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September 16, 2011

California Energy Commission
Docket Unit
Attn: Docket No. 09-AFC-9
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Subject: CALIFORNIA STATE ASSOCIATION OF COUNTIES' BRIEF OPPOSING MOTION FOR ORDER AFFIRMING APPLICATION OF JURISDICTIONAL WAIVER FOR THE RIDGECREST SOLAR POWER PROJECT (DOCKET NO. 09-AFC-9)

As authorized by the Commission's order of August 24, 2011 (Order No. 11-0824-8), the California State Association of Counties respectfully submits and has enclosed for filing our "Brief Opposing Motion for Order Affirming Application of Jurisdictional Waiver for the Ridgecrest Solar Power Project." CSAC submits this brief as an interested entity and member of the public and respectfully requests that it be added to the Proof of Service list as an Interested Agency for this Docket No. 09-AFC-9.

Sincerely,

Jennifer Henning,
Litigation Coordinator
California State Association of Counties

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STATE OF CALIFORNIA
State Energy Resources
Conservation and Development Commission

In the Matter of:	)	DOCKET NO.: 09-AFC-9
	)	
RIDGECREST SOLAR POWER	)	CALIFORNIA STATE ASSOCIATION OF
PROJECT	)	COUNTIES' BRIEF OPPOSING MOTION
	)	FOR ORDER AFFIRMING APPLICATION OF
	)	JURISDICTIONAL WAIVER

INTRODUCTION

The California State Association of Counties ("CSAC") is a nonprofit association comprised of the State's 58 counties. The primary purpose of CSAC is to represent the interests of county government before the federal government, the California Legislature and administrative agencies. Given the precedential effect a decision on Applicant's motion may have and the particular manner in which that decision may affect all counties, CSAC appreciates the opportunity to provide comments in the form of a brief opposing Applicant's motion. The submission of this brief is authorized by the Commission's order dated August 24, 2011 (Order No. 11-0824-8).

On September 1, 2009, Solar Millennium, LLC submitted an Application for Certification ("AFC") to the California Energy Commission ("Commission") seeking authority to construct and operate the Ridgecrest Solar Power Project ("RSPP"), a 250 megawatt solar thermal power project.

On June 17, 2011, Solar Trust of America (formerly Solar Millennium, LLC and referred to herein as "Applicant") informed the Ridgecrest Solar Power Project Committee ("Committee") that "it is exploring redesign of the RSPP" to utilize photovoltaic ("PV") technology instead of solar thermal technology. It also filed a motion asking the Committee to issue an order affirming that Public Resources Code section 25502.3[1] allows an applicant to voluntarily elect to file an Application for Certification ("AFC") for a PV facility that would otherwise be excluded from the Commission's jurisdiction ("Motion").

On July 28, 2011, after an initial hearing, the Committee issued an order requesting that the Commission withdraw from the Committee further hearing and resolution of the Motion so that the full Commission could consider it. The Committee made this request in recognition of the fact that a decision on the Motion would set a significant precedent.

The Commission thereafter issued Order No. 11-0824-8 referenced above which provides in pertinent part: "the Commission has not previously addressed the applicability of Public Resources Code section 25502.3 to photovoltaic power plants. In light of the precedential nature of the question presented in [Applicant's] motion, and the potential interest in the question on the part of stakeholders beyond the parties to this proceeding, the Commission hereby exercises its authority under Code of Regulations section 1204(c) to withdraw the above-referenced motion for consideration by the full Commission." (Order No. 11-0824-8.) This order provided all parties, interested entities, and members of the public, an additional opportunity to file further briefing on the Motion.

[1] All statutory references in this brief are to the Public Resources Code unless otherwise stated.

The Commission has accurately identified that issuance of the order requested by Applicant would have a precedential effect. All counties would potentially be impacted by this order in the manner later described in this brief. As Applicant itself has recognized the order "will have ramifications for other developers who may choose on their own to come [to the Commission][2]" and in seeking its issuance, Applicant is hoping to give "understanding and guidance ... to applicants in the future about what their options might be."[3] In fact, at the Commission's August 24, 2011 Business Meeting, Applicant's counsel publicly acknowledged that, depending upon the outcome of the Motion, Applicant will seek to apply the wavier to its Blythe Solar Power Project (Docket No. 09-AFC-6C).[4]

CSAC does not agree with Applicant's contention that section 22502.3 allows an applicant for a PV project to voluntarily elect to file an AFC with the Commission. CSAC supports and incorporates herein by reference pages 2-7 of the Commission Staff's Reply Brief filed July 5, 2011. Additionally, CSAC provides the following comments for the Commission's consideration.

I. APPLICANT IS SEEKING AN INAPPROPRIATE ADVISORY OPINION

Applicant by its own admission is **merely exploring the possibility** of redesigning RSPP to exclusively use PV technology. Applicant has not filed a notice of intention to file an AFC. Applicant's PV facility **is entirely hypothetical**. Accordingly, in filing its Motion, Applicant is seeking an advisory opinion. Applicant admitted this at the July 25, 2011 Committee hearing when its president said, "we are asking for a legal

[2] July 25, 2011 Committee hearing transcript, page 25, lines 24-25
[3] July 25, 2011 Committee hearing transcript, page 30, lines 4-6
[4] August 24, 2011 Commission meeting transcript, page 21, lines 23-25.

interpretation ahead of time."[5] The Committee also recognized this when it characterized Applicant's Motion as a request for an advisory opinion in its June 28, 2011 order.

In California, courts of law are prohibited from issuing advisory opinions. Rendering an advisory opinion is not a judicial duty imposed by the state constitution and falls within neither the functions nor the jurisdiction of the court. *Younger v. Superior Court,* (1978) 21 Cal.3d 102, 119. The process of siting facilities is an adjudicative proceeding and the Commission is acting in a quasi-judicial capacity during such proceedings. A quasi-judicial body can have no more jurisdiction than that of a court of law. Accordingly, only upon the actual filing of a notice of intention would Applicant's Motion be ripe for decision.

CSAC recognizes that the Commission may designate as a precedent decision a decision, or part of a decision, that contains a significant legal or policy determination of general application that is likely to occur. (Government Code section 11425.60, subd. (b)). CSAC further recognizes that once the Commission has adopted a precedent decision, it may rely in future proceedings on the rule, guideline or other general principle in the decision, even though the principle has not been adopted in a rulemaking proceeding. The power to designate decisions as precedential, however, does not dispense with the requirement that such decisions must still be based on a genuine and existing controversy, calling for the present adjudication of present rights. As noted above, a contrary interpretation would empower the Commission with broader powers than that of a court of law.

[5] July 25, 2011 Committee hearing transcript, page 29, lines 16-17

It also bears noting that the Commission is required to maintain an index of significant legal and policy determinations made in precedent decisions. CSAC has consulted that index and found only one precedent decision. The precedent decision concerned greenhouse gas emissions as part of the Final Commission Decision on the Avenal Energy Project (Docket No. 2008-AFC-01). The precedent decision was made in an actual siting case ripe for decision-- not in the context of the hypothetical case like the one you are now presented with.

II. SENATE BILL 226 CONFIRMS THAT APPLICANT IS MISTAKEN IN ITS INTERPRETATION OF PUBLIC RESOURCES CODE SECTION 25502.3

Public Resources Code section 25502.3 provides:

> "Except as provided in Section 25501.7, any person proposing to construct a facility excluded from the provisions of this chapter may waive such exclusion by submitting to the commission a notice of intention to file an application for certification, and any and all of the provisions of this chapter shall apply to the construction of such facility."

If, as Applicant alleges, this section allows an applicant for an otherwise excluded PV facility to voluntarily elect to file an AFC with the Commission, it would have been completely unnecessary for the legislature to draft and pass Senate Bill 226 (SB 226) which is currently awaiting the Governor's signature. SB 226 would add section 25500.1 to the Public Resources Code.

Subdivision (a) of section 25500.1 would provide:

> "(a) **[t]he owner of a proposed solar thermal powerplant**, for which an application for certification was filed with the commission after August 15, 2007,

and certified by the commission and, of a project on federal land, for which a record of decision was issued by the Department of the Interior or the Bureau of Land Management before September 1, 2011, **may petition the commission not later than June 30, 2011, to review an amendment to the facility's certificate to convert the facility, in whole or in part, from solar thermal technology to photovoltaic technology, without the need to file an entirely new application for certification or notice of intent** pursuant to Section 25502, provided that the commission prepares supplemental environmental review documentation, provides for public notice and comment on the supplemental environmental review, and holds at least one public hearing on the proposal." (Emphasis added.)

Subdivision (c) of section 25500.1, also included in the Senate Bill, would provide:

"(c) For a facility specified in subdivision (a), **this chapter shall continue to apply, notwithstanding that the facility or part of the facility would otherwise be excluded pursuant to Section 25120**." (Emphasis added.)

In short, this bill codifies a jurisdictional waiver for specific applicants seeking to convert to PV technology and would have not been required if section 22502.3 already gives Applicant a right to such a waiver. The fact that the legislature felt required to enact it is conclusive proof that Applicant's interpretation of section 25502.3 is incorrect.

The bill is also conclusive proof that the legislature did not want the jurisdictional election to apply to projects like RSPP, which have not received certification from the Commission and a Bureau of Land Management Record of Decision. Had the legislature wanted to include such projects, it could easily have drafted the bill to include those projects. Its decision not to do so is an express indication of legislative intent that

the jurisdictional election should not apply to such projects. Instead, the applicants for such projects must process them with the appropriate County, which in this case would be Kern County.

SB 226 also underscores that because the Commission is statutorily created and empowered, jurisdictional issues like that presented by Applicant should be addressed legislatively rather than administratively.

III. ABSENT SB 226, APPLICANT IS MISTAKEN IN ITS INTERPRETATION OF PUBLIC RESOURCES CODE SECTION 25502.3

Applicant argues that Public Resources Code section 25502.3 allows an applicant to voluntarily submit to the Commission's jurisdiction and file an AFC for a project that would otherwise be excluded from its jurisdiction. We respectfully disagree.

A. The meaning that Applicant asks the Commission to give section 25502.3 is contrary to the Warren-Alquist Act and its legislative history.

The purpose of the Warren-Alquist Act ("Act"), as evidenced by the wording of the Act itself and legislative history, is to confer upon the Commission jurisdiction to site **only thermal powerplants and related electric transmission lines**. Public Resources Code section 25500 contains the jurisdictional grant and provides in pertinent part: "[T]he commission shall have the exclusive power to certify all sites and related facilities in the state . . . ."

The Act defines "sites" as any location on which a facility is constructed or is proposed to be constructed." (Section 25119.) The Act defines "facility" as "any electric

transmission line or thermal powerplant or both." (Section 25110.) The Act defines "electric transmission line" as "any electric power line carrying electric power from a thermal powerplant located within the state to a point of juncture with any interconnected transmission system. (Section 25107.) The Act defines "thermal powerplant" as "any stationary or floating electrical generating facility using any source of thermal energy, with a generating capacity of 50 megawatts or more, or any facilities appurtenant thereto." (Section 25120.) The definition of thermal powerplant **expressly excludes a solar photovoltaic electrical generating facility**. (Id.)

This express exclusion was added in 1987 by Senate Bill 928. The Senate Committee on Energy and Public Utilities Report on Senate Bill 928 specifically indicates that under the Act, **the Commission is responsible for siting thermal powerplants and electrical generating facilities which are not thermally powered are exempt.**" Nothing in the remaining legislative history of the Act indicates a broader grant of jurisdictional authority. Accordingly, the meaning that Applicant asks the Commission to give to section 25502.3 is contrary to the Act and its legislative history.

B. The meaning that Applicant asks the Commission to give section 25502.3 would require the definitions in the Act to be altered for the purpose of this section only.

As noted above, section 25502.3 provides in pertinent part that: "[A]ny person proposing to construct a 'facility' excluded from the provisions of this chapter may waive such exclusion . . . ." As also noted above, the Act defines "facility" as "any electric transmission line or thermal powerplant or both." (Section 25110.) Applicant concedes that this statutory definition applies everywhere in the Act except in section 25502.3. In that section only, Applicant argues that the term "facility" means something other than

the statutory definition and more specifically, means a solar photovoltaic electrical generating facility because such a facility is excluded from the Act pursuant to section 25120. **The definitions in the Act, however, govern the construction of the Act** unless the context otherwise requires. (Section 25100.) Applicant asserts that section 25502.3 is rendered meaningless if the statutory definition of "facility" is applied because no person could propose to construct a thermal power plant that would be excluded from the Act – such plants are always included.

As Commission staff so clearly demonstrates in its reply brief, however, at the time section 25502.3 was adopted there were certain classes of thermal powerplants that were, in fact, excluded from the Act. Namely, thermal powerplants that the Public Utilities Commission had already certified and thermal powerplants which were planned to commence construction within three years. It is these excluded thermal powerplants that section 25502.3 makes reference to, not those in section 25120. This position is further supported by the fact that the express exclusions in section 25120 were adopted in 1988 - - 14 years after the adoption of section 25502.3.

Accordingly, section 25502.3 is not rendered meaningless if the statutory definition of "facility" is applied. The statutory definition governs; the context does not otherwise require. Only applicants proposing to construct thermal powerplants may waive exclusion under section 25502.3, not applicants proposing PV facilities.

C. The meaning that Applicant asks the Commission to give section 25502.3 would confer on the Commission jurisdiction to certify all energy producing facilities regardless of capacity.

If, notwithstanding the above, the Commission decides that the term "facility" in section 25502.3 means something other than the statutory definition, it would confer upon itself jurisdiction to certify not only PV facilities, but wind and hydroelectric facilities as well. Moreover, it would confer upon itself jurisdiction to certify facilities with a generating capacity of less than 50 megawatts. This is clearly not a result the legislature intended when it adopted the Act and created the Commission.

D. The meaning that Applicant asks the Commission to give section 25502.3 would inappropriately deprive counties of their constitutionally conferred police powers.

Article XI, section 7 of the California Constitution specifically confers on counties the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal.Const.art.XI,§ 7.) County land use regulations protecting the public health, safety, and welfare of residents are a manifestation of these constitutionally granted police powers; they are not an exercise of authority delegated by statute. *See Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d, 412, 417. In contrast, the Commission is a special purpose, statutory entity, the powers of which are limited to those expressly granted or clearly implied.

If the Commission issues Applicant's requested order, Kern County may, at the Applicant's election, be deprived of its constitutionally conferred police power to permit the Ridgecrest Solar Power Project. Moreover, as the Commission has recognized, issuance of the requested order would likely have far reaching effects. Other solar power plant developers may seek similar orders and other counties may, at the election

of those developers, be deprived of their constitutionally conferred police power to permit PV facilities.

For a statutory entity like the Commission to interfere with the police powers of a local jurisdiction, the right to do so must be clearly expressed. *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881, 887. Section 25502.3 does not contain such a clear expression and neither does any other provision of the Act. There would be no need to review the legislative history of the Act if it did. Even that legislative history, however, provides no basis for Applicant's interpretation. Construing section 25502.3 in the manner suggested by Commission staff avoids the problem of depriving another entity of its jurisdiction at the request of an applicant.

CONCLUSION

For the above-referenced reasons, and in light of the earlier information and arguments presented in this matter, CSAC respectfully requests that the Commission deny Applicant's Motion.

September 16, 2011

Respectfully submitted,

Jennifer Henning, Litigation Counsel
CSAC

☑ **Proof of Service and Declaration of Service attached.**

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APPLICATION FOR CERTIFICATION
For the *RIDGECREST SOLAR POWER PROJECT*

Docket No. 09-AFC-9
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(Revised 8/15/2011)

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California State Association of Counties' Brief in Opposition of Motion for Order Affirming Application of Jurisdictional Waiver

DECLARATION OF SERVICE

Dovie

I, Andrew declare that on, 9-16-11, I served and filed copies of the attached ↑, dated 9-16-11. The original document, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: **[www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest/index.html**

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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

____ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, 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.

Dovie L. Andrew