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9 Energy Resources

10 Conservation and Development Commission

11 In the Matter of:

Docket No. 15-AFC-01

12 Application for Certification
13 for the PUENTE POWER PROJECT

14 APPLICANT'S REPLY TO INTERVENERS'
15 JOINT MOTION

16 Applicant hereby responds to Interveners' "Joint Motion To Modify The California
17 Energy Commission's Committee Orders For Additional Evidence And Briefing Following
18 Evidentiary Hearings" dated March 21, 2017 (CEC TN #216641) ("Interveners' Motion").
19 Interveners' Motion requests certain modifications to the "Committee Orders for Additional
20 Evidence and Briefing Following Evidentiary Hearings" dated March 10, 2017 (CEC TN
21 #216505) (the "Committee Order"). Each of Interveners' proposed modifications is addressed
22 below.

23 Proposed Modifications Regarding Focused Biological Surveys

24 Applicant disagrees with assertions contained in the Interveners' Motion pertaining to the
25 adequacy of biological resources surveys completed to date, and the accuracy of the Applicant's
26 and the California Energy Commission staff's conclusions regarding the potential for the Project
27 to adversely impact biological resources. Applicant also disagrees with assertions in the
28 Interveners' Motion regarding potential implications associated with the results of additional

1 surveys, including the suggestion that the presence of certain special status plant species, if
2 established, would “trigger an ESHA designation under the Coastal Act.” (Interveners’ Motion,
3 p. 3). Notwithstanding its disagreement as to the necessity for and potential implications of the
4 additional surveys requested by Interveners, Applicant agrees to Interveners’ requests as
5 specified below.

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7 *Requests For Surveys Of Additional Special Status Wildlife Species*

8 Interveners’ Motion requests that the Committee modify the Committee Order to require
9 Applicant to conduct biological resources surveys for seven additional special status wildlife
10 species in addition to the four wildlife species for which surveys are already required pursuant to
11 the Committee Order. Interveners’ Motion also requests that surveys be conducted on the areas
12 potentially affected by removal of the existing beach outfall in addition to the approximately
13 three-acre Project site.

14
15 In response to the Committee Order and the Interveners’ Motion, Applicant filed a
16 Biological Resources Survey Methodology on March 27, 2017 (CEC TN #217716) (“Survey
17 Methodology”). The Survey Methodology includes the additional seven wildlife species
18 identified in Interveners’ Motion. In addition, the Biological Study Area (“BSA”) covered by
19 the Survey Methodology includes the Project site and the areas potentially affected by removal
20 of the existing outfall structure, as requested in the Interveners’ Motion.

21
22 *Requests For Surveys Of Additional Special Status Plant Species*

23 Interveners’ Motion requests that the Committee modify the Committee Order to require
24 Applicant to conduct biological resources surveys for two additional special status plant species
25 in addition to the one plant species for which surveys are already required pursuant to the
26 Committee Order.

1 The Survey Methodology includes the additional two plant species identified in
2 Interveners' Motion. Consistent with the additional wildlife surveys, surveys for the additional
3 plant species will be conducted in the entire BSA identified in the Survey Methodology,
4 including the areas potentially affected by removal of the existing outfall structure.

5 *Survey Timing*

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7 Interveners' Motion requests that the Committee modify the Committee Order to specify
8 that all surveys be conducted within the biologically appropriate and scientifically recommended
9 time period for the species in question.

10 As explained in the Survey Methodology, all surveys will be conducted within the
11 biologically appropriate and scientifically recommended time period for the species in question,
12 which is April and May.

13 *Request to Allow Expert Testifying Biologists Access to the Project Site*

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15 Interveners' Motion requests that testifying witnesses Mr. Hunt and Ms. Anderson be
16 afforded an opportunity to visit and study the site and to accompany agency staff on any site
17 visits pertaining to the surveys.

18 Applicant does not agree to provide Mr. Hunt or Ms. Anderson, or any other Intervener
19 representative, access to the Project site or any other portion of the Mandalay Generating Station
20 property for any purpose whatsoever. The surveys will be conducted by Applicant's team of
21 expert biologists, whose credentials are included with the Survey Methodology, and under the
22 oversight of expert biologists from the California Energy Commission, California Coastal
23 Commission and California Department of Fish & Wildlife. Participation by Interveners' expert
24 witnesses is not necessary to conduct the biological resources surveys and secure the desired
25 information, or to ensure the adequacy and integrity of the surveys.
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1 To the extent that Interveners’ Motion is requesting that the Committee *order* Applicant
2 to provide access to Mr. Hunt and Ms. Anderson, the request is beyond the authority of the
3 Committee, as derived from the authority of the Commission, which is very specifically
4 proscribed in the Warren-Alquist State Energy Resources Conservation and Development Act
5 (Pub. Res. Code §25000 et seq.) (the “Act”). Relevant authority is contained in Pub. Res. Code
6 §25216.5(a), which authorizes the Commission to take actions “. . . to secure adequate evaluation
7 of applications . . .” Further, Pub. Res. Code §25218(e) authorizes the Commission to take any
8 action it “deems reasonable and necessary” to carry out the Act. Finally, Pub. Res. Code
9 §25218.5 states that the powers of the Commission are to be liberally construed “in order to
10 carry out the objectives” of the Act.
11

12 As stated above, the biological resources surveys will be conducted by qualified
13 biologists under the oversight of three separate state agencies with expertise in this area. There
14 is no reasonable basis for concluding that the involvement of Mr. Hunt and/or Ms. Anderson in
15 the actual conduct of the surveys is necessary, or will even aid in, securing the information
16 sought by the Committee, or that such involvement is necessary to carry out the objectives of the
17 Act. Mr. Hunt and Ms. Anderson will, of course, be free to render their opinions on the results
18 of the surveys and the implications thereof, and the Committee will have the benefit of that input.
19 Under these circumstances, the express authority granted to the Commission by the Act does not
20 include the authority to compel Applicant to provide access to Interveners’ witnesses. Nor can
21 such authority be implied under even the most liberal interpretation of the relevant statutory
22 provisions.
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25 It is well-established that agencies such as the Commission possess only the “powers
26 conferred on them, either expressly or impliedly, by Constitution or statute.” *Am. Fed’n of*
27 *Labor v. Unemployment Ins. Appeals Bd.*, 13 Cal. 4th 1017, 1042 (1996). Furthermore, an
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1 implied power will not be held to exist unless it is “essential to the declared objects and purposes
2 of the enabling act - not simply convenient, but indispensable. Any reasonable doubt concerning
3 the existence of the power is to be resolved against the agency.” *Addison v. Dep’t of Motor*
4 *Vehicles*, 69 Cal. App. 3d 486, 498 (1977). Finally, when a “fundamental” right is at issue, the
5 agency may not strip a party of that right by “mere implication.” *Scannell v. Wolff*, 86 Cal. App.
6 2d 489, 496 (1948). Certainly, a private property owner’s right to exclude others from its land is
7 a “fundamental” right. The United States Supreme Court has clearly and unequivocally stated
8 that the right to exclude others is a fundamental element of the constitutionally-protected right to
9 private property, and that physical intrusion, whether by government *or by private parties acting*
10 *under government permission*, violates that right. See *Nollan v. California Coastal Comm’n*, 483
11 U.S. 825 (1987) (emphasis added).
12

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14 The Committee derives its authority from the Act. The Act does not, and under well-
15 established constitutional principles cannot, grant the Committee express or implied authority to
16 compel an applicant to make its private property available to others for the purposes of
17 conducting studies or collecting information, particularly when doing so is not necessary to
18 address either the immediate needs of the Committee or the broader objectives of the Act.
19 Therefore, the request of Interveners that their witnesses be provided access to the site must be
20 denied.
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22 Proposed Modifications Regarding Briefing Schedule

23 Applicant disagrees with some of the assertions contained in Interveners’ Motion
24 regarding the relevancy of certain information to the determination of the Project’s compliance
25 with applicable land use laws, ordinance, regulations and standards (LORS). However, if
26 Interveners intend to argue that such information is relevant to compliance with land use LORS,
27 as they apparently intend to do (assuming it is admitted into the evidentiary record), then there is
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1 little value to briefing this issue now, since Interveners will presumably seek to re-brief the issue
2 later based on any such additional evidence. In the interest of only briefing the issue once,
3 Applicant concurs with Interveners' request to postpone all briefing until after the evidentiary
4 record is completely closed.
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7 DATED: March 30, 2017

Respectfully submitted,

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9 */s/ Michael J. Carroll*

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