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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:

Beacon Solar, LLC's Application for Certification of the Beacon Solar Energy Project	))))	Docket No. 08-AFC-2

BEACON SOLAR, LLC'S OPPOSITION TO CALIFORNIA UNIONS FOR RELIABLE ENERGY'S MOTION TO FIND GOOD CAUSE AND TO COMPEL PRODUCTION OF INFORMATION

March 25, 2009

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I. INTRODUCTION

In its Motion to Find Good Cause and to Compel Production of Information, California Unions for Reliable Energy (CURE) attempts to convince the Committee that its motion is justified because "this proceeding has serious, unresolved issues." CURE's motion neither correctly reflects the status of the Beacon Solar Energy Project (BSEP) proceedings to date, nor accurately recounts the governing statutes, regulations, and case law applicable to the proceedings.

The California Energy Commission's ("Commission") procedure for permitting and approving power plant projects is a certified regulatory program under the California Environmental Quality Act (CEQA). *See* Pub. Res. Code § 21080.5. Accordingly, many (though not all) of the substantive requirements of CEQA are applicable to the siting process, and the standards developed in CEQA case law generally also apply. *See generally Sierra Club v. State Bd. of Forestry* (1994) 7 Cal. 4th 1215, 1231, 1234; *City of Arcadia v. State Water Res. Control Bd.* (2006) 135 Cal. App. 4th 1392, 1421-22. In addition, the Commission is guided by its own siting regulations, as promulgated in Title 20 of the California Code of Regulations, which regulations comprise the backbone of the certified regulatory program.

When the BSEP Application for Certification (AFC) and proceedings are viewed in light of the above laws, standards, and guidance, it is clear the 144 Data Requests served by CURE on

January 26, 2009 were served unjustifiably late, and without good cause. Furthermore, the bulk of CURE's Data Requests seek information that is irrelevant or unnecessary to a decision on the AFC, not reasonably available to the applicant Beacon Solar, LLC ("Beacon"), or has already been provided in one form or another. S*ee* 20 C.C.R. § 1716(b). As discussed further below, CURE's Motion to Find Good Cause and to Compel Production of Information (MTC) should be summarily denied.

II. OPPOSITION ARGUMENT

CURE attempts to state a number of grounds for its motion to compel, all of which fail. As an initial matter, regardless of how CURE frames the situation, it cannot avoid the fact that its Data Requests were indisputably untimely under the Commission's regulations. Having been called to task by Beacon for its failure to state good cause for the delay in its Data Requests in the first instance, CURE now attempts to manufacture good cause on the basis of the procedural context of this project, arguing-- in essence-- that the process is so delayed already what could 144 more Data Requests hurt? CURE further attempts to convince the Committee that its Data Requests are wholly necessary to the proceeding at hand, namely, a decision on the BSEP AFC. None of its arguments are convincing.

A. CURE's Data Requests Are Still Untimely and CURE Fails to Demonstrate Good Cause For Its Delay

Section 1716 of the California Code of Regulations, Title 20 ("Section 1716") sets forth the rules and timelines governing "obtaining information" during the siting process. Subsection (e) in particular states: "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." 20 C.C.R. § 1716(e). This 180-day period following a determination of completeness on the AFC for a project is generally referred to as the "discovery period." Here, CURE does not dispute that its Data Requests were served approximately 85 days after the discovery period closed in this proceeding.

Instead, CURE asserts that its Data Requests should nonetheless be allowed because they are supported by a showing of good cause.

CURE asks the Committee to find good cause that does not exist. The primary argument advanced by CURE appears to be that, although the regulations generally prohibit discovery requests that come more than 180 days after the AFC has been deemed complete, given the "context" of this particular siting case, the Committee should ignore the regulations and compel Beacon to respond. CURE reasons that because Beacon continued to *voluntarily* provide information regarding the BSEP past the 180-day deadline, it has somehow waived any right to object to CURE's Data Requests and should be compelled to provide CURE with any additional information CURE desires to have. For instance, CURE argues that it is entitled to a response to each of its 144 Data Requests regardless of their substance because, up until February 10, 2009, Beacon continued to provide supplemental information to Staff.[1] This standard, however, is not supported by the regulations. *See* 20 C.C.R. § 1716(f),(g). Moreover, if adopted by this Committee, such a standard could actually operate to interfere with the free exchange of information on a project. Such a standard would create a disincentive for applicants to supplement previously-provided information or provide additional information of interest beyond the initial discovery deadline, for fear that such actions could subject the project to an indefinite cycle of discovery.

Furthermore, much of the recent data exchange with Staff is in an attempt to reach agreement with Staff on project impacts or to propose mitigation measures-- in effect, settlement actions. The Commission has long held and encouraged parties to siting proceedings to work to reach a common understanding of the impacts of the project and any mitigation that may be needed to reduce those project impacts below a level of significance. These types of discussions

[1] CURE erroneously states that Beacon submitted a supplemental response to Staff's Data Request No. 34 on February 13, 2009, the same day Beacon objected to CURE's Data Requests; however, the supplemental response to Staff's request was actually submitted three days earlier, on February 10, 2009.

occur in workshops or additional filings so that all parties can see the information. If submitting additional information to Staff and to all of the other parties would reopen discovery, applicants would be resistant to such settlement efforts. Given the potential number and technical nature of issues presented by the evaluation of power plant applications, this type of disincentive to resolving issues in siting cases would only prolong and unnecessarily complicate the hearing process.

CURE also asserts that whether or not its requests are timely should be viewed in relation to the issuance of the Preliminary Staff Assessment (PSA), as opposed to Section 1716(e). This contention cannot be credited without stripping Section 1716(e) of all meaning. It is a well-settled precept of statutory interpretation that statutes and regulations should be construed so as to give full force and effect to all of their provisions. *Hough v. McCarthy* (1960) 54 Cal. 2d 273, 279. Accordingly, the Committee is not free to compel a response to CURE's Data Requests simply because the PSA has not yet been issued. Per the plain language of Section 1716(e), such requests cannot be granted absent a showing of good cause, and a delay in the PSA alone does not constitute good cause.[2] Arguably, the fact that the PSA has already been delayed far beyond the 165 days generally contemplated in the public participation guidebook supports *denial* of CURE's motion under the regulations. *See* 20 C.C.R. § 1716(i) ("the presiding member [of the committee] may set reasonable time limits on the use of, and compliance with, information requests in order to avoid interference with any party's preparation for hearings or imposing other undue burdens on a party").

[2] As support for the proposition that the timeliness of data requests should be measured in relation to the PSA, CURE cites to page 46 of the Commission's Siting Process Guidebook, *Public Participation in the Siting Process: Practice and Procedure Guide*. That reference states the PSA is usually "filed about 165 days into the project", in which circumstance the 180-day discovery period *would* remain open for about two weeks past issuance of the PSA. It does not follow, though, that where the PSA is filed beyond 165 days into the project, the discovery period in Section 1716(e) is similarly extended.

B. CURE's Argument That it Seeks Only Information Beacon Failed to Provide in Response to Staff's Requests is Not Good Cause

CURE also argues that a response is warranted because CURE only seeks information "to assess specific issues not addressed in Beacon's responses to [Staff]'s data requests" to date. This, however, is ***not*** good cause. First and foremost, as a policy matter CURE should not be permitted to sit silently by and observe the happenings of the formal discovery period-- taking notes, essentially-- only to later serve nearly 150 specific and detailed Data Requests long after the close of discovery, each calculated to capitalize on what CURE perceives as an inadequate earlier response by Beacon (or an area where Staff felt that it was unnecessary to request certain data). Given CURE's purpose and history, this is the epitome of bad faith and should not be tolerated by the Committee.

Furthermore, as set forth in Beacon's Objections to CURE's Data Requests (filed February 13, 2009) and discussed further below, much of the information CURE is asking for has already been provided, or has not been provided because it is not reasonably available. With respect to the former, the fact that CURE may have missed the data in its review of the filings in this case, or simply desires to see the data in a different or more detailed format, is not good cause for its late-filed Data Requests.[3]

C. The Information Requested by CURE is Irrelevant and Unnecessary to a Decision on the AFC

The Commission's regulations provide that only information that is relevant to the application proceedings or reasonably necessary to make a decision on the application may be sought by a discovery request. 20 C.C.R. § 1716(b). Although the regulations do not define "relevant" or "reasonably necessary," these terms are well-defined under California law.

Information is not "relevant," or is irrelevant, when it is totally alien to the subject matter

[3] For example, in its Data Request 4, CURE asks for the engine brand, model, and horsepower rating of the emergency firewater pump engine Beacon plans to use. This data is clearly set forth in Appendix E, Section 3.2, of the AFC, had CURE bothered to look.

of the proceeding, or is so remote that it is of little or no practical benefit in the context of the proceeding. *Covell v. Superior Ct. of Los Angeles* (1984) 159 Cal. App. 3d 39, 42-43 (an objection based on relevancy grounds should be sustained "if the information sought to be elicited relates to matters of little or no practical benefit"). CURE generally avers that the information it seeks in its Data Requests is relevant to the AFC in light of both CEQA and the Warren-Alquist Act, but does not and cannot explain the relevancy of its requests in any further detail than that. As examples, CURE lists Data Requests 21 and 22, stating that those requests seek information "necessary to evaluate the [desert tortoise] survey effort," which is "essential" and "critical" to the proceeding.[4] However, CURE does not iterate how the information sought by these requests would be of any practical benefit in the context of this proceeding, nor is the answer ascertainable from the Data Requests themselves.[5] Indeed, other than being utilized to challenge the methodologies of Beacon's expert consultants, the information requested appears to be so remote from the actual results of the surveys as to be of very little practical benefit in these proceedings.[6]

Information such as that sought by Data Requests 21 and 22 also falls under the definition of information not reasonably necessary to a decision on the application. For purposes

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[4] These Data Requests read, in full:

> **Data Request 21**: Please provide: (1) the number of man-hours devoted to focused tortoise surveys, by location; (2) the role of each individual that participated; and (3) clarification on whether surveyors worked independently or in teams.
>
> **Data Request 22**: Please address any measures that the desert tortoise survey team took to address surveyor accuracy, including whether the survey team conducted the additional intensive survey recommend in the U.S. Fish and Wildlife Service protocol. If the additional intensive survey was conducted, please discuss the results.

[5] All of the information sought by Data Requests 21 and 22 that logically would be relevant to this proceeding has already been provided in the AFC or in supplemental filings. *See* Appendix F, Section 2.2.5 and Attachment B; 2008 Spring Survey Report, Section 2.3.

[6] Consistent with its earlier Objections, Beacon continues to maintain that CURE's true motivation in posing such Data Requests is improper. This is further borne out by questions such as Data Request 19; the premise of this question, like many of CURE's other Data Requests, assumes survey bias that has not been shown by the survey effort or data compiled thus far.

of determining what is meant by "reasonably necessary" to a decision, it is helpful to turn to CEQA case law, statutes, and regulations. Under CEQA, Environmental Impact Reports (EIRs) or EIR equivalents, as relevant here, should:

> [P]rovide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences. 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. . . . The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.

14 C.C.R. § 15151. So long as sufficient information is provided to allow decision-makers and the public to understand the environmental consequences of the project, that is all that is necessary. *See In re Bay Delta Programmatic Envt'l Impact Report Coordinated Proceedings* (2008) 43 Cal. 4th 1143, 1175; *Assn. of Irritated Residents v. County of Madera* (2003) 107 Cal. App. 4th 1383, 1398.

The Commission, as the lead agency in power plant siting proceedings, has discretion to design the EIR or EIR-equivalent, and need not conduct every recommended test or perform all research tasks requested by outside individuals or agencies. 14 C.C.R. § 15204(a); *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal. 3d 376, 415; *Society for Cal. Archaeology v. County of Butte* (1977) 65 Cal. App. 3d 832, 838-39. Put another way, an EIR's evaluation of a project or a particular impact need not be exhaustive, nor include all information that is available on an issue. *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal. App. 4th 645, 666 ("*SJRRC"*) (analysis need not be "so exhaustively detailed as to include every conceivable study or permutation of the data"); *Assn. of Irritated Residents,* 107 Cal. App. 4th at 1396-97; *National Parks & Conserv. Assn. v. County of Riverside* (1999) 71 Cal. App. 4th 1341, 1361. Moreover, the data used in an EIR or EIR-equivalent does not need to be exact. *Laurel Heights*, 47 Cal. 3d at 408, 413-14. Instead, it is appropriate to rely on informed estimates, reasonable assumptions, and the informed judgments of the experts who participated in preparing it. *Id*. at 393; *State Water Res. Control Bd. Cases*

(2006) 136 Cal. App. 4th 674, 796-97; *Assn. of Irritated Residents*, 107 Cal. App. 4th at 1391. The lead agency may accept the statements and conclusions of the experts that prepared the EIR even though others may disagree with the underlying data, analysis, or conclusions. *Id.* at 1397.

Here, CURE's Data Requests 21 and 22 are but two examples of the extensive amount of unnecessary information CURE seeks, in view of the standards cited above. For instance, CURE asks Beacon to undertake different or further cumulative analyses that are not required under the law. *See Laupheimer v. State of Cal.* (1988) 200 Cal. App. 3d 440, 462, 465-66 ("the specific cumulative-impact provisions of the [CEQA] Guidelines cannot be said to be directly applicable" to a certified regulatory program under Public Resources Code section 21080.5). CURE also challenges the conclusions of the AFC and Beacon's experts in other biological resources areas.[7] The fact that CURE may desire that Beacon conduct additional studies, provide further information, or may disagree with the methodologies or conclusions of Beacon's experts, does not mean that the information in its Data Requests is reasonably necessary to a decision on the AFC.[8] *See* 20 C.C.R. § 1716(b).

D. CURE Seeks Information That Has Already Been Provided And is Readily Available to CURE, or That is Proprietary And Not Reasonably Available, Placing an Undue Burden on Beacon

Despite CURE's protestations to the contrary, much of the information CURE purports to seek has already been provided by Beacon, whether in the AFC, in the various supplemental filings that have been made in response to formal data requests by Staff, or in voluntarily-provided supplemental filings made by Beacon.[9] CURE cites Data Requests 5-7 as an example

[7] *See* CURE's MTC at 13-16.

[8] To the extent that CURE seeks further information regarding the biological surveys that is potentially relevant or legitimate, Beacon suggests CURE review Section 2.3 of the 2008 Spring Survey Report, previously docketed with the Commission and served on CURE.

[9] Indeed, throughout this proceeding Beacon has continued to voluntarily docket any supplemental information that is non-proprietary and that might be of use to Staff or the general public in assessing the project, including, for example, courtesy copies of all entitlement applications filed with other responsible agencies.

of its requests for relevant information that has not yet been provided by Beacon. However, the information sought in each of these requests can be found in the AFC. For instance, the information requested in Data Request 5 (leaving aside the fact that this Data Request is arguably confusing and/or overbroad) can be found in Section 5.17 of the AFC, as well as in Appendix J. The information asked for in Data Request 6 can also be found in Section 5.17 of the AFC. Information responsive to Data Request 7 is compiled in Section 4.5.3 of the AFC and Appendices J and K. Again, the fact that CURE may prefer the information in a different or more detailed format does not mean that the information that has been provided by Beacon is somehow deficient. *See SJRRC*, 149 Cal. App. 4th at 666.

Related to these particular Data Requests, on page 10 of its MTC, CURE erroneously implies that, as a result of Beacon's failure to provide additional information relating to the availability of poor quality groundwater for power plant cooling (as CURE purports to seek in Data Requests 5-7), "it appears that Staff is now burdened with providing information and analysis on this issue due to Beacon's failure to provide support for its statements in the AFC." This is an outright mischaracterization. In point of fact, although Beacon has provided all information at its disposal that bears on this issue to Staff, the Commission's Staff [10] is an independent party, and is permitted-- if not expected-- to conduct its own studies and analyses. 20 C.C.R. § 1712.5; California Energy Commission, *Public Participation in the Siting Process: Practice and Procedure Guide*, (Dec. 2006), 8. Thus, the fact that Staff stated its intention in the February 11, 2009 Status Report to conduct a feasibility study for the potential use of non-potable water studies and/or alternative technologies does not carry the negative import that CURE would like. At most, this demonstrates that a difference of opinion may exist between Beacon and Staff on this issue, even after Beacon has submitted all the information available to it. In any event, even if Staff truly felt that Beacon was still not providing necessary and reasonably available information on this issued after multiple requests, Staff does not need

[10] The term "Staff" applies in the collective sense; accordingly, the single pronoun will be used.

CURE to pursue this data on its behalf.

CURE also seeks information that is simply not reasonably available to Beacon. *See* 20 C.C.R. § 1716(b). In particular, CURE repeatedly seeks information relating to the identities of other entities interested in using the alternative water sources listed in the AFC, and the nature of the potential projects. *See* CURE's Data Requests 8, 126, and 127. This information has not been provided to Beacon, despite Beacon's inquiries. In any event, the water supply alternatives referenced by these Data Requests were dismissed based on capacity, treatment level, or distance issues, not because the water was already spoken for by some other project. Accordingly, the information sought in these Data Requests is also wholly irrelevant to a decision on the AFC.

E. CURE's Requests Are Not Clear And Narrowly Tailored

CURE claims that its Data Requests are clear and narrowly tailored. Even a brief reading of its 144 separate Data Requests demonstrates this is not the case.[11] Many of CURE's Data Requests are ambiguously-worded, confusing, or unlimited in time or subject-matter scope—for

[11] By way of example, CURE cites Data Request 9, which reads:

> **Data Request 9**: Please provide a list of and discussion of the "potential environmental issues" referred to on page 4-16 of the AFC.

However, the phrase "potential environmental issues" does not appear on page 4-16 of the AFC, nor anywhere in the AFC, so far as Beacon can ascertain. The nearest approximation of that phrase actually appears on Table 4-8, third row, Rosamond Wastewater Treatment Plant (WWTP), on Page 4-17 of the AFC. Table 4-8 provides a summary of the cooling water supply alternatives that were considered as part of the alternatives assessment included in Section 4.5.3 of the AFC. As Table 4-8 indicates, the Rosamond WWTP, which is approximately 27 miles from the BSEP site, is expected to have an annual reclaimed water output of 560 acre-feet/year in 2010. The table refers to the "potential *for* environmental issues" in the context of obtaining piped water from the Rosamond WWTP.

Assuming that, in Data Request 9, CURE meant to refer to the "potential *for* environmental issues" referenced on Table 4-8 on page 4-17 of the AFC, the phrase simply means there is a potential for environmental impacts to occur along the 27-mile pipeline. These potential impacts could include temporary impacts to special status biological resources due to construction disturbance, temporary impacts to jurisdictional waters (if any) along the pipeline route, impacts to buried or nearby cultural or paleontological resources along the pipeline route, and temporary noise impacts during pipeline construction.

Nevertheless, in order to provide even such a simple response as this one, Beacon was forced to comb the AFC searching for the referenced phrase, and, not finding it, make an educated guess as to CURE's actual intention when writing the question, and then finally formulate a response that may or may not even be responsive to the question CURE meant to ask. Beacon respectfully submits that this is not the best use of its time, nor should CURE have held out Data Request 9 as a model of clarity.

instance, Data Request 52, which asks for *any* "species-specific studies that have examined the relationship between habitat quality parameters and species density." Such requests necessarily preclude a meaningful response, and unless qualified in some appreciable manner, would place an undue burden on Beacon were it forced to attempt a reply.[12] These requests are not conducive to eliciting relevant and reasonably necessary information, and violate the spirit if not the letter of Section 1716(i).

Some of CURE's requests are based on incorrect premises or inaccurate reiterations of the information already provided by Beacon. For instance, while CURE maintains that its Data Requests 75-78 are still applicable (even in light of the most recent Raven Management Plan docketed on March 10, 2009), this is clearly not the case. Beginning with the Raven Management Plan docketed in October 2008, the strategy for raven management shifted from a site-specific focus to a regional one at the request of the regulatory agencies. The Raven Management Plan docketed on March 10, 2009, reflects this same regional approach with some additional detail and input from the agencies. In brief, Beacon will be contributing to a region-wide Raven Management Plan, the implementation of which will be dictated and monitored by the U.S. Fish and Wildlife Service. The regulatory agencies recommended this regional management approach in addition to project-specific design features and mitigation measures aimed to avoid or minimize impacts. In light of this shift in focus, CURE's references to "baselines" and "thresholds," "pre-designated observation locations," or site-specific "raven activity" in Data Requests 75-78 are no longer applicable.

F. CURE's "Requests" Regarding The Feasibility of Mitigation Measures Are Not Data Requests

On a final note, CURE attempts to characterize its Data Requests regarding "feasibility of mitigation" as relevant to the BSEP AFC proceeding. CURE touts the relevance of its proposed mitigation measures by explaining that its proposed measures "have been proposed or implemented for other power plants" and that CEQA requires the use of feasible mitigation measures for significant adverse impacts. (MTC at 13.) However, as stated in Beacon's Objection to CURE's Data Requests, what CURE is requesting does not qualify as "data" and therefore these are not appropriate Data Requests. CURE's proposed "mitigation measures" are

[12] This is apart from the fact that the species-specific studies sought in Data Request 52, if any exist, would be equally available to CURE as to Beacon.

actually requests that Beacon speculatively commit to certain Conditions of Certification that have not been determined by Staff or the Committee to be necessary or effective. As stated in Section 1716(b), the purpose of a Data Request is to provide parties information that is reasonably available to the applicant. Inquiries regarding whether or not Beacon would commit to CURE's preferred Conditions of Certification do not qualify as "data" in the context of the AFC discovery process.

IV. CONCLUSION

Beacon respectfully submits the above Opposition to CURE's MTC. CURE's Data Requests are untimely and without good cause. Given the applicable statutes, regulations, and case law, as well as for each of the reasons articulated in Beacon's Objections to CURE's Data Requests, filed on February 13, 2009, the Committee should deny CURE's MTC in its entirety.

Respectfully submitted,

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March 25, 2009

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR THE BEACON SOLAR ENERGY PROJECT	DOCKET NO. 08-AFC-2

PROOF OF SERVICE
(Revised 2/9/09)

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Declaration of Service

I, Lois Navarrot, declare that on March 25, 2009, I served and filed copies of the attached **Beacon Solar, LLC's Opposition to California Unions for Reliable Energy's Motion to Find Good Cause and to Compel Production of Information.** 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 e-mailed respectively, to the address below **(preferred method)**;

OR

_____ depositing in the mail an original and 12 paper copies as follow:

California Energy Commission
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I declare under penalty of perjury that the foregoing is true and correct.

/s/
Lois Navarrot