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DOCKET
:01-AFC-7C
DATE OCT 23 2007
REC'D. OCT 23 2007

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9 **STATE OF CALIFORNIA**
State Energy Resources
10 **Conservation And Development Commission**

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13 **In the Matter of:**

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17 **RUSSELL CITY ENERGY CENTER,**

Docket No.: 01-AFC-7C

PETITION FOR:

- (1) RE-OPENING OF THE ADMINISTRATIVE PROCEEDINGS;
- (2) RE-OPENING OF THE EVIDENTIARY RECORD;
- (3) RECONSIDERATION OF ENERGY COMMISSION DECISION; AND
- (4) REQUEST FOR STAY

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21 **DATED: October 23, 2007**

RICHARD E. WINNIE, County Counsel in and for the County of Alameda, State of California

BRIAN E. WASHINGTON, Assistant County Counsel

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14 (4) REQUEST FOR STAY

15 **RUSSELL CITY ENERGY CENTER,**

16 Intervenor County of Alameda hereby petitions the Commission for a stay and
17 reconsideration of the Commission's Order of September 26, 2007, in the above-referenced
18 matter, and re-opening of the administrative proceedings and evidentiary record.

19 This petition is made on the grounds articulated in the attached Memorandum of Points
20 and Authorities, and based on the pleadings and records on file in this proceeding and the
21 attached Memorandum of Points and Authorities and the Declaration of James Sorensen.

22 DATED: October 23, 2007

RICHARD E. WINNIE, County Counsel in
and for the County of Alameda, State of
California

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28 Check box if continuation pages are attached.
(Proof of Service Must be attached)

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MEMORANDUM OF POINTS AND
13 AUTHORITIES IN SUPPORT OF
PETITION FOR:

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17 RUSSELL CITY ENERGY CENTER,

- 18 (1) RE-OPEN THE ADMINISTRATIVE PROCEEDINGS;
- 19 (2) RE-OPEN THE EVIDENTIARY RECORD;
- 20 (3) FOR RECONSIDERATION OF ENERGY COMMISSION DECISION;
- 21 AND
- 22 (4) REQUEST FOR STAY

23 MEMORANDUM OF POINTS AND AUTHORITIES

24 Pursuant to section 1720 of the California Code of Regulations, the County of Alameda
25 ("the County") petitions for a stay and reconsideration of the California Energy Commission's
26 ("the Commission") "Final Decision" of September 28, 2007, approving the proposed
27 amendment to the Russell City Energy Center ("RCEC") site plan. Through the instant petition
28 the County also seeks to re-open the administrative proceedings and re-open the evidentiary
record in this matter. The instant petition for reconsideration is supported by the attached
Declaration of James Sorensen and filed along with the County's Petition to Intervene and
accompanying Memorandum of Points and Authorities.

1 I. **Standard for Petition for Reconsideration**

2 Section 1720(a) provides that "[w]ithin 30 days after a decision or order is final . . . any
3 party may petition for, reconsideration thereof." Grounds for such a petition may be based on
4 either (1) new evidence, or (2) "an error in fact or change or error of law." Id. Furthermore,
5 "[t]he petition must fully explain why the matters set forth could not have been considered during
6 the evidentiary hearings, and their effects upon a substantive element of the decision." Id.

7 A. **The County Will Have Standing**

8 Section 1720(a) only permits the Commission or "any party" to file for reconsideration.
9 At present, the County is not a party to the proceedings. To obtain standing, the County has
10 filed a petition to intervene that accompanies the instant petition for reconsideration. Upon grant
11 of the petition to intervene, the County will have standing to petition for reconsideration.

12 B. **The County's Petition is Timely**

13 The Commission issued its final decision approving an amendment to the RCEC site
14 plan on September 26, 2007. Final Commission Decision, CEC-800-2007-003-CMF(October
15 2007) ("Final Decision"). Pursuant to 20 CCR § 1720.4, the effective date of a decision is the
16 "the day when the decision or order is docketed, unless the order states otherwise." The Final
17 Order in this case provides that it is effective September 26, 2007. (See Commission Adoption
18 Order at 2.)

19 Therefore, the County has until October 26, 2007 to file a petition for reconsideration.
20 Accordingly, the instant petition is timely filed.

21 II. **Grounds for Reconsideration**

22 The County contends that the Commission provided inadequate and misleading notice
23 to County agencies from which the Commission was obligated to obtain comments, analyses
24 and recommendations for use in making findings in support of its Final Decision. By failing to
25 obtain the County's comments, analyses and recommendations, the Commission made
26 fundamentally flawed findings that did not consider issues that could only have been raised by
27 the County and its agencies.

1 Similarly, the Commission appears to have failed to provide residents of unincorporated
2 areas of the County with adequate notice of the RCEC amendment proceedings. Public
3 comment and participation are equally necessary to the Commission's ability to make legally
4 sufficient findings.

5 The failure to provide the County and its residents with notice and the resulting flaws in
6 the findings supporting the Commission's Final Decision rise to a level of significance that
7 qualifies as an "error of law" requiring the Commission to re-open the administrative
8 proceedings and evidentiary record to consider additional comments, analyses and
9 recommendations from the County, and to inform and take comments from the public.

10 In addition, the Commission committed legal error by admitting into evidence without
11 providing an opportunity for rebuttal a series of letters from the Federal Aviation Administration
12 opining on the safety of aircraft departing the Hayward Executive Airport flying through thermal
13 plumes generated by the RCEC. The Commission admitted this evidence that was submitted
14 the day before the final hearing on the Presiding Member's Proposed Decision that had been
15 continued solely to allow admission of this evidence, and subsequently relied upon the opinions
16 expressed therein to support the Final Decision without providing parties, government agencies
17 and the public with their right to rebut those opinions.

18 **A. The Commission's Notice to the County Was Inadequate**

19 Section 1714(c) of the Commission's regulations obligates it to provide notice to local
20 agencies that would have had jurisdiction "but for the commission's exclusive authority to certify
21 sites." 20 CCR § 1714(c).

22 **I. The Amended Site Plan Placed the RCEC Facility within the County's**
23 **Jurisdiction**

24 As the Commission's Final Decision acknowledges, at the time RCEC, LLC¹ filed its
25 amendment application in November, 2006, the proposed new site was within the
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27 ¹ At the time the RCEC amendment application was filed, Calpine Corporation was the corporate
28 owner/operator of the site. The Commission approved transfer of ownership to RCEC, LLC in an August
1, 2007 order.

1 unincorporated area of Alameda County, and thus squarely within the County's jurisdiction.
2 Final Commission Decision, at 10 n.9. Although in March, 2007, the City of Hayward annexed
3 that portion of the land in the amended site plan located in the unincorporated area of Alameda
4 County, the site nevertheless remains adjacent to unincorporated areas of the County and
5 within the authority of the County Redevelopment Agency pursuant to the Mt. Eden Sub Area of
6 the County Redevelopment Agency's Eden Redevelopment Plan.

7 The Commission sent its "Request for Agency Participation in the Review of the Russell
8 City Energy Center, Application for Certification" (Docket Log No. 20718) ("Request for Agency
9 Participation") to the following County agencies: Department of Agriculture/Weights and
10 Measures, the Department of Environmental Health, the Hazardous Materials Team, Assessor,
11 Auditor, Public Works Agency, and Sheriff. (See List No. 7078, attached as Exhibit B to the
12 Declaration of James Sorensen.) The Mosquito Abatement District also received notice.

13 While the County appreciates notice to the above agencies, adequate notice would at a
14 minimum have included notification to the County Board of Supervisors, Redevelopment
15 Agency, Community Development Agency, the Airport Land Use Commission and the Planning
16 Department. (See Declaration of James Sorensen at ¶8.) These agencies have primary
17 responsibility over land use, transportation, community development and redevelopment in the
18 County. Therefore, the Commission was obligated to provide notice to these agencies as they
19 would have had primary jurisdiction but for the Commission's exclusive authority to certify sites.
20 By failing to provide these agencies with notice, the Commission failed to meet its regulatory
21 obligation under § 1714(c).

22 **ii. The Commission Has Provided Relevant County Agencies Notice in the**
23 **Past**

24 The Commission has in the past provided notice to the relevant County agencies cited
25 above on energy facility application proceedings in Alameda County, including the East
26 Altamont Energy Center (Docket No. 01-AFC-4) and the Tesla Power Plant (Docket No. 01-
27 AFC-21). (See Declaration of James Sorensen at ¶3-4.) Indeed, the Proof of Service List for
28 the Tesla Power Plant proceedings lists the County Planning Department as an interested

1 agency. Furthermore, the Commission did provide notice on the RCEC amendment
2 proceedings to the City of Hayward's Community and Economic Development Department,
3 whose functions broadly corresponds to the County Community Development Agency. (See
4 List No. 7078, attached as Exhibit B to the Declaration of James Sorensen.) Thus the
5 Commission had no excuse for excluding these agencies from its list of interested agencies for
6 the RCEC amendment proceedings.

7 **iii. The Commission Knew or Should Have Known of Improper Notice to**
8 **the County**

9 The Commission's actions in this amendment proceeding indicate that it knew or should
10 have known that it was improperly excluding Alameda County agencies with land use authority
11 and jurisdiction from the proceedings. At a December 15, 2008 Informational Hearing and Site
12 Visit, Hearing Officer Kramer informed the public that the distribution list for the amendment
13 proceedings was "basically from a mailing list that was left over from the previous case."
14 (Transcript, at 12:14-15.) The Commission should have known from its review of the
15 amendment filings that reusing the mailing list from the original RCEC siting proceedings was
16 improper because RCEC, LLC proposed to move the facility on to land in the unincorporated
17 area of the County. If § 1714(c) is to have any force and effect, then the Commission must
18 exercise some diligence in ensuring that the proper interested government agencies are
19 contacted, and not simply rely a five year-old mailing list that does not reflect present
20 circumstances.

21 **iv. The Commission's Notice to the County Was Misleading**

22 What notice was provided to County agencies was misleading, and would not have
23 prompted them to respond to the Commission's request for comment. The "Request for Agency
24 Participation," attached as Exhibit B to the Declaration of James Sorensen, sent by the
25 Commission to County agencies on its distribution list indicates on the first page that "[t]he
26 facility will be located in the City of Hayward . . ." By contrast, page two of the attached "Notice
27 of Public Informational Hearing and Site Visit," also attached as Exhibit B to the Declaration of
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1 James Sorensen, acknowledges that the new facility will be located "partially in the
2 unincorporated area of Alameda County."

3 Staff of County agencies that did receive notice reviewing the first portion of the
4 document that was directed specifically at government agencies would have been under the
5 false impression that County land use agencies were without jurisdiction over the new site
6 facility because it was located entirely within the City of Hayward. (See Declaration of James
7 Sorensen at ¶17.) Thus it would not have occurred to County staff to conduct the level of
8 review required of the proposed amended RCEC site plan. (See *id.*)

9 **v. The Commission Must Act to Correct Problems Arising from its Own**
10 **Improper Notices**

11 While the County does not allege that the Commission intentionally misled the County,
12 the County does contend that the Commission must bear responsibility for the resulting
13 omission of relevant County agencies from the amendment proceedings. The Commission
14 cannot expect County agencies to pour through every notice it receives to double-check for
15 inconsistencies. The County must rely on the text of these notices, and when the Commission
16 makes an error in that text, it must in good faith attempt to correct that error when it results in
17 the exclusion of government agencies from siting proceedings.

18 When the County contacted the Commission to notify it of its failure to notify relevant
19 County agencies, the Commission ignored the County's concerns. (See Letter from Supervisor
20 Alice Lai-Bitker, September 20, 2007 (Docket Log No. 42380); see also Letter from James
21 Sorensen, Director, CDA, September 24, 2007, attached as Exhibit A to the Declaration of
22 James Sorensen.) The Commission refused the County's reasonable request for a short
23 continuance to allow County agencies and the Board of Supervisors to review the RCEC
24 amendment proposal to determine if the County had any significant concerns. (See *id.*)

25 **B. The Commission's Findings are Fundamentally Flawed Because It Did Not**
26 **Follow its Own Regulatory Process to Receive Comment from the County**

27 Section 1714(c) not only obligates the Commission to provide notice to local agencies
28 with jurisdiction, but in addition to "request analyses, comments, and recommendations

1 thereon." This provision undoubtedly serves the purpose of allowing the Commission to obtain
2 the information necessary to make required findings under the Warren-Alquist Act (Cal. Pub.
3 Resources Code § 25500 *et seq.*) and its own regulations that the proposed site plan conforms
4 with applicable local standards, ordinances or laws, or that the public benefit of the project
5 outweighs any noncompliance. See Cal. Pub. Resources Code §§ 25523(d)(1), 25525; see
6 also 20 CCR § 1769(a)(3)(B).

7 In its Final Decision on the RCEC, the Commission made findings that the amended site
8 plan conformed with all applicable laws, ordinances, regulations and standards ("LORS"). (See
9 Final Decision, at 42, 63, 72, 80, 112, 115, 125, 129, 136, 144, 154, 161, 168, 171-72, 176, 188,
10 197.) These findings are fundamentally flawed because the Commission did not follow its own
11 regulatory procedures requiring it to seek analyses, comments and recommendations from the
12 County and its agencies to determine if the amended RCEC site plan was indeed in compliance
13 with the County's LORS. See e.g. 20 CCR §§ 1714.3, 1714.5 (outlining the procedures by
14 which local agencies are to submit comments, analyses and recommendations, and the method
15 by which the Commission is to consider them). By making such findings without first consulting
16 the County, the Commission has transformed its findings into a form of guesswork in this
17 respect, and may have burdened the County by approving a site facility that is out of compliance
18 with County LORS.

19 In addition, § 1714(c) also facilitates the Commission's ability to make required findings
20 pursuant to § 1769(a)(3)(A), which incorporates findings required pursuant to § 1755 regarding
21 whether the owner/operator will be able to "mitigate or avoid the significant environmental
22 effects . . ." resulting from the proposed facility. § 1755(c)(1). The County is particularly
23 concerned about possible air quality concerns for residents of unincorporated areas of the
24 County who may be affected by pollution from the RCEC.

25 Had the County been properly noticed, it would have provided essential comments and
26 analyses on these and other environmental effects and mitigation issues necessary to the
27 Commission's findings required under § 1769(a)(3)(A). Absent the County's participation in this
28 regard, the Commission's findings are flawed because they are not the product of the

1 Commission's own regulatory process. Moreover, by failing to follow its own regulatory process
2 in arriving at these findings, the Commission has committed legal error that requires it to revisit
3 these issues by re-opening the administrative proceedings and evidentiary record to consider
4 additional material from the County.

5 **C. By Failing to Notice the County, the Commission Did Not Consider the**
6 **Concerns of the County and its Residents**

7 Beyond legal compliance, however, the § 1714(c) requirement that the Commission
8 solicit analyses, comments and recommendations from local governments ensures that the
9 Commission takes into account the concerns of local government agencies and the people they
10 represent when it evaluates proposed site plans. The County and its agencies have recently
11 become aware of community concern over the RCEC site plan's potential environmental, health
12 and safety risks. The Commission's procedural errors have prevented the County from having
13 enough notice and time to sufficiently examine these concerns.

14 Some of these concerns include:

- 15 o The impact of air pollution from the RCEC on nearby residents of unincorporated
16 Alameda County;
- 17 o The ability of County transportation infrastructure to accommodate an
18 evacuation should there be a hazardous discharge;
- 19 o The potential financial impact on regional redevelopment plans;

20 (See Exhibit A to the Declaration of James Sorensen.)

21 Likewise, the policy of local government involvement underlying § 1714(c) forecloses
22 any contention by the Commission that omitting the County from the RCEC amendment
23 proceedings amounted to a "no harm, no foul." The Commission cannot possibly anticipate what
24 commentary and analysis the County and its agencies would have offered to the proceedings.
25 While the County may ultimately agree with some of the Commission's findings with regard to
26 the above-listed issues, County agencies have not had an adequate amount of time to consider
27 these issues in full. The County and the residents it represents deserve no less than a full
28

1 appraisal of these issues and the confidence that the Commission's approval of a new energy
2 facility was made after a thorough evaluation of all possible evidence and analysis.

3 **D. The Commission's Notice to the Public Was Inadequate**

4 In addition to failing to provide legally sufficient notice to the County, the Commission did
5 not adequately inform members of the public of the RCEC amendment proceedings, and in
6 particular residents of unincorporated areas of Alameda County immediately adjacent or
7 downwind of the facility site. The Commission's failure to provide these residents with notice
8 amounts to legal error as its notice efforts to the public fell far short of its obligation to ensure
9 public participation.

10 The County contends that residents of communities in unincorporated areas of the
11 County that will be affected by the RCEC deserved direct notice of the RCEC proceedings.² In
12 addition, the Commission's distribution list does not indicate that notice was provided to any
13 organizations or local advisory councils in the areas of Castro Valley, San Lorenzo, Ashland,
14 Cherryland, Fairview and Hillcrest Knolls. (See List No. 7078, attached as Exhibit B to the
15 Declaration of James Sorensen.) Without being provided with any notice, organizations and
16 local advisory councils in this area were unable in turn to notify residents of the amendment
17 proceedings.

18 In addition to inadequately notifying residents of the RCEC amendment proceedings, the
19 Commission conducted an insufficient number of public hearings to allow members of the public
20 to voice their concerns with the project. Moreover, all of the Commission's hearings were
21 conducted in Hayward despite that the RCEC is designed to serve as a regional energy facility,
22 and will have environmental impact beyond the City of Hayward.

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26 ² The County is uncertain to what degree notice was sent directly to residences because the County's
27 request for distribution lists was returned with partial redactions by the Commission. (See Exhibit B to the
28 Declaration of James Sorensen.) The County's allegation is based upon numerous complaints from
residents in these areas of the County expressing their frustration that they did not receive notice. (See
e.g. Letter from Supervisor Alice Lai-Bitker, September 20, 2007, Docket Log No. 42380.)

1 **E. The Commission Improperly Prohibited Parties, Government Agencies and the**
2 **Public from Analyzing and Rebutting Letters from the Federal Aviation**
3 **Administration**

4 The Commission committed legal error by admitting into evidence a series of letters from
5 the Federal Aviation Administration opining on the safety of aircraft departing the Hayward
6 Executive Airport flying through thermal plumes generated by the RCEC without allowing the
7 parties, interested government agencies or the public the time or opportunity to rebut the
8 opinions contained within the letters.

9 The Commission's Rules of Evidence for siting proceedings are not extensive; however,
10 they do provide that "each party shall have the right to call and examine witnesses, to introduce
11 exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the
12 proceeding, and to rebut evidence against such party." 20 CCR § 1212(c).

13 At the conclusion of the Commission Hearing on the Presiding Member's Proposed
14 Decision in Sacramento on September 12, 2007, the Commission agreed to continue the
15 hearing to the Commission's next regular Business Meeting in Sacramento on September 26,
16 2007, to allow the Federal Aviation Administration to submit additional evidence. (See
17 California Energy Commission Energy Calendar for September 26, 2007, available at
18 http://www.energy.ca.gov/cgi-pl/cal_make.pl?p1=DAY20070926.) On September 19, 2007, the
19 Federal Aviation Administration submitted two emails attaching a letter from the Regional
20 Director of the Western-Pacific Region³. (See Notice of Availability of the Presiding Member's
21 Proposed Decision, Docket Log No. 42637.) The attached letter included the opinion of the
22 Federal Aviation Administration's Flight Standards Division opining that "the RCEC poses a risk
23 to aircraft in the Hayward traffic pattern" (See Flight Standards Letter at 2.)
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27 ³ The emails and letter are available on the Commission's website at http://www.energy.ca.gov/sitingcases/ruselectricity_amendment/documents/others/2007-09-18_FAA_LETTER_EMAIL.PDF
28 (hereinafter "Flight Standards Letter").

1 On September 25, 2007, the Regional Director of the Western-Pacific Region sent a
2 second letter⁴ that significantly modified that opinion to suggest that the risk to aircraft could be
3 mitigated, and that the Federal Aviation Administration hoped to work with the Commission on
4 mitigation efforts. On September 26, 2007, the Commission approved the Presiding Member's
5 Proposed Decision as the Commission's Final Decision. (See Notice of Decision by California
6 Energy Commission, Docket Log No. 42562.) The Commission's Final Decision relied upon the
7 Federal Aviation Administration's opinion in the second letter of September 25, 2007 in
8 approving the RCEC. (See Final Decision, at 3.)

9 These two letters were admitted at the last minute and after the final local evidentiary
10 hearing in Hayward such that parties, interested government agencies, and the general public
11 did not have an adequate opportunity to analyze or rebut the opinions provided therein. The
12 Commission's actions were unfair and unnecessary, as the slight delay proposed by Alameda
13 County would have allowed all parties, interested government agencies and the public to
14 consider and comment upon the Federal Aviation Administration's opinions. Instead, the
15 Commission needlessly rushed to judgment without thorough review and consideration of
16 opposing views. In particular, the Commission should have sought out the County's Airport
17 Land Use Commission's comments on the Federal Aviation Administration's opinions.

18 The Commission's legal error in admitting these two letters without allowing sufficient
19 time and opportunity for analysis and rebuttal merits reconsideration and the re-opening of the
20 administrative proceedings and evidentiary record.

21 **III. The Commission Must Stay Its Final Decision to Allow the County and Its**
22 **Residents Additional Time to Prepare for a Re-Opened Administrative Proceeding**
23 **Implicit in the County's arguments is the need for the Commission to stay its Final**
24 **Decision to provide additional time for County agencies and the public that did not receive**
25 **notice to prepare comments, analyses and recommendations for a re-opened administrative**

26 _____
27 ⁴ This second letter is available on the Commission's website at [http://www.energy.ca.gov/sitingcases/
28 russellcity_amendment/documents/others/2007-0925_RUSSELL_CITY_ENERGY_CENTER_IMPACT_
HAYWARD_EXECUTIVE_AIRPORT.PDF](http://www.energy.ca.gov/sitingcases/russellcity_amendment/documents/others/2007-0925_RUSSELL_CITY_ENERGY_CENTER_IMPACT_HAYWARD_EXECUTIVE_AIRPORT.PDF)

1 proceeding and evidentiary record. As articulated in the attached Declaration of James
2 Sorensen, the County will suffer irreparable harm if the Commission declines to stay its Final
3 Decision pending reconsideration.

4 The Commission has already improperly denied County agencies their fair opportunity to
5 thoroughly analyze the RCEC amendment proposal and submit comments, responses and
6 recommendations. Advanced notice to governmental agencies serves the additional purpose
7 of allowing them to conduct studies and prepare thoughtful analyses of complex energy facility
8 proposals.

9 Failing to stay the Final Decision pending reconsideration and the re-opening of
10 administrative proceedings and the evidentiary record would once again deny County agencies
11 the necessary time to prepare the comments, analyses and recommendations. The County
12 requests that the length of time of the stay should at a minimum equal the amount of time
13 afforded to other public agencies that received adequate notice in this proceeding.

14 DATED: October 23, 2007

RICHARD E. WINNIE, County Counsel in
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