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3 **STATE OF CALIFORNIA**
4 **California Energy Commission**

5 **In the Matter of:**

6 **REDONDO BEACH ENERGY PROJECT**

Docket No. 12-AFC-03

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8 **APPLICATION FOR CERTIFICATION**
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11 **INTERVENOR CITY OF REDONDO BEACH'S SUPPLEMENTAL BRIEF IN SUPPORT**
12 **OF MOTION TO COMPEL PRODUCTION OF AES' TECHNICAL NOISE DATA**

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15 September 10, 2015

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9 INTERVENOR CITY OF REDONDO BEACH'S SUPPLEMENTAL BRIEF IN SUPPORT
10 OF MOTION TO COMPEL PRODUCTION OF AES' TECHNICAL NOISE DATA

11 INTRODUCTION

12 Intervenor City of Redondo Beach ("City") submits this supplemental brief in
13 support of its Motion to Compel the Production of Technical Noise Data from AES.

14 I. AES' DELAY IN PROVIDING NOISE DATA UNTIL MONTHS AFTER THE DATA
15 REQUEST DEADLINE IS THE PRIMARY REASON THAT INTERVENORS AND
16 ENERGY COMMISSION STAFF NEED TO MAKE DATA REQUESTS AFTER
17 THE DEADLINE.

18 In AES' Response to the City's Motion, AES asserts that the City's request is
19 untimely and thus does not justify reopening the data request period. However, the City has good
20 cause for making data requests after the data request deadline of February 24, 2014: *AES did not*
21 *provide responses to critical noise data requests from Energy Commission Staff until months after*
22 *the deadline.* Once they were produced, the responses were incomplete and piecemeal. Neither
23 Staff nor the City could submit follow up questions until after the responses were received. Soon
24 after the data was finally produced, AES voluntarily "suspended" the AFC proceeding.

25 On February 24, 2014, CEC Staff submitted a data request, asking that AES provide
26 a sound level contour map that shows the expected operational noise levels from the proposed
27 project at receptors M3 and M4. (CEC Staff's Data Request Set 4 (No. 72), Feb. 2, 2014,
28 TN#201796.)

1 On March 26, 2014, AES’ consultant provided an “Estimated RBEP Noise Level
2 Contour . . . [Map] (Existing Ambient Noise not included).” Critical pieces of data were missing,
3 including any confirmation of whether the existing AES Power Plant was operating at the time the
4 noise measurements were taken.

5 As of April 30, 2014, Energy Commission Staff and other interested parties,
6 including the City, were anticipating additional noise data responses from AES. The Committee’s
7 Status Report #6 provides that “as stated in Status Report #5, staff is still waiting on responses to
8 Noise Data Requests No. 26R and 28R which will be provided after the power plant is dispatched
9 and noise measurements taken.” (CEC Committee Status Report #6, Apr. 30, 2014, TN#202276.)
10 AES did not provide this supplemental noise data until May 22, 2014, which was subject to
11 additional requests for clarification from CEC Staff as memorialized in CEC Staff’s Report of
12 Conversation, dated June 4, 2014. (DR Set 1C 26R-28-Revised, May 22, 2014, TN#202364; see
13 also, Report of Conversation Re: Data Response 26R & 28R Additional Information Requested by
14 CEC Staff, Jun. 3, 2014, TN#202417.)

15 AES' substantial delays in providing noise data—and the piecemeal manner in which
16 it provided data even months after the data request deadline—provide good cause for the
17 submission of the City's data requests after the deadline.

18 **II. IN LIGHT OF THE INCOMPLETE AND CONFUSING MANNER IN WHICH AES**
19 **HAS RESPONDED TO THE NOISE DATA REQUESTS BY THE CITY AND**
20 **ENERGY COMMITTEE STAFF, THE CITY IS PROVIDING A TABLE TO**
21 **CLARIFY WHAT HAS BEEN PRODUCED SO FAR, AND WHAT HAS NOT BEEN**
22 **PRODUCED.**

23 The table in Exhibit A is intended to clarify which data requests by the City have
24 been produced thus far by AES, and which have not. We hope it is helpful to the Committee.

25 **III. AES’ RELIANCE ON CLAIMS OF PRIVILEGE AND CONFIDENTIALITY ARE**
26 **UNACCEPTABLE UNDER CEQA**

27 Much of the data that AES is refusing to produce is based on claims of privilege and
28 confidentiality. But in the context of CEQA, it is *not OK* for a decision-maker to rely on data that is
confidential and not disclosed to the public. The exclusion of data based on AES’ assertion that the

1 information is proprietary and confidential is inconsistent with CEQA’s policy of transparency that
2 mandates “full environmental disclosure.” (*Communities for a Better Environment v. City of*
3 *Richmond* (2010) 184 Cal.App.4th 70 at p. 88 (“*CBE*”).)

4 In *CBE*, Chevron applied to the City of Richmond for a permit to proceed with an
5 energy and hydrogen renewal project. In doing so, Chevron relied on an expert, Dr. Sahu, who
6 rendered his opinion based on calculations and analyses that "were based, in part, on confidential
7 data supplied by Chevron that was not made available to anyone else.” (*Id.*)

8 The court concluded, "Even if this post-EIR information could somehow be used to
9 cure the EIR's shortcomings, Dr. Suhu's reliance on undisclosed data from Chevron does not meet
10 the 'informational' goals of CEQA." Although full environmental disclosure is required pursuant to
11 CEQA, "Chevron apparently decided that the public and the decisionmakers did not need to see
12 proprietary data given only to Dr. Sahu and relied on by [Dr. Sahu]." The public and the
13 decisionmakers should have had access to the same data. The court cautioned, "If Chevron's
14 position becomes the rule—that a project proponent can pick and choose who sees pertinent data—
15 then a stake is driven into the 'heart of CEQA' by preventing the information necessary for an
16 informed decision from reaching the decisionmakers and the public." (*Id.* at p. 88.)

17 CEQA’s underlying policy hinges on public disclosure of and access to fundamental
18 data that supports the lead agency’s determination and assessment of environmental impacts. To
19 allow claims of confidentiality to effectively shield AES from having to disclose this data would
20 undermine CEQA’s core purpose. If AES wants the Commission to rely on its noise analysis and
21 data, it must share them with the Commission and the public.

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IV. CONCLUSION

For the reasons set forth above, the City respectfully requests that the Committee grant the Motion and compel AES to provide the requested technical noise data.

DATED: September 10, 2015

JEFFER MANGELS BUTLER & MITCHELL LLP



By: _____
JON WELNER

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BEACH

EXHIBIT A
STATUS OF CITY'S REQUEST FOR DATA AND AES' RESPONSE

City's Request for Data	Overview of Why the Requested Data is Critical to a Meaningful Noise Analysis	AES' Response	AES' Reason for Withholding/Non-Production of Data
1. All ambient noise measurement data for locations M3 and M4.	The requested data is needed because ambient noise levels should be used as the basis for evaluating future noise impacts under CEQA.	AES provided only a summary of the data at M3 and M4, not the actual data itself. There was no description of the measured noise and/or sources at the time of measurements. AES also failed to confirm whether the existing AES power plant was operating at the time the noise measurements were taken.	None given.
2. An electronic copy of the CADNA/A noise model file and AES' underlying assumptions.	The data is needed in order to prepare a comprehensive peer review of AES' noise and impact analysis.	AES refused to provide the file.	Assertion that the CADNA/A noise model is proprietary. (AES Response to Mtn. at p. 11.)
3. List of major equipment sound power levels used in the AES analysis, including elevation/height of noise-generating equipment.	Same as No. 2. The site plan provides a general overview in terms of location and spacing, but more information regarding the equipment and noise emissions is needed.	AES provided this data in response to CEC's request for additional noise data. (See Mr. Khoshmashrab's Email of Aug 11, 2015, posted to 12-AFC-03 Docket, TN#205701.)	Claim that the data "is based on proprietary and confidential equipment vendor information that is subject to a non-disclosure agreement with a third-party." (AES Response to Mtn. at p. 12.)

City's Request for Data	Overview of Why the Requested Data is Critical to a Meaningful Noise Analysis	AES' Response	AES' Reason for Withholding/Non-Production of Data
4. List of noise mitigation measures included in the AES noise model or analysis.	Same as No. 2. More information is needed: (a) Locations of noise barrier walls and corresponding wall height dimensions; (b) Location, rough dimensions, and information on expected ventilation openings, exhaust/stack openings, and potential large doors. These elements are typically the weak link in any building enclosure. Knowing that the walls are STC 45 is simply not adequate.	AES provided this data in response to CEC's request for additional noise data. (See Mr. Khoshmashrab's Email of Aug 11, 2015, posted to 12-AFC-03 Docket, TN#205701.)	AES contends that it provided non-privileged portions and that the data is not necessary. (AES Response to Mtn. at pp. 13-14.)
5. Provide the calculations and data, with source documentation, used to develop the predicted operational noise levels.	Same as No. 2.	AES has not provided the requested source documentation, specifically no explanation of where AES obtained its source sound power levels has been provided.	None given.

City's Request for Data	Overview of Why the Requested Data is Critical to a Meaningful Noise Analysis	AES' Response	AES' Reason for Withholding/Non-Production of Data
<p>6. Provide the calculations and data, with source documentation equipment sound power levels, including octave and third-octave band levels, used to develop the noise contour map.</p>	<p>Same as No. 2.</p>	<p>AES provided <i>most of</i> the data requested in response to CEC's request for additional noise data. (See Mr. Khoshmashrab's Email of Aug 11, 2015, posted to 12-AFC-03 Docket, TN#205701.)</p> <p>AES has not provided the third-octave band levels, which is needed to conduct a meaningful tonal analysis.</p>	<p>None given.</p>