DOCKET
09-AFC-7
DATE APR 15 2010
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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION FOR THE *PALEN SOLAR POWER PROJECT*

DOCKET NO. 09-AFC-7

NOTICE OF OPPORTUNITY TO FILE STATEMENTS OF CONCERN REGARDING EILEEN ALLEN SERVING AS A COMMISSIONER ADVISOR ON THIS CASE

As indicated in the attached Declaration of Eileen Allen, Ms. Allen has been offered the position of Advisor to Commissioner Robert Weisenmiller. Because her responsibilities in that position will necessarily include off-record communications with Commissioner Weisenmiller, and perhaps as well with other commissioners and their advisors, the hearing advisers, and the Chief Counsel and his deputies who advise the Commission, Commissioner Weisenmiller has asked the Commission's Chief Counsel to determine if Ms. Allen's prior work on this case as a Staff member would prevent her from conducting those off-record communications without violating the Commission's ex parte rule, which is based on in Government Code sections 11430.10 and 11430.30.

Section 11430.30, subdivision (a) expressly allows off-record communications by an employee of the Commission to a decision-maker where the "communication is for the purpose of assistance and advice to the [decision-maker] from a person *who has not served as investigator, prosecutor, or advocate* in the proceeding" (emphasis added). This section, like all of the revisions to the Administrative Procedure Act that were enacted in 1995, was enacted upon a recommendation of the California Law Revision Commission to the Legislature. Thus the following comment of the Law Revision Commission provides important assistance in understanding what the Legislature meant by the phrase "served as an investigator, prosecutor, or advocate":

> Under this provision, a person has "served" in any of the capacities mentioned if the person has *personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function*. The limitation is intended to apply to *substantial involvement in a case by a person, and not merely marginal or trivial participation*. The sort of participation intended to be disqualifying is *meaningful participation that is likely to affect an individual with a commitment to a particular result in the case*. Thus a person who merely participated in a *preliminary determination* in an adjudicative proceeding or its pre-adjudicative stage would ordinarily be able to assist or advise the presiding officer in the proceeding. [Citation]. For this reason also, a staff member who plays a *meaningful but neutral role* without becoming an adversary would not be barred by this section.

(Cal. Law Revision Com. com., Gov. Code foll. § 11430.10, italics added.)

Reflecting on this guidance, Ms. Allen has executed the attached declaration under penalty of perjury. The declaration describes the supervisorial and non-adversarial nature of her work in this case (and others) and concludes that she has not "served as an investigator, prosecutor, or advocate," as described above, in this proceeding. Therefore, absent the filing of a sufficient Statement of Concern as described below, this Committee will conclude that Ms. Allen may advise the decision-makers on this case without violating the ex parte rule.

Any party who believes Ms. Allen's previous participation in Staff activities in this case would render her advice to decision-makers inconsistent with the ex parte rule may submit a Statement of Concern. Any such Statement must be filed with the Commission's Dockets Unit, served on the parties and others listed on the most recent Proof of Service list, and an electronic copy e-mailed to the Hearing Officer, no later than 3:00 p.m. on Monday April 26, 2010, and must be supported by a declaration, executed under penalty of perjury, that describes specific, particular facts that are known or reasonably believed to be true by the declarant and that would justify a conclusion that Ms. Allen has "served as an investigator, prosecutor, or advocate" on behalf of the Energy Commission staff in this proceeding. The Committee will set for hearing all Statements that present a *prima facie* case. At any such hearing, Ms. Allen's Declaration and the declarations supporting the Statements shall be the only direct testimony, and Ms. Allen and the declarants supporting the Statements shall be made available for cross-examination. The Committee will issue a ruling as soon as possible after any such hearing.

Questions of a legal or procedural nature should be directed to Raoul Renaud, the Hearing Officer, at (916) 651-2020 or e-mail: **[rrenaud@energy.state.ca.us]**.

Information concerning the status of the project, as well as notices and other relevant documents may be viewed on the Energy Commission's Internet web page at: **[http://www.energy.ca.gov/sitingcases/solar_millennium_palen]**.

Dated: April 15, 2010 at Sacramento, California.

Original signed by:
ROBERT WEISENMILLER
Commissioner and Presiding Member
Palen Solar AFC Committee

Attachment: Declaration of Eileen Allen

PALEN SOLAR POWER PROJECT

DECLARATION OF EILEEN ALLEN

I, Eileen Allen, declare as follows:

1. I am an employee of the California Energy Resources Conservation and Development Commission and have been employed as a member of the Energy Commission's staff responsible for energy facility licensing since September of 1987.

2. On March 9, 2010, Commissioner Robert Weisenmiller asked me to become his advisor. The purpose of this declaration is to address any potential communications between me and Commissioner Weisenmiller or other decisionmakers with respect to the substantive issues in any of the cases that are currently before the Commission and that have involved any level of my prior staff duties. In my opinion, and based on the advice of legal counsel, these communications would not violate the Commission's ex parte rule because they fall within the exceptions to that rule in Government Code section 11430.30.

3. From January of 2005 until December of 2007, my responsibilities were to supervise the siting project managers responsible for the Commission Staff's licensing process for proposed energy facilities such as power plants and transmission lines. My responsibilities in that period included making assignments and maintaining an even workload for project managers, reviewing the project managers' draft data adequacy packages for quality control purposes, reviewing their issues identification reports for quality control purposes, and reviewing data requests for coherence and quality control. I also reviewed project status reports that the project managers produce, which describe the progress of the case and do not generally advocate any particular result. The current cases that were filed with the Commission during this period are:

A. Carlsbad (Docket # 07-AFC-6)
B. CPV Sentinel (Docket # 07-AFC-3)
C. Ivanpah SEGS (Docket # 07-AFC-5)
D. San Gabriel (Docket # 07-AFC-2)
E. Sun Valley (Docket 05-AFC-3)

4. Beginning in December of 2007, I was an Office Manager in the Energy Commission's Siting, Transmission, and Environmental Protection Division. During that time, as part of the Division Management team I supervised a larger number of siting , compliance, and docket staff. My primary responsibilities remained quality control of staff products and, whenever possible, ensuring adherence to product deadlines. I was not responsible for providing specific direction to technical staff as to their investigation of issues or proposed goals for staff participation (e.g. imposition of a particular condition of certification to resolve or mitigate impacts). I did, however, participate in some substantive discussions of technical issues and staff strategy in the following cases:

A. Abengoa Mojave (Docket # 09-AFC-5)
B. Almond 2 (Docket # 09-AFC-2)
C. BP Watson (Docket # 09-AFC-1)
D. Beacon (Docket # 08-AFC-2)
E. Carlsbad (Docket # 07-AFC-6)
F. CPV Sentinel (Docket # 07-AFC-3)
G. CPV Vaca Station (Docket # 08-AFC 11)
H. Genesis Solar (Docket # 09-AFC-8)
I. Hydrogen Energy CA (Docket # 08-AFC-8)
J. Ivanpah SEGS (Docket # 07-AFC-5)
K. Lodi (Docket # 08-AFC-10)
L. Mariposa (Docket # 09-AFC-3)
M. Marsh Landing (Docket # 08-AFC-3)
N. Oakley (Docket # 09-AFC-4)
O. Palmdale (Docket # 08-AFC-9)
P. Rice Solar (Docket # 09-AFC-10)
Q. Solar Millennium Blythe (Docket # 09-AFC-6)
R. Solar Millennium Palen (Docket # 09-AFC-7)
S. Solar Millennium Ridgecrest (Docket # 09-AFC-9)
T. San Gabriel (Docket # 07-AFC-2)
U. San Joaquin Solar 1&2 (Docket # 08-AFC-12)
V. Sun Valley (Docket 05-AFC-3)
W. SES Solar 1 (Calico) (Docket 08-AFC-13)
X. SES Solar 2 (Imperial) (Docket 08-AFC-5)
Y. Willow Pass (Docket # 08-AFC-6)

5. Based on discussions with legal counsel, I understand that the exception to the ex parte rule that is provided in Government Code section 11430.30 depends, on a case by case basis, upon whether I have served as investigator, prosecutor, or advocate in the proceeding. I also understand that the Law Revision Commission has provided the following guidance in a comment on this section of the Government Code:

> Under this provision, a person has "served" in any of the capacities mentioned if the person has personally carried out the function, and not merely supervised or been organizationally connected with a person who has personally carried out the function. The limitation is intended to apply to substantial involvement in a case by a person, and not merely marginal or trivial participation. The sort of participation intended to be disqualifying is meaningful participation that is likely to affect an individual with a commitment to a particular result in the case. Thus a person who merely participated in a preliminary determination . . . would ordinarily be able to assist or advise . . . . [Citation.] For this reason also, a staff member who plays a meaningful but neutral role without becoming an adversary would not be barred by this section.

6. With the possible exception of specific issues in four cases, discussed in the paragraph below, my work with respect to each of the proceedings listed above did not include any direct writing or filing of testimony, direct and personal investigation of any

facts related to any of these proceedings, or direct advocacy of any result either within the staff or before the Energy Commission. My work did involve participation in discussions of the cases and review of written products on some technical issues, but I did not direct case strategy or any staff position in the cases. My participation in discussions was necessary for me to assign appropriate personnel to tasks and track the progress of each case for Division Management. The purpose of my review of written staff products was quality control, not direction of a staff position or a proposed desired result. As a consequence, I firmly believe that I am fully capable of advising and assisting a member of the Energy Commission in each of these cases with no preconceived outcome in mind, and with the understanding that my duty is to summarize the record as it is presented in the evidentiary hearings and other public proceedings and to make recommendations based on that record.

7. In four cases, I did more than monitor staff products for timeliness, coherence and quality control. Specifically, in these cases my responsibilities led me to put forward a tentative position or strategy relating to particular issue at a preliminary stage in the proceeding, well before these issues were presented to the decision-maker in evidentiary hearings. In each case, I was involved in only one issue at this level of detail. Those cases and the specific issue that rose to this level of activity in each are:

A. Abengoa Mojave (Docket # 09-AFC-5)—Water Resources
B. Beacon (Docket # 08-AFC-2)—Water Resources
C. Genesis Solar (Docket # 09-AFC-8)—Water Resources
D. Hydrogen Energy CA (Docket # 08-AFC-8)—Carbon Sequestration

Even in these cases, I do not believe that my work affected me with a commitment to a particular result in these cases as to these issues, but I identify them in the interest of full disclosure.

Even in these cases, I do not believe that my work affected me with a commitment to a particular result in these cases as to these issues, but I identify them in the interest of full disclosure.

Executed this 15 day of April, 2010 at Sacramento, CA.

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

_*Original signed by:*_____
Eileen Allen

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION FOR THE *PALEN SOLAR POWER PLANT PROJECT*

Docket No. 09-AFC-7

PROOF OF SERVICE
(Revised 4/14/10)

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*indicates change

DECLARATION OF SERVICE

I, Maggie Read, declare that on April 15, 2010, I mailed hard copies of the attached Notice of Opportunity to File Statements of Concern Regarding Eileen Allen Serving as a Commissioner Advisor on this Case Service, dated April 15, 2010. 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:
[http://www.energy.ca.gov/sitingcases/solar_millennium_palen]

The documents have 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;

____ by personal delivery;

__x__ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date 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
Attn: Docket No. 09-AFC-7
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury 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.

Original signed by:
Maggie Read
Hearing Adviser's Office