Office mail at Sacramento, California, addressed as follows:

Alexander Crockett  
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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. Executed on February 27, 2008, at Sacramento, California.

  
Lynn Tien-Tran