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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of: Petition For Amendment for the **PALEN SOLAR ELECTRIC GENERATING SYSTEM**	**DOCKET NO. 09-AFC-7C** **PALEN SOLAR HOLDINGS, LLC'S REPLY BRIEF**

In accordance with the Committee direction at the PreHearing Conference held on October 24, 2013 and the Committee Order dated November 1, 2013, Palen Solar Holdings LLC (PSH) files this Reply Brief to address issues raised by the parties in their Opening Briefs.

INTRODUCTION

As a preliminary matter, PSH objects to the introduction of evidence through the Opening Briefs. The failure of parties to follow Commission rules and procedures prevents any meaningful dialogue. The Commission should not only reject any late-filed evidence but should also question the motives and credibility of parties that engage in this blatant act of "sandbagging".

The Commission process for considering the siting of power plants is one of the most engaging and publicly transparent processes available to members of the public. And while the decision before the Commission is whether to amend the Final Decision of the PSEGS, the Committee and Commission Staff in this matter have processed the Petition For Amendment (Petition) much more like a brand new Application For Certification (AFC) rather than an amendment. Unlike the Petition currently being processed by the Commission for the Blythe Solar Power Project (09-AFC-6C), the Committee held a Site Visit and Informational Hearing; the Staff conducted numerous Data Request and Issue Resolution Workshops and Workshops on the Preliminary Staff Assessment (PSA); and the Committee held Status Conferences, a PreHearing Conference, multiple days of evidentiary hearings, and allowed Opening and Rebuttal Testimony filings. PSH never objected to the process and fully engaged the parties with a desire and determination to

resolve issues. PSH made its filings on-time and offered proposed resolutions to as many issues as it could, usually through the use of proposed modifications to the Conditions of Certification.

The Center for Biological Diversity (CBD), an active intervening party to the amendment proceeding, did not propose a single modification to a Condition of Certification until its Reply Brief. This is a violation of the Committee Order for the PreHearing Conference which specifically directed the parties to include any proposed modifications to the Conditions of Certification in its PreHearing Conference Statement. This would have allowed the parties to address such proposed modifications at evidentiary hearing. Such late filing denies PSH the ability for its experts to testify as to why CBD's proposed conditions of certification are unworkable.

CBD also criticizes Staff for failing to evaluate an alternative which CBD produced in its Testimony, long after Staff would have had the ability to analyze it. CBD's late filing denies Staff the ability to truly analyze CBD's proposed alternative configuration.

Additionally, Staff filed with its Opening Brief a document that purports to be testimony from Roger Johnson relating to findings of override. This late filing denies PSH due process to conduct meaningful cross-examination of Mr. Johnson's opinion its basis.

Of course, some parties will argue that they have been unable to provide the aforementioned information in a timely manner because the Commission is "rushing" the process to review PSH's Petition, as if more time is always the answer. The record, however, is clear that all of these issues could have been raised at the PSA Workshop or in PSA comments so that meaningful dialogue could ensue. In addition, the Commission should note that the processing of this amendment will, in fact, take longer than the Commission's statutory requirement for processing a new AFC. The Commission should send a very clear message that parties should act in good faith, avoid last minute "sandbagging" and, accordingly, the Commission should give the appropriate weight to the contentions of the parties engaging in such behavior.

ENVIRONMENTAL BASELINE

The scope of the proceeding before the Commission is whether to Approve or Deny PSH's Petition For Amendment, and the evidentiary burdens are governed by Commission Regulation Section 1769. As the Committee has previously directed, each party bears the burden of proof for presenting its evidence. Each party's evidence must be specifically related to the amendment, the scope of which includes changing the technology from solar trough to power tower, addition of a natural gas supply line and shifting a portion of the approved transmission line corridor 1,125 feet to the west. Unless 1) there is a change of law, ordinance, regulation or standard (LORS); 2) there is new scientific information that is

relevant and was not available to the parties at the time of the original evidentiary hearings; or 3) the evidence is related specifically to the change in technology, addition of the natural gas pipeline, or shift of the approved transmission line corridor; the evidence or arguments are not relevant. This is also consistent with CEQA's provisions on the scope of preparing a subsequent EIR.[1]

ISSUES PREVIOUSLY ADJUDICATED

The following issues are raised in CBD's and the Colorado River Indian Tribes' (CRIT) Opening Briefs that were previously adjudicated or addressed in the Final Decision for the Approved Project. Applying the legal standard above, neither CBD nor CRIT has provided any credible evidence that there is new information that would require the Commission to revisit its Final Decision for the following topics:

Mojave Fringe Toed Lizard Mitigation Ratios

The Final Decision approved Condition of Certification **BIO-20** and **BIO-29** which included mitigation ratios for Mojave Fringe Toed Lizard (MFTL). As described by Dr. Alice Karl in Exhibit 1080:

> The mitigation ratio for direct and indirect impacts to MFTL was adjudicated in the original proceedings and there is no new scientific evidence provided by Dr. Muth that should warrant reopening that issue.

No party contends that this issue was not addressed in the original proceedings. Therefore, the Committee should adopt the mitigation ratios approved in the Final Decision.

Desert Tortoise Connectivity

For the reasons identified in Exhibit 1080, the testimony of Dr. Alice Karl, the Desert Tortoise Connectivity issue was thoroughly examined in the original proceedings. Specifically, the Project Applicant for the PSPP prepared a wildlife connectivity study, marked as Exhibit 32 in the original proceeding. The Final Decision concluded:

> With implementation of proposed Conditions of Certification, these potential impacts to wildlife connectivity would be reduced below a level of significance. Specifically, item No. 1 under Condition of Certification **BIO-9** requires construction of desert tortoise exclusion fencing on both sides of

[1] Public Resources Code Section 21166, CEQA Guidelines 15162 and 15163. See also *Black Property Owners Association v. City of Berkeley* 22 Cal. App. 4th 974; *Benton v. Board of Supervisors* 226 Cal. App. 1467.

I-10 to direct desert tortoise and other wildlife to safe passage under the freeway bridges.[2]

In Exhibit 1080, Dr. Karl addressed CBD's claim that there was new scientific evidence that warrants the Commission re-opening the issue.

Ms. Anderson (Page 5) states:

> "Despite these declines, the project is being sited in the only WHMA established by BLM to provide connectivity from the Chuckwalla DWMA in the southern part of the Colorado River Recovery Unit to the northern part of the Unit, including to the Chemehuevi DWMA. … Even with mitigation, this key connectivity area will be lost forever…"

These statements are not accurate as presented. First, this *proposed* WHMA does not connect two DWMAs (Chuckwalla and Chemehuevi). It connects the Chuckwalla DWMA to a *multi-species* WHMA on the north side of the freeway. The major connection to the north for tortoises is the DWMA itself, which BLM modified to include the habitat on the north side of the freeway, well west of the project. Second, the BLM's connectivity WHMA is roughly five times the width of the solar site, and extends both east and west of the solar site. The solar site itself lies in a portion of the WHMA that has few to no tortoises and little to no tortoise habitat, so it is not an effective connectivity corridor.[3]

CBD now alleges for the first time in its Opening Brief that the PSEGS has moved the project boundary such that it would be closer to I-10, thereby increasing the constraints on desert tortoise movement.[4] This is not correct. CBD is confused about the difference between the wind fenceline of the Approved Project and the boundary of the Project Disturbance area of the Approved Project. As shown on Page 2.1-3, of Exhibit 1003, the outside boundary of the PSEGS has not been moved any closer to I-10 than the original Approved Project Disturbance boundary.[5] The tortoise fence for the PSEGS project will follow the Approved Project Disturbance Area along I-10.

CBD assumes, incorrectly, that there would not have been desert tortoise exclusion fencing along the Project Disturbance boundary for the Approved Project. The Conditions of Certification for the Approved Project would have required desert tortoise exclusion fencing for the Project Disturbance area. Specifically, Condition of Certification **BIO-9,** Section 2. a. requires:

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[2] Final Decision, Biological Resources, pages 19 and 20.
[3] Exhibit 1080, Rebuttal Testimony of Dr. Alice Karl.
[4] CBD Opening Brief, page 26
[5] See also Testimony of Charles Turlinski, 10/29/13 RT, pages 60-61; 68-70.

> The exclusion fencing shall be installed in any area subject to disturbance prior to the onset of site clearing and grubbing in that area.[6]

Therefore, CBD has failed to meet its burden for showing that the Petition, new scientific evidence or new LORS require the Commission to revisit desert tortoise connectivity issues.

PreHistoric Trails

CRIT in Section III B. of its Opening Brief claims that PreHistoric Trails were not evaluated. This issue was examined by the Commission in the Final Decision for the Approved Project. Specifically the Commission found:

> Of the resources evaluated, Staff concluded that the proposed project would have a significant direct impact on 49 resources either recommended eligible or assumed eligible for either the National Register of Historic Places and/or California Register of Historical Resources. These impacts include:
>
> - Direct impacts to nine prehistoric archaeological sites, all potential contributors to a prehistoric cultural landscape (historic district) identified by Staff and designated as the Prehistoric Trails Network Cultural Landscape (PTNCL);[7]

and

> - Cumulative impacts to the PTNCL and the DTCCL, resulting from the PSPP's impacts to contributors to these assumed register-eligible resources.[8]

CRIT has introduced no new evidence of specific locations of new trail segments that were not analyzed in the Final Decision.

Further the Commission found:

> In conclusion, with the adoption and implementation of Staff's recommended Cultural Resources Conditions, the PSPP would be in conformity with all applicable LORS. **CUL-1** and **CUL-2**, which we also adopt, would reduce the project's cumulative impacts to the PTNCL and DTCCL to the greatest extent possible, but those impacts would still be

[6] Final Decision, Biological Resources, page 74.
[7] Final Decision, Cultural Resources, pages 27 through 28.
[8] Ibid, page 28.

> cumulatively considerable. **CUL-3** through **CUL-15** would reduce the direct impacts to less than significant.[9]

Impacts to Cultural Resources On-Site

CRIT argues in its Opening Brief Section III., D., 1 and 2 that the Conditions of Certification for Cultural Resources do not mitigate the impacts to cultural resources on-site to levels of less than significant. This issue was decided by the Committee in the Final Decision for the Approved Project, which involved the movement of 22 times the volume of soil as that proposed for the PSEGS. Specifically, the Commission found:

> In conclusion, with the adoption and implementation of Staff's recommended Cultural Resources Conditions, the PSPP would be in conformity with all applicable LORS. **CUL-1** and **CUL-2**, which we also adopt, would reduce the project's cumulative impacts to the PTNCL and DTCCL to the greatest extent possible, but those impacts would still be cumulatively considerable. **CUL-3** through **CUL-15** would reduce the direct impacts to less than significant.[10]

The claim that lessons learned from the Genesis Project constitutes new evidence requiring the Commission to revisit its conclusions for the PSEGS, which reduces ground disturbance by 95 percent compared to the Approved Project, is illogical. The Commission should note that both Staff and PSH experts agree that the setting of the PSEGS site does not exhibit any of the attributes of the Genesis Project site that may give rise to likely discoveries.[11] Therefore, we request the Committee find that the impacts to cultural resources that may be encountered on site are less for the PSEGS than for the Approved Project.

Notwithstanding the above, PSH, in an attempt to accommodate some of CRIT's requests, proposes to modify certain Conditions of Certification consistent with the Committee direction provided in the Blythe Solar Power Project evidentiary hearing. The proposed changes are included as Attachment A to this Reply Brief.

REBUTTAL TO CEQA VIOLATION CLAIMS

It is important to note that while the FSA is an important environmental document, it is not the equivalent of an EIR. The Commission regulatory process has been certified by the Secretary of Resources as a "certified regulatory program" pursuant to PRC Section 21080.5. While this determination does not exempt the Commission from compliance with

[9] Ibid, page 29.
[10] Final Decision, Cultural Resources, page 29.
[11] Exhibit 1081 and Exhibit 2003, page 32.

the substantive requirements of CEQA, it does exempt the Commission from several of the procedural requirements. The purpose is to avoid redundancy by allowing a regulatory process such as the Commission's to be the "functional equivalent" of an EIR process. However, comparison of the FSA to an EIR is not appropriate. The FSA is simply an independent analysis performed by Staff for use by the Commission. The combination of the FSA and all of the other evidence in the record including public comment is then used by the Commission to prepare a Final Decision. Therefore, it is more accurate to compare the Final Decision to a Final EIR in a traditional CEQA setting except that the Final Decision must also include CEQA-related findings.

Sufficiency of Baseline Data

CBD alleges that the environmental analysis is not supported by enough baseline data. CEQA does not require the exhaustive types of studies that CBD suggest. For example, "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project, [t]he fact that additional studies might be helpful does not mean that they are required.[12] A study, required by an agency, which "takes place over two winters could conflict with the requirement that EIR's for private projects be prepared and certified within one year."[13] CEQA requires the EIR performed on a potential project to "reflect a good faith effort at full disclosure", and does not "mandate perfection or the EIR to be exhaustive" and "will be judged in light of what was reasonably feasible."[14] In fact, the purpose of the baseline data is to provide enough information upon which to inform the public and the decision makers about the change to the environment that may be attributed to the project. CEQA Guidelines Section 15151 provides:

> an evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in light of what is reasonably feasible.

CEQA Guidelines Section 15204 Subd. (a) provides:

> CEQA does not require a lead agency, to conduct every test or perform all research, study, and experimentation recommended or demanded by commenters.

Yet CBD argues that the baseline data for determining avian impacts is deficient. PSH has performed thousands of hours of surveying for avian species and believes it has provided more than enough evidence on avian species that may use or may migrate

[12] *Gray v. County of Madera*, (2008) 167 Cal. App.4th 1099. (Quoting *Associated of Irritated Residents v. County of Madera*, (2003) 107 Cal.App.4th 1383).
[13] Id. (See also, Public Resources Code 21100.2, 21151.5; CEQA Guidelines 15108.)
[14] *City of Long Beach v. Los Angeles Unified School District*, (2009) 176 Cal. 889.

through PSEGS study area.[15] Therefore, CBD's claim is simply unsupported by the evidence in the record.

No Deferral of Analysis

Both CRIT and CBD claim that the Commission is improperly deferring analysis in violation of CEQA. CEQA Guidelines Section 15126.4 subd. (a)(1) (b) provides:

> Measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.

Also the courts have held:

> Deferral is permissible where the agency commits itself to mitigation and either (1) adopts a performance standard and makes further approvals contingent on finding a way to meet the standard or (2) lists alternative means of mitigating the impact which must be considered, analyzed, and possibly adopted in the future.[16]

CBD alleges that such deferral has occurred for avian impacts. First, CBD ignores the fact that both PSH and Staff agree that even with the implementation of the conditions of certification, the PSEGS has the potential to result in significant and unmitigatable impacts to avian species. In other words, neither Staff nor PSH have relied on the proposed mitigation to support of a finding of "less than significance". Second, the conditions of certification include performance standards that are based on acquiring real-time data on bird use and behavior at the PSEGS site when the facility is operational. The plans prepared in accordance with the conditions of certification do not allow modification of the Commission ultimate conclusion that the PSEGS will result in significant avian impacts. It is this data that will inform the alternative means of mitigating the impact.

CBD has also criticized PSH for providing some of the avian risk reduction measures that may be considered by the TAC as impermissible deferral. The purpose of the testimony was to inform the Committee that measures that are employed at other developments (airports, wind farms, etc.) may be helpful to reduce and minimize risk to avian species. In addition, the TAC is comprised of agencies with jurisdiction over avian species that may be impacted by the PSEGS. The primary purpose of the TAC is to provide coordination and agency concurrence on implementation of measures to avoid jurisdictional and legal conflicts.

CRIT alleges that Condition of Certification **CUL-1** is a deferral of analysis. PSH agrees. There is no clear performance standard outlined in the condition and the condition appears

[15] Exhibits 1014, 1035, 1037, 1047 and 1048.
[16] *CF. Defend the Bay v. City of Irvine (2004)* 119 Cal. App. 4th 1261, page 1275.

to gather information for the sole purpose of gathering information. As described in our Opening Brief, the primary reason for rejecting the condition is that the PSEGS does not result in the impacts purportedly mitigated by Condition of Certification of **CUL-1.**

Alternatives

1. Project Objectives Relied On in the FSA were Not Too Narrow.

CEQA mandates that an EIR include a "statement of the objectives *sought by the proposed project*", and to analyze a "reasonable range" of project alternatives that will "feasibly attain" most of those project objectives.[17] Per the CEQA Guidelines, the statement of objectives sought by the project "should include the *underlying purpose of the project*."[18]

In determining which alternatives to analyze in detail, Staff considered the PSEGS project objectives which include (see Exh. 2000, p. 6.1-5):

- Deliver 500 megawatts of renewable electrical energy to the regional electrical grid to fulfill its existing approved power purchase agreements (PPAs) for electrical sales from the facility.
- Develop a solar thermal power plant at a site where some of the permits and other authorizations required for construction have been completed and/or obtained.
- Develop a site that is large enough to accommodate BrightSource Energy's Solar Power Tower technology.
- Develop a site that is in a BLM-designated Solar Energy Zone.
- Develop a site with an executed and approved Large Generator Interconnection Agreement for interconnection to a substation that would be operational in time to meet delivery of electricity under the approved PPAs.

Staff also retained some of the original project objectives from the PSPP and incorporated other basic objectives that are consistent with the state's renewable energy goals (see Exh. 2000, p. 6.1-5):

- Safely and economically construct and operate a utility-scale solar energy project of up to 500 megawatts.

[17] 14 C.C.R. § 15124(b), 15126.6(a) (emphasis added).
[18] 14 C.C.R. § 15124(b) (emphasis added).

- Develop a renewable energy facility that will supply clean, renewable electricity, and assist Southern California Edison in satisfying its California Renewables Portfolio Standard program goals.

- Ensure construction and operation of a renewable electrical generation facility that will meet permitting requirements and comply with applicable laws, ordinances, regulations, and standards.

- Develop a renewable energy facility in a timely manner that will avoid or minimize significant environmental impacts to the greatest extent feasible.

- Develop a renewable energy facility in an area with high solar value and minimal slope.

CBD incorrectly argues that Staff only considered the original project objectives from the PSPP.[19] As noted in Staff Exhibit 2000, as well as in Staff's Opening Brief, Staff considered the PSEGS project objectives listed above (which includes the underlying purpose of the amended project), as well as the original PSPP project objectives.[20] Thus, the project objectives relied on in the FSA were extensive and allowed staff to consider a reasonable range of alternatives.

The FSA's project objectives are not too narrow, and in fact are more expansive than the project applicant's objectives. This is permissible in developing a range of alternatives to carry forward for analysis and full disclosure purposes, but for the reasons discussed below, the Commission can, and should, rely on the business purpose of PSH and reject the PV Alternative and the No Project Alternative as infeasible.

2. A Commission Rejection of the PV Alternative as Infeasible is Supported By Substantial Evidence

As part of its alternatives analysis, Staff analyzed a PV alternative and found that it would reduce certain project impacts. However, based on uncontested evidence in the record, including testimony about the project objectives, economic viability[21], and timing uncertainty, the Commission should ultimately reject the PV alternative as infeasible.[22]

The specific reasons for infeasibility of a PV alternative include:

a. <u>PV is not allowed under the project PPAs</u>. As stated by Charles Turlinski, "[T]he PPA's in question do not allow for a change in technology without the requisite counterparty and CPUC approval, both would be a lengthy and uncertain

[19] CBD Opening Brief, Page 16.
[20] Staff Opening Brief, Pages 21-22.
[21] 14 C.C.R. § 15126(f)(1) (One of the factors that may be taken into account when addressing the feasibility of alternatives is economic viability).
[22] Under CEQA, the goal of identifying the environmentally superior alternative is to assist decision makes in considering project approval. CEQA does not require an agency to select the environmentally superior alternative. 14 C.C.R. § 15043.

process."[23] CBD offers no evidence in the record which refutes this statement. Further, when presented with the opportunity to directly question Charles Turlinski about the PPAs during evidentiary hearings, CBD chose not to do so.

b. PV is not contemplated under the project LGIA. As stated by Charles Turlinski, "Any modification of the PSEGS to utilize PV technology would require . . . a material modification analysis and subsequent amendment to the LGIA."[24] CBD offers no evidence in the record to the contrary. Further, when presented with the opportunity to directly question Charles Turlinski about the LGIA during evidentiary hearings, CBD chose not to do so.

c. If amended, the LGIA would likely have reduced project output. As stated by Charles Turlinski: "[A]ny request to amend the LGIA would likely result in reduction in the project output by the California Independent System Operator (CAISO) due to the difference in power quality and reliability from a large injection of PV electricity."[25] CBD offers no evidence in the record which refutes this statement. Further, when presented with the opportunity to directly question Charles Turlinski about the LGIA during evidentiary hearings, CBD chose not to do so.

d. Utility (and later CPUC) approval of any proposed PPA amendments is uncertain and could take years. As stated by Charles Turlinski: "First, there is no guarantee that the utility . . . would ultimately approve any such amendments. Second, it could take months or even years to negotiate and finalize any such amendments."[26] CBD offers no evidence in the record which refutes this statement. Further, when presented with the opportunity to directly question Charles Turlinski about possible PPA amendments during evidentiary hearings, CBD chose not to do so.

e. Investment Tax Credit (ITC) would expire. Charles Turlinski stated that having to amend "either the PPA's or the LGIA would essentially make the project infeasible because it would no longer be able to be constructed in sufficient time to qualify for the Investment Tax Credit."[27] Additionally, Mr. Turlinski noted that trying to negotiate and finalize PPA and LGIA amendments would put "key Project Objectives (e.g., delivering high quality renewable electricity to California consumers and qualifying for the Investment Tax Credit which will expire in 2016) in serious peril."[28] CBD offers no evidence in the record which refutes this assertion. Further, when presented with the opportunity to directly question

[23] Applicant's Alternatives Opening Testimony, Page 3.
[24] Ibid.
[25] Ibid.
[26] Ibid.
[27] Ibid.
[28] Ibid at Pages 3-4.

Charles Turlinski about the ITC during evidentiary hearings, CBD chose not to do so.

f. Petitioner desires to build its own proprietary renewable energy technology. The objectives sought by the project cannot be disregarded or altered on the basis that the objectives are tailored in part to achieve Applicant's business purposes. The California Supreme Court has left no doubt that the business purposes of the project proponent are an appropriate project objective: Although a lead agency may not give a project's purpose an *artificially* narrow definition, a lead agency may structure its EIR alternatives analysis around a reasonable definition of underlying purpose and therefore need not study alternatives that cannot achieve that basic goal. For example, if the purpose of the project is to build an oceanfront hotel or waterfront aquarium, a lead agency need not consider inland locations.[29] Further, feasibility must be viewed in context of what can be done by the *specific Applicant*.[30] PSH has developed proprietary power tower solar technology with the goal of advancing the technology to second generation with a storage component. Charles Turlinski testified:

> The PSEGS will construct and operate BrightSource Energy second generation power tower technology. BrightSource Energy is committed to developing this second generation technology as a significant step toward developing its third generation technology incorporating thermal storage.

PSH is not a PV company. PSH was formed to develop a project utlilizing BrightSource Energy proprietary technology. Therefore, the PV alternative would frustrate the underlying business objectives of the company.[31]

CBD cites *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736-37 for the proposition that prior commitments (in that case, an agreement between the utility and the project owner) could not foreclose analysis of alternatives. However, the court also noted that the existing contract between the utility and the project owner "is not irrelevant. It must be considered in the review process." Additionally, the facts in *Kings County* are very different from the facts here. The EIR in *Kings County* failed to even analyze a different technology alternative (in that case, a natural gas plant alternative versus the planned coal facility). In this matter, Staff analyzed the PV alternative for the Commission to determine whether or not the PV alternative is feasible.

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[29] *In re Bay Delta Programmatic Envt'l Impact Report Coordinated Proceedings*, 43 Cal.4th 1143, 1166 (2008) (emphasis added).

[30] Addressing "feasibility" in *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553 (1990), the Supreme Court limited the scope of the project EIR to what can be done by the individual developer, not what is best for the region.

[31] California courts have long recognized that it is perfectly acceptable to base a CEQA alternatives analysis on Applicant's underlying business objectives (*See, e.g.*, *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal.3d 553, 561 (1990) (holding that inland location alternative need not be analyzed if business objective of project is to build a waterfront hotel); *Save San Francisco Bay Ass'n v. San Francisco Bay Conservation Comm'n,* 10 Cal. App.4th 908, 924 (1992) (holding that inland location alternative need not be analyzed if business objective of project is to build waterfront aquarium); *Sequoyah Hills Homeowners Ass'n v. City of Oakland*, 23 Cal.App.4th 704, 715 (1993) (holding that low density alternative need not be analyzed if business objective is providing multi-family housing).

Further, in *Kings County,* the Court acknowledged that; "Renegotiation of the contract may have been possible; if not, the EIR must indicate the reasons for that conclusion." As described above, renegotiation of the PPA's for the PSEGS would render the project infeasible.

Additionally, CBD and CRIT inaccurately characterize PSH's contention that the PV alternative is infeasible as purely economic. Then, based on that incorrect assumption, they cite a line of cases that seem to require an economic analysis to support the assertion. However, as described above, PSH has articulated several arguments supporting infeasibility and has not relied on economics in the way alleged by the Interveners.

The purpose of the CEQA alternatives analysis is to identify ways in which the objectives sought by the proposed project might be achieved while also avoiding or substantially lessening any of the significant effects of a project.[32] The Court in *Sierra Club v. County of Napa* (2004) 121 Cal. App. 4th 1490 upheld using the applicant's business purpose and project objectives for a finding of infeasibility. In that case, the applicant sought to consolidate winery operations into one location and the court held that it would frustrate the objectives of the applicant if a reduced project was determined to be feasible, when it would not have allowed all the consolidation of activities sought by the applicant. Similarly, the business purpose of using the BrightSource proprietary technology must be given great weight as a legitimate business purpose.

Staff's alternatives analysis conducted according to the requirements set forth in CEQA. The analysis is more than sufficient under the law. It is thorough and certainly meets the goal of CEQA to foster meaningful public participation and informed decision-making. Staff's alternatives analysis informs the Commission on whether there are alternatives to the project that will avoid or reduce significant immitigable environmental impacts. CBD and CRIT fail to recognize a very important next step in the Commission process; deliberation by the Commission. PSH urges the Commission to consider the PV alternative and based on the unrefuted testimony of Charles Turlinski, find that it is not feasible for this applicant to achieve its business purpose.

3. PV Alternative Would Still Result in Significant Unmitigatable Avian Impacts

Staff identified the PV Alternative as the environmental superior alternative. However, while Staff points out the PV Alternative would eliminate impacts to avian species due to solar flux, they conclude that:

[32] 14 C.C.R. § 15126.6(a).

> Under the Solar PV Alternative, with implementation of all feasible mitigation measures, indirect and cumulative collision impacts could remain significant after mitigation.[33]

Therefore, approval of the PV Alternative would ***not*** reduce impacts to avian species to less than significant levels and a finding of override would still be necessary.

REBUTTAL TO ASSERTION OF IMPACTS TO CULTURAL LANDSCAPE

Staff Fails to Prove that PSEGS Will Materially Impair the PGTRL

For a Cultural Resource to be eligible for listing, it must retain enough, not all, of its ***integrity*** to convey the aspects that cause it be eligible for listing on the California or National Register of Historic Places.[34] Staff has the burden to demonstrate that the visual intrusion of the PSEGS is sufficient to cause the PGTRL to no longer be eligible for listing. Staff has failed to meet its burden.

1. Staff Alters Its Position. In the FSA, Staff claimed that it was primarily the height of the two solar towers that would degrade the ability of the landscape to convey its historical significance. Staff stated that "***the difference in the visual profiles between the original project and the amended project***" is the primary focus of the cultural resources analysis for the present amendment.[35] Staff also noted that the "presence of the facility's two heliostat fields ***and particularly the two, approximately 750 foot-tall solar power towers would introduce stark visual intrusions on the landscape***".[36] Similarly, Staff stated that "***the towers would loom large over the Valley floor near the facility site . . .***"[37]

   However, following evidentiary hearings where PSH provided compelling visual evidence that the towers would often be difficult to see from various key observation points, and following the testimony of Mary Barger who said:

   > [S]taff stated that the towers would profoundly and irreparably degrade the ability of the landscape to convey its historic significance.
   >
   > I believe, as I described, that the landscape is still intact. The physical features and all of the contributing elements listed in the

[33] Exhibit 2000, page 6.1-98.
[34] 10/28/13 RT pages 45 and 46, Mr. Mcguirt; Exhibit 1076.
[35] FSA Cultural Resources, Page 4.3-3 (emphasis added).
[36] FSA Cultural Resources, Page 4.3-158 (emphasis added).
[37] FSA Cultural Resources, Page 4.3-159 (emphasis added).

> final staff assessment are all present. These include the petroglyph sites, the springs, mountains, foothills, Palen Dry Lake ACEC. They're all physically unaffected by the addition of the two towers.[38]

Staff now changes its story to say that it's no longer the height of the towers, but the intensity of the light produced that degrades the PGTRL. Staff now states that:

> ***The question of the difference in visual effects is not, as the project owner has framed it, a question of whether the licensed or amended facility is more or less spatially visible at ground level.*** The question of the difference in visual effects pertains to the difference in the magnitude of the height, brilliance, and the ***intensity of the light*** that the amended facility would produce relative to the licensed project, and whether that difference in light intensity would substantively degrade the ability of the subject portion of PRGTL to convey its historical significance.[39]

This statement is disingenuous and is contradicted by Staff's own words in the FSA. Further, Staff offers no evidence that the difference in intensity of the light between the original project and the amended project is sufficient to ruin the integrity of the PGTRL such that it could no longer be listed.

2. Staff Changes Its Mitigation Measures. In its Opening Brief, Staff now introduces a new table of costs which it claims addresses PSH's testimony that **CUL-1** is uncapped. However, the new table comes far too late in the process, and PSH has no ability to question or cross-examine Staff about how the numbers were derived. Therefore, the new table should be rejected. Additionally, if Staff intended any of the costs to be capped, they failed to make any changes to **CUL-1** to provide such a cap.

3. No Legal Nexus. Staff again fails to provide ***any*** legal nexus demonstrating how any of the required actions in **CUL-1** would in fact contribute towards mitigating the impact it asserts. Staff admits that even with the mitigation imposed by **CUL-1** the impacts are immitigable:

> Staff proposes a suite of compensatory mitigation through revisions to Condition of Certification **CUL-1** from the original project's license that, ***while not reducing the amended project's effects to a less than significant level***, would serve to ameliorate the loss of the

[38] 10/28/13 RT pages 73 through 75.
[39] Staff Opening Brief, Page 3.

Chuckwalla Valley portion of the PRGTL's ability to convey its associative values.[40]

A proper nexus must exist between impacts and mitigation in order to limit government overreach.[41] As we describe in our Opening Brief, without a proper nexus, any such mitigation imposed is arbitrary and capricious. Therefore, **CUL-1** should be rejected.

REBUTTAL TO WORKER SAFETY IMPACT

Staff's argument largely rests on its determination that the PSEGS causes a "direct" impact while the Approved Project would have resulted in a "cumulative" impact. Staff supports this determination that there is no longer a cumulative impact because the PSEGS has eliminated Therminol.

Staff bases its impact and mitigation assessment on:

1. A revised Staff Emergency Response Matrix (CEC 2013k; see **Worker Safety/Fire Protection Appendix A**);
2. The recent events at the Ivanpah Solar Energy Project which utilizes solar tower technology;
3. The increased need for and difficulty of rescue in a tower;
4. The need for the RCFD to expend resources to become familiar with new technology within its jurisdiction;
5. The decreased fire risk due to the removal of HTF and propane from the project;
6. The decreased risk of explosion due to the removal of propane; and
7. Staff's expertise and judgment.[42]

Staff then states that it recognized the ***reduced risk*** (associated with the elimination of Therminol) in its mitigation but ultimately, with the addition of its recommended cost escalator, requires the PSEGS to ***pay more mitigation than the original project***. While Staff cautions against relying too heavily on the Staff Emergency Response Matrix

[40] Staff Opening Brief, Page 4.

[41] See generally *Koontz v. St. Johns River Water Management District*, 133 S.Ct. 2586 (2013), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) which showcase efforts by the Supreme Court to prevent governmental bodies from going "too far" in imposing development regulations and mitigations.

[42] Exhibit 2000, page 4.14-29.

(Matrix)[43] to determine impacts, it is the ***sole basis for Staff's calculation of the mitigation amount***. Staff explained that it revised the Matrix to reflect the reduction in risk posed by the PSEGS. Then Staff simply scaled the amount of compensation based on the reduced risk percentage identified in the Matrix. Then Staff simply multiplied the original mitigation amount by the percentage reduction in the risk identified in the Matrix. The Matrix was originally used for the PSPP, the GSEP, the RSEP, and the BSPP to allocate each of these project's contribution to a "cumulative impact" to which Staff now believes PSEGS does not contribute. If the PSPP was mitigating for a cumulative impact due to its use of Therminol, and as Staff suggests the elimination of Therminol eliminated any contribution to a cumulative impact, scaling the original mitigation amount is comparing apples to oranges. The amount of mitigation that was required of the PSPP for its cumulative impact logically bears no relation to any new direct impact now claimed by Staff.

As discussed in PSH's Opening Brief, there is simply no evidence in the record except Exhibit 1051-the Fire Needs Assessment prepared by PSH-upon which to base any determination of a direct impact. Staff cannot have it both ways. If it believes that there is only a direct impact, Staff should have conducted an analysis that did not rely on the Matrix to "scale" the previous cumulative mitigation for the Approved Project.

Also, to ensure that the Committee has an appropriate comparison of impacts and mitigation amounts, PSH has modified the table that Staff incorporated into its Opening Brief to reflect the Approved Project and the Final Decision for the RSEP.

	Worker Safety-7	Approved Project	***PSH***	Rice Solar Energy Project
One-time payment for capital Improvements	$1,000,000	$875,000	***$1,200,000***	$716,140[44]
Annually, during Construction for three years	$313,000	$375,000	***$684,000***	$0
Annually, during Operations	$313,000	$375,000	***$85,500***	$0
Annual Cost Escalator	CPI-U (approximately $1,600,000 over life of the project)	$0	***$0***	$0

[43] Ibid, page 4.14-28.
[44] See PSH Opening Brief, page 39.

REBUTTAL TO RESPONSES TO COMMITTEE QUESTIONS

No Curtailment

The issue of curtailment was raised during evidentiary hearings. First, Mr. Emmerich of Basin and Range Watch asked Staff "is curtailment ever an option?"[45] CEC Staff member Chris Huntley replied as follows:

> As part of our conditions of certification, we have recommended and proposed the development of a very comprehensive and rigorous monitoring so far, and so we'll be working with Petitioner and the resource agencies to develop a monitoring plan to help us get a handle on the number and type of birds that may be subject to mortality and morbidity from the solar flux. So that process is starting right now and will be developed. So that's first part. The second part is we right now believe that, you know, it's reasonably foreseeable that these kind of impacts will occur with birds, but we don't know the exact suite of species. So it's very preliminary for us right now to come up with a number. I think part of the Technical Advisory Committee will be to develop thresholds and find -- and kind of find approaches for mitigation and conservation that are appropriate based on what we're finding with our studies. And we acknowledge that, you know, this is very new technology and we are taking what actions we deem are appropriate to offset the impact as best we can.[46]

Immediately thereafter, Hearing Advisor Celli followed up with another curtailment question, asking Staff "Does the Technical Advisory Committee, would they be empowered to curtail – to come up with some number to curtail operations if there was an exceed[ance]?"[47] CEC Staff member Chris Huntley then replied:

> I think the intent is to develop a tactical resource agency or energy commission staff, have the Applicant or the Petitioner involved, and then, in the process, determine whether additional mitigation is appropriate or other actions. ***I can't put on the table curtailment at this point in time***."[48]

Hence, Staff considered the concept of curtailment, but rejected it in favor of the suite of mitigation measures included in Condition of Certification **BIO-16a** and **BIO-16b**. CBD was present at these evidentiary hearings, yet chose not to engage either Staff or PSH on the issue of curtailment.

[45] 10/29/13 RT page 170.
[46] 10/29/13 RT pages 170-171.
[47] 10/29/13 RT page 172.
[48] 10/29/13 RT page 172 (emphasis added).

Additionally, any form of curtailment requirement would render the PSEGS unfinanceable (and likely put PSEGS into default under its existing power purchase agreements). Such an approach is simply not necessary and would involve speculation in violation of CEQA principles. With implementation of the adaptive management program, the PSEGS will be taking feasible measures to reduce risks.

Public Comment on TAC Recommendations

PSH supports public comment on TAC recommendations as described in its Opening Brief. Since the TAC is made up of the agencies that have jurisdiction over the species that may be impacted, PSH believes that the public does not have additional expertise that could help with TAC deliberations. As Dr. Alice Karl testified at evidentiary hearing:

> [I]t is experts that we would want to look at the data and analyze whether the measures are working. And if -- if more monitoring needs to be done, different monitoring needs to be done, what kind of adaptive management, not the general public. And certainly, the public will be aware of the information because of -- of reports that will be on the websites, ***but it's experts that need to weigh in on this and not the general public***.[49]

TAC deliberations should be left to the experts to ensure that TAC decisions are not arbitrary, are based on scientific data, and are not influenced by emotion. If the TAC feels the need to obtain additional outside expertise, it certainly can seek that outside support.

No Violation of LORS

Staff and PSH agree that the PSEGS will not violate any applicable LORS. CBD's speculation that the PSEGS will take an eagle or other fully protected species is unwarranted and not supported by any evidence in the record. Please see PSH's Opening Brief.

CRIT PROPOSED CONDITIONS OF CERTIFICATION

In light of the stipulation between the CRIT and the Blythe Solar Power Project proponent, PSH has considered and agrees to the following additional modifications to the Conditions of Certification to provide greater involvement to the tribes in the review of the Cultural Resources Monitoring and Mitigation Plan (CRMMP) and provide the flexibility for avoidance. Specifically we provide the following modifications to Condition of Certification **CUL-5:**

[49] 10/29/13 RT page 185 (emphasis added).

CUL-5 CULTURAL RESOURCES MONITORING AND MITIGATION PLAN

Prior to the start of ground disturbance, the project owner shall submit to the CPM for review and approval the Cultural Resources Monitoring and Mitigation Plan (CRMMP), as prepared by or under the direction of the CRS, with the contributions of the PPA, and the PHA. **The CPM shall facilitate review and comment by affected Indian tribes prior to approval.** The authors' name(s) shall appear on the title page of the CRMMP. The CRMMP shall specify the impact mitigation protocols for all known cultural resources, i.e., archaeological, ethnographic, and historic resources, and identify general and specific measures to minimize potential impacts to all other cultural resources, including those discovered during construction. Implementation of the CRMMP shall be the responsibility of the CRS and the project owner. Copies of the CRMMP shall reside with the CRS, alternate CRS, the PPA, and the PHA, each CRM, and the project owner's on-site construction manager. No ground disturbance shall occur prior to CPM approval of the CRMMP, unless such activities are specifically approved by the CPM. Prior to certification, the project owner may have the CRS, alternate CRS, the PPA, and the PHA complete and submit to CEC for review the CRMMP, except for the portions to be contributed by the PTNCL and the DTCCL programs.

The CRMMP shall include, but not be limited to, the elements and measures listed below.

1. The following statement shall be included in the Introduction: "Any discussion, summary, or paraphrasing of the Conditions of Certification in this CRMMP is intended as general guidance and as an aid to the user in understanding the Conditions and their implementation. The Conditions, as written in the Commission Decision, shall supersede any summarization, description, or interpretation of the conditions in the CRMMP. The Cultural Resources Conditions of Certification from the Commission Decision are contained in Appendix A."
2. The duties of the CRS shall be fully discussed, including coordination duties with respect to the completion of the Prehistoric Trails Network Cultural Landscape (PTNCL) documentation program and the Desert Training Center California-Arizona Maneuver Area Cultural Landscape (DTCCL) documentation program, and oversight/management duties with respect to site evaluation, data collection, monitoring, and reporting at both known prehistoric and historic-period archaeological sites and any CRHR-eligible (as

determined by the CPM) prehistoric and historic-period archaeological sites discovered during construction.

3. A general research design shall be developed that:

   a. Charts a timeline of all research activities, including those coordinated under the PTNCL and DTCCL documentation program;

   b. Recapitulates the existing paleoenvironmental, prehistoric, ethnohistoric, ethnographic, and historic contexts developed in the PTNCL and DTCCL historic context and adds to these the additional context of the non-military, historic-period occupation and use of the Chuckwalla Valley, to create a comprehensive historic context for the PSEGS vicinity;

   c. Poses archaeological research questions and testable hypotheses specifically applicable to the archaeological resource types known for the Chuckwalla Valley, based on the research questions developed under the PTNCL and DTCCL research and on the archaeological and historical literature pertinent to the Chuckwalla Valley; and

   d. Clearly articulates why it is in the public interest to address the research questions that it poses.

4. Protocols, reflecting the guidance provided in **CUL-10** through **CUL-15** shall be specified for the treatment of known and newly discovered prehistoric and historic-period archaeological resource types.

5. Artifact collection, retention/disposal, **in-situ or onsite reburial (to the extent authorized by BLM),** and curation policies shall be discussed, as related to the research questions formulated in the research design. These policies shall apply to cultural resources materials and documentation resulting from evaluation and data recovery at known prehistoric-period, ethnographic, and historic-period archaeological sites and any CRHR-eligible (as determined by the CPM) prehistoric and historic-period archaeological sites discovered during construction. A prescriptive treatment plan may be included in the CRMMP for limited data types.

6. The implementation sequence and the estimated time frames needed to accomplish all project-related tasks during the ground-disturbance and post-ground–disturbance analysis phases of the project shall be specified.

7. Person(s) expected to perform each of the tasks, their responsibilities, and the reporting relationships between project construction management and the mitigation and monitoring team shall be identified.

8. The manner in which Native American observers or monitors will be included, in addition to their roles in the activities required under **CUL-1**, the procedures to be used to select them, and their roles and responsibilities shall be described.

9. **Notification of Native American Tribes After a Discovery. The CRMMP shall identify which Native American Tribes will be notified of events triggering notification requirements; and will include manner, type and timing of the notification.**

10. **The CRMMP will also describe the steps and timing for addressing an unanticipated discovery.**

11. All impact-avoidance measures (such as flagging or fencing) to prohibit or otherwise restrict access to sensitive resource areas that are to be avoided during ground disturbance, construction, and/or operation shall be described. Any areas where these measures are to be implemented shall be identified. The description shall address how these measures would be implemented prior to the start of ground disturbance and how long they would be needed to protect the resources from project-related impacts.

12. The commitment to record on Department of Parks and Recreation (DPR) 523 Series forms, to map, and to photograph all encountered cultural resources over 50 years of age shall be stated. In addition, the commitment to curate all archaeological materials retained as a result of the archaeological investigations (survey, testing, and data recovery), in accordance with the California State Historical Resources Commission‘s Guidelines for the Curation of Archaeological Collections, into a retrievable storage collection in a public repository or museum shall be stated.

13. The commitment of the project owner to pay all curation fees for artifacts recovered and for related documentation produced during cultural resources investigations conducted for the project shall be stated. The project owner shall identify a curation facility that could accept cultural resources materials resulting from PSEGS cultural resources investigations.

14. The CRS shall attest to having access to equipment and supplies necessary for site mapping, photography, and recovery of all cultural

resource materials (that cannot be treated prescriptively) from known CRHR-eligible archaeological sites and from CRHR-eligible sites that are encountered during ground disturbance .

15. The contents, format, and review and approval process of the final Cultural Resource Report (CRR) shall be described.

Verification:

1. Preferably at least 45 days, but in any event no less than 30 days prior to the start of ground disturbance, the project owner shall submit the CRMMP to the CPM for review and approval. **The CPM shall facilitate review and comment of the CRMMP with affected Native American tribes.**

2. At least 20 days prior to the start of ground disturbance, in a letter to the CPM, the project owner shall agree to pay curation fees for any materials generated or collected as a result of the archaeological investigations (survey, testing, and data recovery).

At least 30 days prior to the start of ground disturbance, the project owner shall provide to the CPM a copy of a letter from a curation facility that meets the standards stated in the California State Historical Resources Commission‘s Guidelines for the Curation of Archaeological Collections, stating the facility‘s willingness and ability to receive the materials generated by PSEGS cultural resources activities and requiring curation. Any agreements concerning curation will be retained and available for audit for the life of the project.

In addition, PSH again proposes the following modifications to Condition of Certification **CUL-10** to address CRIT’s preference for avoidance. Staff specifically rejected PSH’s proposed condition and replaced it with a burdensome and complicate process. CRIT agreed with the inclusion of PSH’s proposed Condition of Certification **CUL-10** provided below:

CUL-10 FLAG AND AVOID

If resources within the transmission line corridor can be spanned rather than impacted, **or resources within the solar field can be feasibly avoided by adjustment of individual heliostat**, or in the event that new resources are discovered during construction where impacts can be reduced or avoided, the project owner shall:

1. Ensure that a CRS, alternate CRS, PPA, or CRM re-establish the boundary of each site, add a 10-meter-wide buffer around the periphery of each site boundary, and flag the resulting space in a conspicuous manner;

2. Ensure that a CRM enforces avoidance of the flagged areas during PSEGS construction; and
3. Ensure, after completion of construction, boundary markings around each site and buffer are removed so as not to attract vandals.

In the event a resource can be avoided, data recovery required by these conditions of certification shall not be performed.

All other proposed modifications that CRIT has proposed were rejected for the reasons described in Exhibit 1081.

REBUTTAL TO STAFF RECOMMENDATION FOR NO OVERRIDE

Staff filed an attachment to its Opening Brief that purports to be testimony that it cannot support a finding of override for avian impacts. As discussed in the Introduction section of this Reply Brief, such a late filing prevents any meaningful dialogue and more importantly prevents PSH or the Committee from engaging in cross-examination to more fully understand Staff's position. Surely this position could have been included in the FSA, or later in Opening Testimony, or in its Rebuttal Testimony, or brought up at evidentiary hearings. A similar filing was made by Staff in the RSEP proceedings but the filing was made prior to evidentiary hearing so that the applicant in that matter could engage in cross-examination. Ultimately, the Commission disregarded the Staff testimony and PSH urges the Committee for a similar result here.

Specifically, PSH, in its Opening Testimony on Project Description and its Testimony on Alternatives[50], has provided an analysis of the facts upon which the Final Decision made Findings of Override pursuant to PRC Section 21081 for the Approved Project and has indicated whether those same facts are applicable to the PSEGS. Further, the testimony provides additional facts relevant to the PSEGS that are sufficient for the Commission to approve CEQA findings of override for cumulative cultural resource impacts, visual resource impacts, and potentially significant unmitigatable impacts to avian species.

In Staff's Attachment to its Opening Brief, Roger Johnson explains that one of the reasons Staff could not support an override for avian impacts is that it is unsure of whether the alternatives that reduce that impact are feasible. For the reasons outlined in this Rebuttal Brief and the evidence in the record, the PV alternative is infeasible. We urge the Commission to rely on this unrefuted evidence in the record and make the appropriate CEQA findings of override so that the Petitioner can achieve the project objectives.

[50] Exhibit 1076.

CONCLUSION

PSH respectively requests the Commission approve the PSEGS amendment. The PSEGS reduces impacts in many technical areas and PSH has worked cooperatively with Staff to minimize and/or mitigate the impacts associated with the change in technology to the extent feasible. The PSEGS is located in a BLM designated Solar Energy Zone, is within the boundaries of the Approved Project, will utilize an existing LGIA that is important to the overall upgrades of the regional transmission system, and will deliver clean, renewable energy to California's ratepayers pursuant to approved PPAs. The record in this Amendment proceeding is robust and contains ample evidence to support the Commission's approval and necessary CEQA findings of override.

Dated: December 2, 2013

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