BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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APPLICATION FOR CERTIFICATION FOR THE
BEACON SOLAR ENERGY PROJECT
BY *BEACON SOLAR, LLC*

DOCKET NO. 08-AFC-2

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DATE	APR 15 2009
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COMMITTEE ORDER DENYING CURE'S MOTION TO COMPEL PRODUCTION OF INFORMATION

I. SUMMARY

On March 16, 2009, Intervenor, California Unions for Reliable Energy (CURE), filed its *Motion to Find Good Cause and to Compel Production of Information (*Motion or Motion to Compel). The Motion is **DENIED** for the reasons set forth below.

II. BACKGROUND

On January 26, 2009 CURE served 144 Data Requests on the Applicant. On February 13, 2009, Applicant filed its *Objections to California Unions for Reliable Energy's Data Requests* (Objections) which (1) argued that CURE's Data Requests should be disallowed in their entirety for untimeliness and (2) provided specific substantive objections to various data requests. On March 16, 2009, CURE responded by filing its Motion to Compel. On March 25, 2009, Applicant and Staff filed responses to CURE's Motion; CURE submitted rebuttal on March 30, 2009.

What follows is a brief chronology of relevant events:

- May 7, 2008 - The Commission found the AFC (Application for Certification) for the BSEP project to be data adequate.
- May 22, 2008 – The Commission granted CURE's Petition to Intervene.
- June 11, 2008 – CURE enters an appearance at the Informational Hearing (6/11/08 RT 2:13-25; 46:8-12).
- June 16, 2008 - Staff files Data Requests.
- July 22, 2008 – Staff leads Data Response Workshop.

- August 25, 2008 - Staff leads Biology Issue Workshop.
- September 30, 2008 - CURE submits status report.
- *November 3, 2008 - Discovery closes (180 days from the date AFC was found data adequate [Cal. Code Regs., tit 20, § 1716 subd. (e)]).*
- November 6, 2008 - Data Response Workshop.
- November 12, 2008 - CURE's attorney asks Staff Project Manager whether the discovery period had lapsed or if it had been extended.
- November 14, 2008 - Staff Project Manager replies that the discovery period had lapsed and had not been extended.
- January 26, 2009 - CURE files First Set of 144 Data Requests (249 days after CURE intervened, 264 days after AFC was determined to be complete, 84 days after the close of discovery.)
- February 13, 2009 - Applicant files Objections to CURE's Data Requests.

III. DISCUSSION

Our regulations grant to all parties (Applicant, Staff, and Intervenors) the right to obtain information. [Cal. Code Regs., tit. 20, §§ 1712 subd. (b), 1716, subd. (b).] However:

> *All requests for information shall be submitted no later than 180 days from the date the commission determines an application is complete, unless the committee allows requests for information at a later time for good cause shown. [Cal. Code Regs., tit. 20 § 1716(e).]*

CURE submitted their Data Requests to Applicant 264 days after the commission determined the application was complete and 84 days after the 180 days allowed by Section 1716(e). After Applicant filed timely objections, CURE filed their Motion to Compel. We find that CURE's Data Requests were untimely filed and turn next to the question of whether CURE has shown "good cause" for the delay.

<u>What Is "Good Cause"?</u>

"Good cause" is a flexible concept. As the courts have noted, the term "is not susceptible of precise definition [and] its definition varies with the context in which it is used" (*Zorrero v. Unemployment Ins. Appeals Bd.* (1975) 47 Cal.App.3d 434, 439); it is "largely relative in [its] connotation, depending upon the particular circumstances of each case" [*R.J. Cardinal Co. v. Ritchie* (1963) 218 Cal.App.2d 124, 144]. The nature and extent of the showing necessary to satisfy the good cause requirement for an extension must, of necessity, vary

with the circumstances of every case (*Chalco-California Corp. v. Superior Court of Los Angeles County* (1963) 59 Cal 2d 883). There are no hard-and-fast rules that apply in our proceedings. Indeed, in civil litigation, when considering analogous motions to extend the time for discovery, "the court shall take into consideration *any* matter relevant to the [extension] requested." (Code Civ. Proc., § 2024.050, subd. (b), italics added.) The applicable civil litigation statute also specifically lists the following factors as potentially relevant:

> (1) The necessity and the reasons for the discovery.
>
> (2) The diligence . . . of the party seeking the discovery . . . and the reasons that the discovery was not completed . . . earlier.
>
> (3) Any likelihood that permitting the discovery . . . will . . . interfere with the trial calendar, or result in prejudice to any other party.

[*Id.*, § 2024.050, subd. (b)(1)-(3).]

In general, we believe good cause requires a showing that a diligent effort has been made to complete discovery within the prescribed time frames and that failure to do so was caused by obstacles which could not reasonably be avoided. The list of factors which follows is not exhaustive or exclusive, but is useful in deciding whether the requesting party has made an adequate showing of good cause:

- the requesting party's reasons for seeking an extension of discovery;
- the requesting party's diligence in earlier pursuing discovery;
- legal or technical sophistication of the requesting party;
- any prejudice which would inure to the requesting party if an extension is denied;
- any prejudice which would inure to the other parties if an extension is granted;
- the age of the case and whether a PSA has issued or a hearing date has been set; and
- the impact of the requested extension on the schedule.

<u>CURE's Reasons for the Requested Extension</u>

CURE offers four reasons for its late filed discovery: (1) CURE contends that it is entitled to an extension because Applicant submitted documents, reports, and studies in response to Staff's timely filed formal data requests beyond the 180-day period; (2) Staff continues to informally seek additional information from Applicant and Applicant

continues to answer Staff's requests; (3) Staff continues to raise new issues in other resource areas, so therefore CURE is entitled to submit late data requests because the data gathering phase appears to be ongoing and issues remain unresolved; and, (4) timeliness of data requests should be considered in relation to the issuance of the Preliminary Staff Assessment ("PSA") (see CURE's Motion to Compel, pp. 4-6).

The Committee notes that three of CURE's four reasons for filing beyond the 180-day period share a single premise: that if Staff and Applicant are exchanging information after the cut-off, then this means discovery is still open and the 180 day cut-off is somehow tolled. CURE offers no authority in support of this premise.

In response to CURE's first reason for their belated request (supplemental Data Responses were filed after the 180 day limit), we would first point out that the 180-day period in Section 1716(e) only applies to Data *Requests*, not Data Responses. The mere fact that supplemental responses to a timely filed Data Request are submitted after the cut-off date does not, in and of itself, trigger a right for all parties to disregard the 180 day rule. We can envision a scenario where a Data Response represents such a dramatic departure from the project description that a party would have good cause to submit Data Requests predicated thereon; but such a scenario is not before us in this case. Thus, the mere fact that supplemental Data Responses were submitted after the 180 day limit in response to timely filed Data Requests or as a result of a later workshop, does not, without more, constitute good cause to reopen discovery.

Second, CURE suggests that Staff's informal requests for information from the Applicant, and Applicant's answers thereto, constitute discovery that should resurrect CURE's right to propound Data Requests. We disagree. "Communications between parties, including staff, for the purpose of exchanging information or discussing procedural issues" is permissible at any time. [Cal. Code Regs., tit. 20, § 1710, subd. (a).] Indeed, it is common for parties to exchange information voluntarily, even late into the proceedings. But such informal communications are not formal Data Requests, and their mere existence does not amount to good cause for violating the rules that are applicable to formal Requests.

CURE's third reason that "the data gathering phase appears to be ongoing and issues remain unresolved," is based upon the same misconception: that a party's subjective belief that discovery appears to be ongoing suspends the discovery time limits. We have already found that it does not. We can only assume that the same issues that are unresolved now were also unresolved before the expiration of 180 day discovery period. CURE offers no explanation why they waited three months after discovery closed to ask the same questions they could have asked when discovery was open. Again, we do not find good cause based upon the mere appearance of ongoing information exchange

between parties lasting beyond the discovery cut-off date, even when coupled with the existence of unresolved issues.

CURE‘s fourth reason claims that the 180-day period typically extends fifteen days past the issuance of a PSA. There is nothing in the regulations that extends the 180-day discovery period fifteen days past the issuance of a PSA. There is no mention of the PSA in Section 1716 at all. But even if that is a “typical experience” in other cases, that fact does not excuse a party’s failure to meet the 180-day deadline. If a party believes that the issuance of the PSA legitimately creates the need for additional discovery, an appropriate motion may be filed then.

CURE’s Diligence in Earlier Pursuing Discovery

We reiterate that good cause requires a showing that a diligent effort has been made to complete discovery within the prescribed time frames and that failure to do so was caused by obstacles which could not reasonably have been avoided. CURE is silent on the issue of their diligence. However, in their briefs in opposition to CURE’s Motion, both Applicant and Staff make the case for CURE’s lack of diligence.

CURE allowed 218 days to pass before submitting its first set of data requests since it was granted leave to intervene on May 22, 2008. During those 218 days, CURE’s representative attended three workshops: the July 22, 2008 workshop on data requests, the August 25, 2008 workshop on biological issues, and the November 6, 2008 workshop on data requests. The August 25, 2008 workshop was held at United States Fish and Wildlife Service’s (USFWS) office for the purpose of discussing potential project-related impacts to desert tortoise, Mohave ground squirrel, and other species of special concern. This workshop would have been an excellent opportunity for CURE to engage in discussions with California Department of Fish and Game (CDFG), USFWS, and Staff on biological issues. CURE contacted the Project Manager to specifically discuss the discovery limit the week after discovery expired, but waited nearly three more months to submit Data Requests.

119 of CURE’s 144 late data requests pertain to the area of biology. Yet, even after attending two workshops within the first 100 days of discovery, CURE chose not to file data requests. CURE has provided no reason why, despite a copious record of studies, workshops and discussion, it waited 218 days to propound its first set of data requests. The requesting party has the burden to demonstrate their diligence and CURE has not met that burden.

Technical or Legal Sophistication of the Requesting party

The technical or legal sophistication of the requesting party is a relevant factor to be carefully weighed in determining good cause to extend discovery. The California Energy Commission makes every attempt to encourage public participation in the power plant siting process. Anyone can petition to become an Intervenor and there is no requirement that they be represented by legal counsel. Still, as a practical matter, an Intervenor represented by seasoned legal counsel familiar with the Energy Commission's practices and procedures has a distinct advantage.

It is important not to punish parties with counsel nor reward parties without. However, when, as here, a party misses a deadline or some other procedural hurdle, the party's past dealings with the Energy Commission and apparent knowledge of our procedures is relevant to a determination of good cause.

CURE has been one of the most frequent and experienced Intervenors in Energy Commission siting cases for more than a decade. The excuse that "discovery appeared to be ongoing" might contribute to a finding of good cause for an unsophisticated, unrepresented member of the public attempting to navigate our process for the first time, but coming from the highly sophisticated, well-represented CURE, that excuse rings hollow.

Prejudice Inuring to CURE

CURE's claim of prejudice is simply that:

> *Without the requested information, CURE will be unable to exercise its right to fully participate in these determinations and will be restricted in its ability to provide meaningful input into the Commission's licensing process. In addition, the Commission will be denied information necessary to its evaluation of the AFC. (CURE's Motion to Compel, p. 3).*

This bare, general allegation is insufficient. On a motion to find good cause to extend discovery, the requesting party must provide a statement of particularized facts demonstrating that a lack of response to each specific question (or group of questions) will result in prejudice (See generally *In re Marriage of Leonard* (2004) 119 Cal.App.4th 546, 550, 557, 561 [14 Cal.Rptr.3d 482]; *Cal. Highway Patrol v. Superior Ct.* (2000) 84 Cal.App.4th 1010, 1020-1022 [101 Cal.Rptr.2d 379].) By failing to provide such facts, CURE has failed to show good cause.

CURE's claim that "the Commission will be denied information necessary to its evaluation of the AFC," is not shown *(*CURE's Motion to Compel, *p.* 3*)*. CURE's assertion lacks specificity as to what information is missing. Besides, by law, the Applicant must supply the Commission with all information necessary to evaluate the AFC [Cal. Pub. Resources Code Section 25519(b)]. CURE's showing of prejudice is so thin that we cannot make a finding of good cause shown.

Prejudice Inuring to Other Parties

If we grant the extension, the Applicant will have to take the time to review each question, develop a response, and provide it. Other parties will also have to take time to review the responses to determine whether the new information changes their analyses or strategy. While this is a necessary burden during the 180-day discovery period, that period has long since ended and the proceeding has transitioned to the pre-hearing stage; the parties are mobilizing the PSA workshop in preparation of the FSA and evidentiary hearings. There would be substantial harm from requiring the parties to revive the discovery phase while simultaneously managing the pre-hearing stage.

Age of the Case

In general, the likelihood of allowing an extension to submit Data Requests should decrease in proportion to the advancing age of the case. We agree with CURE that the proximity of the PSA may be a relevant factor, but in most cases it is important to complete discovery *before* the publication of the PSA. Here, the PSA has already been filed (on April 2, 2009). With the publication of the PSA will come a PSA workshop followed by the FSA, and then evidentiary hearings in quite short order. This late stage of the proceeding is not the time to embark on an extensive first round of Data Requests, in the absence of other good cause.

Impact of the Requested Extension on the Schedule and Proceedings

The law frowns upon stale demands and declines to aid those who have slept on their rights (Civ. Code § 3527). The AFC is a month short of a year old and the schedule is already five months in arrears. Staff has published the PSA, and CURE has provided no justification for an extension of discovery. We find the negative effects of delaying these proceedings by elongating discovery substantially outweigh any speculative benefit to CURE.

IV. CONCLUSION AND ORDER

Based upon the foregoing, we conclude that CURE has not provided good cause for their late submission of 144 Data Requests. However, we note that in the event of a substantial change in the project description or upon newly discovered information, CURE, or any party, may move to reopen discovery on a showing of good cause, for the limited purpose of obtaining necessary and relevant information regarding such change or new information.

Because we find that the entire first set of CURE's Data Requests are untimely, the remaining objections to individual Data Requests are moot. Accordingly, the Motion of California Unions for Reliable Energy to Find Good Cause and Compel Production of Information is **DENIED**.

Dated April 15, 2009, at Sacramento, California

Original Signed By:
KAREN DOUGLAS
Chairman and Presiding Member
Beacon Solar Project Committee

Original Signed By:
JEFFREY D. BYRON
Commissioner and Associate Member
Beacon Solar Project Committee

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Docket No. 08-AFC-2

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(Revised 2/9/09)

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DECLARATION OF SERVICE

I, RoseMary Avalos, declare that on April 15, 2009, I served and filed copies of the attached Committee Order Denying CURE's Motion To Compel Production Of Information, dated April 15, 2009. 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:
[www.energy.ca.gov/sitingcases/beacon]. The document has 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:

__X__ sent electronically to all email addresses on the Proof of Service list;

__X__ by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

__X__ 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
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I declare under penalty of perjury that the foregoing is true and correct.

Original Signed By:
RoseMary Avalos