STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

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| Application for Certification for the ABENGOA MOJAVE SOLAR POWER PLANT | ) | Docket No. 09-AFC-5 |

**SUPPLEMENTAL COMMENTS OF ABENGOA MOJAVE SOLAR PROJECT ON THE PRESIDING MEMBER'S PROPOSED DECISION**

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The Applicant, Abengoa Mojave Solar Project ("Applicant" or "Project") submits these Supplemental Comments on the Presiding Member's Proposed Decision.

San Bernardino County ("County"), in its comments on the Presiding Member's Proposed Decision, seems to endorse this Project. The County states that is has fewer issues with endorsing this Project than perhaps any other solar energy project.[1] The County states that the Project "may be as optimal a large renewable energy project as the County could reasonably hope." [2]

Nevertheless, the County takes issue with proposed Conditions of Certification Worker Safety 6 and 7. The County argues that these proposed conditions are "improper under the California Environmental Quality Act ("CEQA").[3]

The County's argument reflects a very fundamental misunderstanding of CEQA. The alleged impact of the Project – "the impact upon County emergency services"[4] - is not an environmental impact and CEQA is simply not applicable to this alleged impact. Moreover, even if the Commission were to ignore the plain language of CEQA and assume that the alleged financial impacts on public services were significant "environmental" impacts requiring mitigation, Conditions Worker Safety 6 and 7 provide economic relief that would fully satisfy CEQA. Finally, the record clearly supports a finding that practical considerations, including the County's own delays in offering evidence on the question of public services, prohibit the Commission from devising more specific economic relief for the County at this time.

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[1] Comments of San Bernardino County on the Presiding Member's Proposed Decision, p. 12
[2] *Id.* at p.2
[3] *Id.* at p.3
[4] *Id.* at p.3

## I. CEQA DOES NOT APPLY TO THE PROJECTS' ALLEGED IMPACTS ON COUNTY PUBLIC SERVICES.

The County alleges that the cumulative impact of the Project on County public services is an environmental impact and that CEQA requires the impact be mitigated. The County is wrong. CEQA is very clear that the Project's impact on public services, including fire and emergency services, if any, is not a significant environmental impact under CEQA.

A. An increase in the cost of providing public services, such as the increased capital and operating costs to the County Fire Department, is not a significant *environmental* impact under CEQA.

CEQA Guidelines section 15131 states explicitly that "Economic or social effects of a project shall not be treated as significant effects on the environment."[5]

Economic impacts, such as the costs of providing fire and police services, are relevant to CEQA only where an EIR traces "a chain of cause and effect from a proposed decision on a project through anticipated economic or social *changes* resulting from the project to *physical changes* caused in turn by the economic or social changes. The intermediate economic or social changes need not be analyzed in any detail greater than necessary to trace the chain of cause and effect. The focus of the analysis shall be on the physical changes."[6]

The term "significant effect on the environment" is defined in Section 21068 of CEQA as meaning "a substantial or potentially substantial adverse change in the environment."[7] This focus on physical changes is further reinforced by Public Resources Code Sections 21100 and 21151. Effects on public services are not regarded as significant environmental effects of a project. The changes must be related to or caused by physical changes in the environment. In *Citizens*

[5] 14 CCR § 15131(a)
[6] *Ibid.*
[7] Cal. Pub. Res. Code §21068

*Association for Sensible Development of Bishop Area v. Inyo* (1985) 172 Cal. App. 3d 151, the court held that "economic or social change may be used to determine that a physical change shall be regarded as a significant effect of the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project."[8]

The longstanding principle that the financial impacts of providing public services is not an environmental impact is reinforced by Appendix G of the CEQA guidelines. Appendix G provides:

> "Would the project result in substantial adverse ***physical*** impacts associated with the ***provision of new or physically altered governmental facilities***, need for new or physically altered governmental facilities, ***the construction of which could cause significant environmental impacts, in order to maintain acceptable service ratios*, response times or other performance objectives** for any of the public services....fire protection, police protection, parks and schools"

The County's stated concerns with Conditions Worker Safety 6 and 7 relate exclusively to economic factors. The County's Comments expressly acknowledge that the County's exclusive concern in the financial impact of the project, not on the physical environment, but upon the cost of providing certain public services.[9] The County's comments do not allege, as they cannot, any physical impacts associated with the provision of these public services, any specific new or physically altered government facilities, the construction of which would cause a physical change in the environment.

The Applicant does not suggest that the potential financial or economic impacts of the Project on the provision of public services are not important. However, the impacts addressed by Conditions Worker Safety 6 and 7 are not environmental impacts, the remedies provided by

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[8] *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo*, 172 Cal.App.3rd 151 (Cal.App.4th Dist. 1985)

[9] Comments of San Bernardino County on the Presiding Member's Proposed Decision, p.7.

these conditions are not environmental mitigation, and the standards of CEQA simply do not apply here.

## II. THE ADOPTION OF APPROPRIATE FINANCING MECHANISMS TO ENSURE THAT NEW DEVELOPMENT PAYS ITS FAIR SHARE TOWARD THE PROVISION OF SHARED PUBLIC SERVICES IS NOT DEFERRED MITIGATION OF AN ENVIRONMENTAL IMPACT.

The County argues that Conditions Worker Safety 6 and 7 constitute improper deferred mitigation under CEQA. However, as discussed above, the alleged financial impact of the Project on public services provided by the County is not an environmental impact under CEQA and the remedies for addressing this impact are not "mitigation" of environmental impacts.

To buttress its claim that Conditions Worker Safety 6 and 7 constitute improper deferred mitigation under CEQA, the County cites the recent case of *Communities for a Better Environment v City of Richmond*, 184 Cal. App. 4th 70. However, rather than supporting the County's argument, this case readily exposes the flaw in the County's claims regarding Worker Safety 6 and 7. The City of Richmond case involved the City's approval of permits for the upgrade and modification of the Chevron refinery. At issue in the *City of Richmond* case was the adequacy of the greenhouse gas mitigation plan. What distinguishes the *City of Richmond* case is that the impact at issue is an *environmental* impact resulting in a change in the physical environment, not merely a financial impact on a public service. As the court stated: "Here, the final EIR merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate the 898,000 tons of emissions resulting from the Project."[10] The focus in the *City of Richmond* case was upon a physical change in the environment (an increase of 898,000 tons of greenhouse gas emissions) and the "mitigation plan" was faulted for not

[10] *Communities for a Better Environment v. City of Richmond*, 184 Cal.App.4th 70 (Cal.App.1st Dist. 2010)

describing with greater particularity the measures that would mitigate these physical impacts. In contrast, Worker Safety 6 and 7 address the procedure for calculating the financial costs of providing public services for such routine administrative matters as plan checking and for the potential delivery of emergency services, in the rare event of a service call to the Project.

When a true environmental impact may occur, California courts have properly required early formulation of mitigation measures because once a physical change in the environment has occurred, an agency cannot "un-ring the bell" and the courts seek assurance that the significant physical impacts on the environment can be avoided or mitigated. On the other hand, where the impact is financial, and does not result in a physical change in the environment, the financial remedies are not cast as "mitigation". In these circumstances, the Commission has for 35 years exercised broad discretion to fashion remedies for financial compensation during the post-certification period. Worker Safety 6 and 7 are modeled after similar conditions adopted in the *Colusa* case.[11]

## III. PRACTICAL CONSIDERATIONS PREVENT DEVISING MORE SPECIFIC MEAURES REGARDING THE ECONOMIC IMPACTS OF THE PROJECT ON PUBLIC SERVICES.

Even if the alleged financial impact of the Project on public services was an environmental impact, which it is not, deferred selection of mitigation measures is permissible for the "kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process . . .the agency can commit itself to eventually devising measures that will satisfy specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is

[11] The Colusa conditions were proposed by the Commission Staff in that case. It is inexplicable that a condition proposed by the Staff and adopted by the Condition is now characterized as improper.

contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated."[12]

In this case, the impact of added costs of providing public services is the kind of impact for which mitigation – financial reimbursement – is known to be feasible. In fact, it is the only remedy proposed by the County.

Moreover, practical considerations caused by the County's own delays in raising this issue in this case, have prohibited devising other forms of mitigation earlier in this proceeding. The Warren Alquist Act provides a generous period of a year or more in which agencies such as the County may bring their concerns into the forum and work with the Applicant and Commission Staff in devising appropriate remedies for both environmental and economic impacts. In the instant case, even though the County has had notice of this Application for more than a year, even though the County became an intervenor and even though the County was expressly admonished to participate in the proceeding in a timely manner, the County did not raise its concerns regarding the costs of providing public services until after the deadline for submitting testimony.[13] If the County had raised its concerns in a timely manner, there would have been an adequate period for review of this issue. But when the County, intentionally waits until the very end of the proceeding to first voice its concerns, it should be estopped from complaining that these remedies were not examined more closely earlier in the proceeding.

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[12] *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029

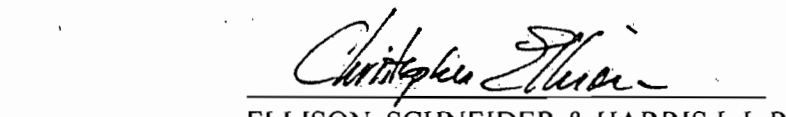
[13] Monday, June 21, 2010 Prehearing Conference, Tr. pp. 49-52

## IV. CONCLUSION

The Applicant agrees with the County that the most favorable outcome on this issue will come as a result of negotiation, and the Applicant continues to work with the County in good faith to find a favorable negotiated outcome. Nevertheless, the County has raised its concerns very late in the proceeding, and even in its comments on the PMPD poses further dilatory objections without proposing a viable solution. Under these circumstances, the PMPD proposes a reasonably balanced compromise to a purely economic issue. The Commission should approve Conditions Worker Safety 6 and 7 as proposed in the PMPD and approve the renewable energy project which is as optimal as any party, including the County, could reasonably hope.

September 7, 2010.

Respectfully submitted,



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**PROOF OF SERVICE**

I, Deric J. Wittenborn, declare that on September 7, 2010, I served the attached *SUPPLEMENTAL COMMENTS OF ABENGOA MOJAVE SOLAR PROJECT ON THE PRESIDING MEMBER'S PROPOSED DECISION* via electronic and U.S. mail to all parties on the attached service list.

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

Deric J. Wittenborn

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