

STATE OF CALIFORNIA

**Energy Resources Conservation and
Development Commission**

In the Matter of:

Docket No. 08-AFC-13C

The Application for Certification for the
Calico Solar Project Amendment

SIERRA CLUB NOTICE OF PROTEST

May 3, 2011

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I. INTRODUCTION

On April 20, 2011, Sierra Club filed a Motion to Dismiss the Petition to Amend filed by Calico Solar, LLC (the “Applicant”) in this proceeding. The Motion to Dismiss asserted that the California Energy Commission (“Commission”) lacks the statutory authority to consider the Petition to Amend because it is a request for authority to construct a solar photovoltaic (“PV”) facility. A PV facility is expressly excluded from Commission jurisdiction by Public Resources Code section 25120.

Sierra Club filed its Motion to Dismiss as a courtesy to the Commission and the parties to allow briefing on the purely legal issues raised therein. Sierra Club anticipated that the Commission would comply with its own Rules of Practice and Procedure under Section 1716.5, which provides parties with 15 days to respond to the Motion to Dismiss and the Commission with 30 days to act on the Motion to Dismiss. However, the Committee’s Scheduling, Briefing, and Procedures Order issued May 2, 2011 (“Scheduling Order”) made clear that the Commission has no intention of addressing Sierra Club’s Motion to Dismiss in a timely manner. Sierra Club objects to the Commission’s decision to ignore the Motion to Dismiss. Sierra Club hereby informs the Commission of its intent to seek pursuant to Code of Civil Procedure section 1085 a peremptory writ of mandate ordering the Commission to cease its exercise of certification

jurisdiction in this proceeding and a declaratory judgment that the Commission does not have certification jurisdiction over this or any other PV powerplant projects.

II. DISCUSSION

The Scheduling Order made no reference whatsoever to the Sierra Club or its Motion to Dismiss. Instead, the Scheduling Order called for briefing on jurisdictional issues to be included with a wide range of other issues including, *inter alia*, whether a subsequent EIR is necessary, what baseline environmental conditions should be considered, and whether evidentiary hearings should be conducted. This is improper and unduly burdensome to Sierra Club, other parties to this proceeding, and the public. The question of whether the Commission has jurisdiction to conduct this proceeding is paramount over all other issues and must be decided before continuing.

The Sierra Club need not wait for the Commission to consider this issue. California courts will review a claim that an agency lacks jurisdiction over an ongoing proceeding by considering:

- (1) The injury or burden that delay will impose;
- (2) The strength of the legal argument that the agency lacks jurisdiction; and,
- (3) The extent to which agency expertise may aid in resolving the jurisdictional issue. *Security Nat. Guar., Inc. v. California Coastal Com'n* (2008) 159 Cal.App.4th 402, 416-17; *Coachella Valley Mosquito and Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1082.

These three factors favor immediate judicial review of the Commission's jurisdiction in this proceeding. Sierra Club hoped that the Commission would resolve the jurisdictional issue without requiring litigation; however, in the absence of any indication by the Commission that it would address the Motion to Dismiss before continuing with this proceeding, Sierra Club has no choice but to seek judicial relief and a declaratory judgment on the immediate matter and on any other PV facilities.

A. The Scheduling Order Unduly Burdens the Parties and the Public

The Scheduling Order ordered all parties to engage in and complete any discovery **prior** to the Commission's decision on jurisdiction and other issues.¹ The Scheduling Order also proposed to conduct mandatory status conferences prior to any Commission decision on whether it has jurisdiction to conduct this proceeding. In other words, the Commission proposed to continue along with the proceeding for the Calico Solar Project Amendment under the assumption that it has the jurisdictional authority to consider the Petition to Amend. This decision was improper and prejudices Sierra Club's and others' interests. The Commission's decision to proceed in the inefficient manner proposed by the Scheduling Order would force the public and parties to expend considerable resources on legal counsel and expert consultants in order to preserve their rights in the unlikely event that the Commission and/or the courts ultimately determine that the Petition to Amend falls within the jurisdiction of the Commission.

Continued participation in the Commission's chaotic and cumbersome procedures under the Warren-Alquist Act is no small task. Sierra Club invested hundreds of hours in legal expertise and technical consultation, as well as significant travel and administrative costs in order to participate in the original Calico proceeding. Other intervenors and members of the public invested similar resources and made available themselves and numerous experts on various issues. The Commission repeatedly modified or abandoned its own practices and procedures, often requiring the public and parties to respond within days or even hours to new information and analyses. The Commission held hearings late into the evenings, and on one occasion straight through the night into the next morning, in a manner that placed enormous burdens on parties, intervenors, and members of the public who wished to participate. The Warren-Alquist Act's provision of exclusive jurisdiction over certification of thermal powerplant facilities allowed the Commission to

¹ The Scheduling Order provided that the last day to submit data-requests is May 31, 2011, whereas reply briefing on the various issues will not be completed until June 3, 2011.

conduct the original Calico proceeding in this unfair and burdensome manner. However, the Commission **does not have jurisdiction over the amended Calico project**, and therefore the Commission cannot force the public and parties to comply with its overly burdensome and costly procedures in this matter.

In light of the substantial and unnecessary burden that the Commission's proceeding would have on Sierra Club and others, Sierra Club filed its Motion to Dismiss immediately following the April 20, 2011 informational hearings so that the Commission could address and dispose of the jurisdictional issue at the outset of this proceeding. By ignoring the Motion to Dismiss and deferring any consideration of its jurisdictional authority until after substantial participatory requirements have passed, the Commission acted improperly. This improper action will result in injury and burden to Sierra Club and others.

B. The Commission's Lack of Jurisdiction in this Proceeding is Clear

The Motion to Dismiss clearly articulated the basis for the determination that the Commission does not have jurisdiction to consider the Petition to Amend. Sierra Club does not repeat those arguments here other than to reiterate that Public Resources Code section 25120 expressly limits the Commission's jurisdiction by stating, "Thermal powerplant' **does not include any** wind, hydroelectric, or **solar photovoltaic** electrical generating facility." (emphasis added) The Commission does not have the authority to expand its jurisdiction to a PV facility in light of the clear intention of the Legislature that it does not have such jurisdiction. *See, e.g., Department of Water & Power v. Energy Resources Conservation & Dev. Com.* (1991) 2 Cal.App.4th 206, 222 (rejecting Commission's attempt to extend its jurisdiction over a repowering project); *Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal.App.3d 437, 450 (holding that the Legislature clearly intended to limit the Commission's jurisdiction with respect to transmission lines). Even under a liberal interpretation of its

jurisdiction, the Commission cannot expand its own authority beyond the clearly defined limits of Public Resources Code section 25120. “The Energy Commission’s authority within its sphere of jurisdiction, which is the certification of sites and related facilities for thermal power plants, should be broadly interpreted to permit it fully to accomplish the duties entrusted to it. This does not mean that under the guise, [sic] of liberal statutory construction the Energy Commission’s certification jurisdiction can be enlarged to include matters outside of that legislatively circumscribed sphere.” 61 Ops.Cal.Atty.Gen. 127 (1978) (concluding that the Energy Commission has no regulatory jurisdiction over construction and operation of geothermal wells). The Commission does not have certification jurisdiction over the amended Calico project because it is a PV facility, and any attempt to contrive such jurisdiction would be directly contrary to the clear language of Public Resources Code section 25120.

C. The Motion to Dismiss Raised Purely Legal Issues that the Commission Must Address Before Continuing with this Proceeding

The question of whether the Commission has jurisdiction to consider the Petition to Amend is purely a legal issue. It is undisputed that the Applicant requested authority to amend the Calico project to construct an initial facility of 275 MW of solar PV generation and, several years later, another facility of 288 MW of solar PV generation, and only 100.5 MW of solar thermal generation from SunCatchers.² There are no disputed or outstanding issues that would benefit from the application of Commission expertise. “[T]he issue of whether the agency proceeded in excess of its jurisdiction is a question of law, and is one on which [the courts] do not defer to the Commission’s views.” *Security Nat. Guar., Inc. v. California Coastal Com'n*, 159 Cal.App.4th at 417 (internal citations and quotations omitted). The Commission and/or the courts are

² The Applicant has since stated on the record that the SunCatchers are not yet commercially available because of financing difficulties experienced by the manufacturer. (Hearing Transcript, April 20, 2011, p.24:4-9.) It is therefore possible that the amended Calico project would never include any SuCatchers.

perfectly capable of deciding this purely legal issue without any further Commission proceedings. Given the burden that parties and the public will face in continuing to participate in the Commission's proceeding and the clear likelihood that the Commission does not have jurisdiction to consider the Petition to Amend, this matter should be addressed either by the Commission or the courts before the proceeding continues.

III. CONCLUSION

Sierra Club filed the Motion to Dismiss as a courtesy to allow the Commission and other parties an opportunity to address the legal issue regarding the lack of Commission jurisdiction over the Petition to Amend the Calico project. This jurisdictional issue, however, does not require any findings or discretion on the part of the Commission, and Sierra Club may proceed with judicial remedies whether or not the Commission decides to respond to the Motion to Dismiss. Given the fact that the Scheduling Order completely ignored the Motion to Dismiss and deferred any consideration of the jurisdictional question, Sierra Club has no choice but to seek judicial relief in the form of peremptory writ of mandate ordering the Commission to cease its exercise of certification jurisdiction in this proceeding and a declaratory judgment that the Commission does not have certification jurisdiction over this or any other PV powerplant projects.

Dated: May 3, 2011

Respectfully submitted,

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For the CALICO SOLAR AMENDMENT

**Docket No. 08-AFC-13C
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DECLARATION OF SERVICE

I, Jeff Speir, declare that on May 3, 2011, I served by U.S. mail and filed copies of the attached Notice of Protest, dated, May 3, 2011. 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/calicosolar/compliance/index.html>].

The documents have been sent to both 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:

(Check all that Apply)

FOR SERVICE TO ALL OTHER PARTIES:

- sent electronically to all email addresses on the Proof of Service list;
- by personal delivery;
- by delivering on ^{May 4} ~~this date~~, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

- sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

- depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 08-AFC-13C
1516 Ninth Street, MS-4
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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.

/s/ Jeff Speir
