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STATE OF CALIFORNIA
Energy Resources
Conservation and Development Commission

In the matter of:

Amendment for the **PALEN SOLAR
ELECTRIC GENERATING SYSTEM**

DOCKET NO. 09-ACF-7C

INTERVENOR COLORADO RIVER INDIAN TRIBES
OPENING BRIEF (REOPENED EVIDENTIARY PROCEEDINGS)

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INTRODUCTION

Throughout the California Energy Commission's ("CEC" or "Commission") two evidentiary hearings on the Palen Solar Electric Generating System ("Palen" or "Project"), the Colorado River Indian Tribes ("CRIT") and other area tribes have urged the Commission to deny the proposed amendment. *E.g.*, Transcript of the July 29, 2014 Evidentiary Hearing ("7/29/14 Transcript") (TN# 202873), at 166 (CRIT Councilwoman Amanda Barrera: "As protectors of the land, we express ourselves in utmost respect and ask you to listen with your hearts and deny the proposed project and its impacts."), 157 (CRIT Mohave Elder David Harper: "So today we say we're in spiritual warfare. We are here because we have to protect our landscape. This is Aboriginal territory of [the] Mohave people."). Many tribal members and tribal representatives invested significant time to bring one message to the Commission: approving the proposed project would destroy the cultural landscape of the Chuckwalla Valley and inflict great cultural harm.

During the January 7, 2014 hearing on the Presiding Member's Proposed Decision ("PMPD"), Commissioner Karen Douglas noted that while this expected cultural loss "factored into [the Committee's] decision" to initially recommend denial of the proposed amendment, it was her opinion that "it's highly likely that sooner or later a project will be built on the site," given its location within a BLM designated Solar Energy Zone [("SEZ")] and a Desert Renewable Energy Conservation Plan [("DRECP")] proposed development focus area, and the importance of renewable energy to the State of California. Transcript of the Committee Conference on the Presiding Member's Proposed Decision ("1/7/14 Transcript") (TN# 201608), at 10, 15-17. Ultimately, she concluded, renewable energy goals and Native American cultural values therefore conflict at the site. In such circumstances, she viewed the California Energy Commission's duty as "honestly and

respectfully acknowledg[ing] that conflict, reduc[ing] or mitigat[ing] it as best we can, and recogniz[ing] our own limitations in that regard.” *Id.*

CRIT respectfully disagrees with this assessment. The Commission has wide latitude to weigh the benefits and costs of a proposed project, and can reject projects on the basis of significant cultural resource concerns alone. Moreover, the Commission has a duty to approach each individual project as presented, and not to hypothesize about what might happen if the project is rejected.¹ CRIT and other affected area tribes have unanimously voiced their concern about this *particular* project in this *particular* location; the construction of two of the largest structures in California, together with stunning glint and glare impacts, will destroy the vital cultural landscape of the Chuckwalla Valley. The Commission’s duty should be to recognize an ill-conceived and ill-sited project and reject it in favor of other, less harmful mechanisms for reaching the State’s renewable energy goals. For this reason, CRIT respectfully requests that the Committee adopt a revised PMPD that continues to recommend denial of the petition to amend.

Moreover, as outlined below, the most recent evidentiary proceedings suffered from numerous flaws, including violations of the California Environmental Quality Act (“CEQA”), Public Resources Code section 21000, et seq., and state consultation requirements. For these reasons as well, the Commission cannot move forward with approving the proposed amendment.

¹ Commissioner Douglas’s reliance on the Project’s location within the Riverside East SEZ and proposed development focus areas (1/7/14 Transcript, at 15-17) is particularly frustrating, given that tribes were not consulted on the identification of the SEZs and were largely left out of the DRECP’s process. CRIT has repeatedly objected to the designation of the Riverside East SEZ in particular, given the significant cultural resources in the area.

STANDARD OF REVIEW

The Commission has adopted a certified regulatory program for conducting environmental review in siting cases like this one. Pub. Res. Code §§ 25500, 25519(c).² Under this program, the Commission must comply with CEQA’s substantive mandates. *See* 20 Cal. Code Regs. §§ 1741, 1742, 1752.5. Thus, when referring in this brief to the Commission’s legal obligations for environmental review, CRIT cites to CEQA’s statutory provisions, implementing regulations, and related case law.

Failure to comply with these obligations constitutes a prejudicial abuse of discretion, as does a failure to support conclusions with substantial evidence. § 21168.5; *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 392. For instance, the Commission fails to “proceed in the manner required by law” if its EIR-equivalent omits relevant information or analysis, or defers analysis or mitigation measures until after project approval. *See Communities for a Better Env’t v. City of Richmond* (“*CBE*”) (2010) 184 Cal.App.4th 70, 92-93; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712. The Commission must also support any statement of overriding consideration—necessary for project approval where, as here, the Commission identifies significant, unmitigable environmental impacts—with substantial evidence. *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316 356-57.

ARGUMENT

I. Proposed Revisions to CUL-1 Do Not Address Significant Impact to Affected Tribes.

After the release of the PMPD, Commissioner Douglas articulated her concern that the then-proposed mitigation measures for cultural resources skewed too far in favor of the State’s interest in

² Except as otherwise noted, all further statutory references are to the Public Resources Code.

protecting cultural resources at the expense of mitigation “devised to address the impact of the project on Native Americans.” 1/7/14 Transcript, at 19. In response, both CEC Staff and Palen suggested revisions to CUL-1. Unfortunately, the proposed CUL-1s are the products of a flawed consultation process, conflict with tribal law, and all but guarantee future disputes over the allocation of funding. Consequently, they are not the type of “meaningful mitigation” requested by Commissioner Douglas (*id.* at 18.) to address the significant cultural resource impacts of the Project.

A. Placing Compensatory Mitigation Into a Single Fund to Be Distributed by a Native American Advisory Committee Is Problematic.

CRIT’s fundamental concern relates to the mechanism by which either Staff’s CUL-1B or Palen Solar Holdings, LLC’s (“PSH”) CUL-1 monetary funds would be distributed. Staff’s proposal envisions the compliance project manager and BLM distributing compensatory mitigation funding based on the input of a Native American Advisory Committee. Ex. 2020, Staff’s Proposed Condition of Certification CUL-1 (Clean) (TN# 202766). Under Petitioner’s proposed mitigation measure, all of CUL-1 funding would be disbursed only after the 15 area tribes agreed to a mechanism for disbursement, with no funding going toward the projects identified in CEC Staff’s CUL-1A unless selected by the tribes. 7/29/14 Transcript, at 255-57.

Under either scenario, area tribes will be pitted against one another to obtain funding for mitigation projects that can address their own unique cultural harm. Area tribes have different levels of connection to the Chuckwalla Valley and have participated at different levels both in this proceeding and in the similar Genesis Tribal Working Group. Some tribes, like CRIT, have a direct footprint in the Chuckwalla Valley and have actively participated in administrative and legal efforts to protect this cultural landscape. Other tribes appear to have more remote ties. If all compensatory mitigation is lumped into one fund, the CEC will increase the likelihood for conflict as a result of the disparate interests of CEC Staff and 15 unique area tribes. While there is some unity of interests and

a strong sense of cultural connections and mutual appreciation and respect, each Tribal Nation is independent, with its own land base, economy, cultural history, government, and set of interests. Resource “sharing” as contemplated by both CEC Staff and PSH is neither the historical norm nor presently practiced; the Genesis Tribal Working Group has further demonstrated the difficulties presented by this approach.

Finally, CRIT is concerned that if all CUL-1 funding is lumped into one category, as Petitioner proposes, CEC and BLM will put pressure on tribes to ensure that some funding goes toward the projects they have identified as necessary to satisfy their legal obligations.

B. Consolidating State and Tribal Interests into a Combined CUL-1 Does Not Satisfy CEQA.

PSH has proposed allocating all compensatory mitigation into one fund, which would be released for projects only upon consensus of the 15 area tribes. Ex. 1172, Proposed Modifications to CUL-1 (TN# 202733); 7/29/14 Transcript, at 255-56. CEC Staff, however, has retained separation between CUL-1A, intended to address the State’s interest in learning about the cultural resources of the Chuckwalla Valley (referred to here as the “State interest”), and CUL-1B, intended to ameliorate the cultural harm that will be experienced by area tribes (referred to here as the “cultural interest”). Ex. 2020. At the evidentiary hearing, Commissioner Douglas indicated she saw some sense in collapsing the two interests into one fund, as the underlying need for all proposed compensatory mitigation can be traced back to harm to a specific place or landscape. 7/29/14 Transcript, at 188, 190, 193-94 (“I actually liked Petitioner’s suggestion of combining CUL-1A and CUL-1B, and I think the reason that I like it is that, to me, unless you can convince me otherwise, I think that the impacts that we’re talking about is fundamentally an impact to place.”).

CRIT respectfully requests that the Committee rethink this position. As a preliminary matter, while Commissioner Douglas is correct that both the State and cultural interests ultimately tie back

to impacts to the cultural landscape, the proposed mitigation measures are *indirect* mechanisms for attempting to mitigate that loss of place. On the State interest side, CEC Staff proposes measures to learn about and disseminate information about the specific scientific and artistic resources that will be visually impacted by the Project. If the Project is approved, CRIT, however, will use the funding to attempt to prevent cultural loss despite the destruction of a cultural landscape. Consequently, while both the State and cultural interests are rooted in impacts to *place*, the core purposes of each type of compensatory mitigation are fundamentally different.

Moreover, the CEC has a unique obligation to mitigate impacts to archaeological resources under CEQA (i.e., the identified State interest). *E.g.*, § 21083.2. CEC Staff views certain mitigation projects, currently located in their proposed CUL-1A, as necessary in order to satisfy their CEQA obligations. *E.g.*, 7/29/14 Transcript, at 246. By combining CUL-1A and CUL-1B, the CEC can offer no assurance that these impacts will be adequately mitigated. 7/29/14 Transcript, at 187-88 (CEC Staff Michael McGuirt: “[I]f we drop the mitigation too low on the non-Native American side, we haven’t met our CEQA thresholds for mitigation . . .”). While CRIT has voiced no unique interest in the content of these measures, the Tribes do believe that the Commission must ensure that any approval complies with applicable law.

C. Staff’s Proposed Modifications Conflict with Tribal Law.

CEC Staff modeled its CUL-1B funding mechanism after the Genesis Tribal Working Group, a consortium of affected tribes intended to decide the disbursement of mitigation funding proposed for the discovery of thousands of buried cultural artifacts during the construction of the Genesis Solar Energy Project. As expressed in CRIT’s oral and written testimony, and by members of other tribes, the Genesis Tribal Working Group has not been a successful mechanism for distributing

compensatory mitigation funding.³ *E.g.*, Ex. 8030, Testimony of Councilwoman Amanda Barrera (TN# 202565); Ex. 8036, Rebuttal Testimony of Councilwoman Amanda Barrera (TN# 202755); 7/29/14 Transcript, at 242-44, 272. While CEC Staff detailed some differences between the Genesis and Palen Projects (7/29/14 Transcript, at 241 (CEC Staff Thomas Gates explaining that the applicant holds the funds and is under time pressure to comply)), CRIT does not believe that such differences will have a significant impact on the outcome of the proposed Native American Advisory Group.

CEC Staff also proposes a number of recommendations to “improve” or build on the Genesis Tribal Working Group. Ex. 2017, Energy Commission Staff Supplemental Staff Assessment and Testimony (TN# 202480), at 31-32; 7/29/14 Transcript, at 239. First, CEC Staff’s proposed measure would require the designation of official tribal representatives. Ex. 2017, at 31. Second, CEC Staff’s proposed measure would require the adoption of parliamentary procedures, presumably to reach decisions within the group. *Id.* at 32. Both of these proposals directly conflict with CRIT’s tribal law. The CRIT Constitution places decisionmaking responsibility with Tribal Council, which must vote to approve any substantive decision, including any agreement regarding specific compensatory mitigation measures. Ex. 8036, at 1. While CRIT does not object to providing a designated

³ Councilwoman Amanda Barrera outlined four specific difficulties with the Genesis Tribal Working Group. First, the proposed scholarship project placed unnecessary restrictions on the Tribes, particularly given that CRIT is accustomed to administering multi-million dollar federal scholarships on a regular basis. Second, the working group has adopted parliamentary procedures over the objections of CRIT, as they conflict with CRIT’s government decisionmaking requirements. Third, NextEra hired Blue Stone Consulting to develop a public outreach strategy; while over \$184,000 have been spent, the tribes have yet to see anything of value from this work. Finally, over \$300,000 has been spent on a work plan/literature review for the proposed ethnographic study, yet no actual work has been conducted. CRIT has repeatedly stated that the ethnographic study should have been completed before the Project was even approved. *See* 7/29/14 Transcript, at 242-244.

representative, the measure must acknowledge that the representative will attend the Advisory Group meetings solely to gather information to take back to the CRIT Tribal Council for decisions. *Id.*

D. Inadequate Consultation Mars Efforts to Revise CUL-1.

CRIT acknowledges that the Commission and its Staff face regulatory restrictions that severely hinder the consultation process with affected tribes. CRIT also acknowledges that CEC Staff attempted to work within this flawed rubric to seek input from CRIT and other tribes. *See, e.g.*, Notice of Public Workshop on Tuesday, April 8, 2014 (TN# 201909) (CEC Staff hosted public workshop to seek input on appropriate mitigation measures for impacts to tribal interests). However, these restrictions do not validate the CEC's failure to conduct true, government-to-government consultation with CRIT. Because of these regulatory constraints, neither the Commission nor its Staff have met with CRIT's Tribal Council to discuss CUL-1, despite repeated invitations from CRIT, and therefore have not received adequate input regarding the proposed mitigation measures.

This failure is especially frustrating given CRIT's willingness to serve as an Intervenor in this siting proceeding in order to provide testimony and evidence to serve the CEC's decisionmaking process. Rather than facilitating dialog, CRIT's Intervenor status precluded the Tribes from negotiating with CEC Staff outside of a public forum. *See, e.g.*, 20 Cal. Code Regs. § 1710(a). Consequently, CRIT was denied even the very basic form of staff consultation available to other affected tribes.

The Commission acknowledged these difficulties during the evidentiary hearing. 7/29/14 Transcript, at 206-07, 217-22, 236-37, 239. CRIT appreciates that the Commission is under tremendous pressure from Palen to reach a decision in short order. However, to approve this Project, while simultaneously acknowledging that the procedures are not adequate to conduct government-to-government consultation required by Executive Order B-10-11 or to obtain information necessary

for informed decisionmaking, would unfortunately discredit assertions that the Commission takes seriously its responsibility toward affected tribes.

E. CEC Staff’s Recommended Increases to CUL-1B Are Supported by Substantial Evidence.

CEC Staff recommends an increase to CUL-1B based on a number of factors, including (a) knowledge about increased glint and glare from the Ivanpah Project, (b) the necessity of dividing the total amount among 15 affected tribes, and (c) achieving parity with the mitigation provided for the State’s interests in CUL-1A. Ex. 2017, at 28-29.

Substantial evidence supports this recommended increase. First, the record is replete with information indicating that the glint and glare from the Ivanpah Project has been greater than expected, indicating that prior predictions regarding glint and glare at the Palen Project are also inaccurate. Ex. 2017, at 47-50; 7/29/14 Transcript, at 62 (Gary Cathey: “[U]nequivocally [] the glare that I experienced from flying in the vicinity of Ivanpah was the most intense that I’ve ever observed [in my 30 years of flying].”). Moreover, while the proposed mitigation measures require PSH to attempt to mitigate for glint and glare events that are reported by pilots and/or motorists, the Heliostat Positioning Plan will not attempt to mitigate for the impacts of increased glint and glare on cultural or recreational users. 7/29/14 Transcript, at 253.

Second, CRIT and other area tribes have repeatedly voiced concerns that the proposed mitigation funding is insignificant when divided among 15 affected tribes. Ex. 8028, Testimony of Chairman Dennis Patch Regarding Proposed Modifications to CUL-1 (TN# 202563), at 1. The average per-tribe amount of \$133,333 is paltry when compared to the specific cultural harms that will be caused by the Project (especially for CRIT’s Mohave members, who have a direct footprint in the Chuckwalla Valley cultural landscape). It is also trivial when compared to the amount of revenue—approximately \$6 billion over 25 years—that PSH will likely generate. Ex. 8028, at 2; *see*

also 7/29/14 Transcript, at 158 (CRIT Mohave Elder Spokesman David Harper: “Why would we accept finances of a one-time deal to alter, to destroy, to remove our traditional landscape? Why would we accept that? While Palen [] stands to make six billion dollars []? That seems like that would be a social injustice.”).

Third, CRIT’s official testimony and the public comment provided by tribal members of CRIT and other area tribes supports Commissioner Douglas’ statement that the concerns of affected tribes and tribal members are likely greater than the State’s cultural resource interest. 1/7/14 Transcript, at 19 (“The PMPD found that the PSEGS project would have a disproportionate impact on Native Americans . . .”). Consequently, CEC Staff’s recommendation that the CUL-1B amount be increased to achieve greater “parity” with CUL-1A funding is well supported by the record and previous findings.

F. The CEC Must Comply with Duty to Mitigate to the Extent Feasible, Even if Override Findings Can Be Made.

Counsel for Palen suggested during the evidentiary hearings that the Commission has the authority to override significant environmental impacts *without* formulating adequate mitigation measures under CEQA. 7/29/14 Transcript, at 245 (PSH Attorney Scott Galati: “And so isn’t it true that the Energy Commissioners could satisfy their CEQA obligation by merely making a finding of override?”). This assertion directly conflicts with CEQA’s substantive mandate.

CEQA requires an agency to adopt all mitigation measures which are feasible and capable of reducing the project’s significant impacts, a substantive requirement that serves as CEQA’s teeth. §§ 21002.1(a), 21081 (agency must find, based on substantial evidence, that mitigation measures “have been required in . . . the project which mitigate [] the significant effects on the environment”); 14 Cal. Code Regs. § 15021(a)(2). For this reason, mitigation measures can be made less restrictive or eliminated completely only if the record contains substantial evidence showing infeasibility based on

“specific economic, environmental, legal, social, and technological factors.” 14 Cal. Code Regs. § 15021(b). It would subvert the purpose of CEQA if an agency were permitted to cut all effective mitigation measures simply by adopting both a “significant and unavoidable” impact finding and statement of overriding considerations. *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1039 (“A gloomy forecast of environmental degradation is of little or no value without pragmatic, concrete means to minimize the impacts . . .”).

As a result, the Commission must adopt *all* feasible mitigation measures capable of reducing the Project’s significant cultural resource impacts. The Commission cannot “merely mak[e] a finding of override,” as suggested by PSH, to avoid the difficult task of formulating adequate cultural resource impact mitigation measures.

II. Glint and Glare Impacts to Pilots Are Significant.

The record, including testimony provided during the evidentiary hearings, indicates that the glint and glare impacts to pilots and motorists remain significant with mitigation. In particular, based on reconnaissance flights over the Ivanpah Project, the concentration of reflected light when the heliostats are in the “standby” mode creates “disability glare [and] compromised visual performance” “unacceptable for flight safety.” Ex. 2017, at 50. Consequently, to approve the Project, the Commission must adopt all feasible measures to reduce these impacts and include the Project’s significant transportation impacts in any statement of overriding considerations.⁴

The true glint and glare impacts of the Project are currently unknown, but the Ivanpah Project provides a real-world example of possible issues. Since commissioning and operation began a year ago, the Ivanpah Project has been the subject of numerous pilot complaints. Ex. 2017, at 47-48.

⁴ As described in Section VI, *infra*, however, the record indicates that this significant impact in tandem with impacts to cultural and biological resources again renders the benefits of the project outweighed by the impacts.

However, due to a lack of systematic collection, the record indicates that only a small fraction of glint and glare events are being reported to the project owner. 7/29/14 Transcript, at 79.

The Ivanpah Project experience indicates that the proposed mitigation plan may not be “feasible and efficacious” at reducing glint and glare below the threshold of significance.⁵ *CBE*, 184 Cal.App.4th at 95 (holding that CEQA requires a lead agency to support, with substantial evidence, a finding that its proposed mitigation measures will be both “feasible and efficacious”). First, the Heliostat Positioning Plan at the Ivanpah Project—which is the model for the Heliostat Position Plan proposed here—requires the Project Owner to adjust the heliostats *in response to complaints about specific glint and glare events*. Modifications to TRANS-7 Heliostat Positioning and Monitoring Plan (TN# 202877); 7/29/14 Transcript, at 35. Consequently, the Project Owner is required to act only when pilots or motorists actually report their concerns; as indicated during evidentiary hearings, affected pilots and motorists rarely report these incidents. *Id.* at 79 (CEC Staff explaining that “[i]t’s true that [] we do not know what the ratio is between reported incidents and incidents experienced. We know that that ratio is very small.”). Thus, without assuring that reporting of glint and glare events will actually occur, the Heliostat Positioning Plan is only occasionally responsive to health and safety concerns.

In addition, ample evidence supports the conclusion that the Project engineers are not yet certain that adjustments to the heliostats can bring glint and glare events below the threshold of significance and still maintain a viable operations model, even at the Ivanpah Project. 7/29/14 Transcript, at 46-47 (CEC Staff Jim Adams expressing his “hope[]” that the issues at Ivanpah and Palen could be resolved, but indicating they had not yet had any “face-to-face with the technical experts and staff to really work this out”), 48 (Sandia Lab’s Cliff Ho explaining certain heliostat

⁵ As used here, the threshold of significance is whether glare events pose threats to human safety.

repositioning intended to address glare events could prevent operators from rapidly moving the heliostats into position when they need energy), 77 (Jim Adams stating “I’m not totally confident that we can have enough engineering modifications to get it to the point where it’s always going to be less than significant”), 79-80 (CEC Staff Greg Irvin stating “we can’t say with certainty that if unknown mitigation mechanisms are implemented properly, [] it will be reduced [to] less than significant”), 89 (Cliff Ho stating he was not sure if the recent attempts at Ivanpah to reduce glint and glare “had a significant reduction with regard to [] ocular impact”).⁶

Moreover, no analysis has been completed to determine whether the differences between the Ivanpah and Palen Projects—including the significant difference in the height of the towers and the size of the heliostat fields—will impede the company’s ability to apply new information from the Ivanpah Project to the Palen Project. *Id.* at 75-76 (Jim Adams stating “I haven’t given that a whole lot of thought . . .”).

Consequently, any revised PMPD must acknowledge that glint and glare impacts from the Project remain significant even after mitigation.

III. Palen’s Proposed Future Addition of Thermal Energy Storage Must Be Analyzed Now.

Just over one week before the start of evidentiary hearings, PSH proposed a new condition of certification requiring the company to petition the Commission to add an unspecified amount of

⁶ During the evidentiary hearings, CEC Staff Jim Adams later expressed his belief that changes to TRANS-7 agreed to in the workshop made it “likely that the glare can be impacted to a less than significant level.” 7/29/14 Transcript, at 113. During the workshop, TRANS-7 was changed in two ways. First, language requiring the monitoring plan to reduce impacts to a “less than significant level” was weakened to require that the plan reduce impacts only “so that there is not a [Direct Solar Reflection from the Heliostats] Event that is a Health and Safety Issue.” *Compare* Trans-7 Heliostat Positioning and Monitoring Plan (TN# 202821) *with* Modifications to TRANS-7 Heliostat Positioning and Monitoring Plan (TN# 202877). Second, language was added to allow the project owner to cease monitoring in the event the Project Owner resolves legitimate complaints. *Id.*; *see also* 7/29/14 Transcript, at 115-116. When questioned, Mr. Adams was unable to explain how these two changes resulted in his apparent shift in opinion. *Id.* at 113-114.

thermal energy storage prior to constructing the second tower. Ex. 1166, Project Description Supplemental Rebuttal Testimony (TN# 202727), at 3. This late addition not only made it difficult for the parties to participate in the evidentiary hearings, it also runs afoul of CEQA's requirements in two ways.

First, CEQA requires a stable project description throughout the environmental review process. “[A]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient [environmental impact report].” *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193. Instead of creating a stable project description from the beginning of this renewed evidentiary proceeding, PSH instead added a significant new aspect of the Project at the last minute. While lead agencies are authorized to revise original proposals during the course of CEQA review, that new information must be circulated for public review and comment. § 21092.1. Here, the parties received the new information well after preparation of the staff assessment and the submission of opening and rebuttal testimony.

It is abundantly clear from the transcripts of the evidentiary proceedings that the shifting project description created confusion for the parties and the public. *E.g.*, Transcript of the July 30, 2014 Evidentiary Hearing (“7/30/14 Transcript”) (TN# 202871), at 54-58, 126-34; Comments of the USFWS (TN# 202896) (indicating their understanding that the project had been reduced to one tower only). It is exactly this confusion, and its effect on informed decisionmaking, that the stable project description requirement is intended to prevent. *County of Inyo*, 71 Cal.App.3d at 197.

Second, the last-minute inclusion of Condition of Certification PD-1 makes it reasonably foreseeable that this Project will be expanded to include thermal energy storage. Ex. 1166, at 3. Under CEQA, a lead agency must conduct an analysis of all relevant aspects of the project, including a reasonably foreseeable future expansion, prior to project approval. *Laurel Heights I*, 47 Cal.3d at

396 (“We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects.”); 14 Cal. Code Regs. § 15126 (EIR’s impact analysis must consider all phases of the project). A lead agency is not permitted to omit analysis simply because the potential future expansion is uncertain or may not occur, or because additional environmental review will be conducted at some point in the future. *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 75.

Here, however, no environmental analysis of this potential expansion has been presented to the public or decisionmakers. PSH does not provide any information about the type of thermal energy storage, the duration of its storage capacity, or when it will be added to the site. CEC Staff further admits it conducted no analysis of the proposed modification. 7/30/14 Transcript, at 59-60 (CEC Staff Christine Stora: “Being that we haven’t received a petition to amend on the storage component, I can’t personally speak to it that much. We haven’t evaluated it yet, so we don’t know what the storage component would be.”), 201 (Basin and Range Watch expressing concerns that PSH asked the Commission to assess the benefits of thermal energy storage without knowing anything about its particulars or impacts). It instead defers to some future, unknown time all information about this aspect of the project, including any discussion of potential environmental impacts.⁷ Unless and until this information is provided in a revised staff assessment and assessed in reopened evidentiary proceedings, the Commission cannot approve the Project.

⁷ While none of the parties have conducted a thorough environmental review of the impacts of thermal energy storage, it is apparent from the record that, at the very least, such storage could have a negative environmental impact on hazardous materials and air quality (via increased demand for natural gas). 7/30/14 Transcript, at 59-60, 148.

IV. Deferral of Avian Deterrent Methods to Technical Advisory Committee Violates CEQA.

CRIT is concerned that a number of the proposed avian deterrent strategies will have negative impacts on cultural resources and/or the cultural landscape of the Chuckwalla Valley. For instance, the use of certain avian hazing methods, including dogs, cannons, lasers or falcons, would likely further disrupt the Chuckwalla Valley's cultural landscape. Ex. 2017, at 21-22. CEC Staff echoed these concerns. Ex. 2018, CEC Staff's Rebuttal Testimony (TN# 202773), at 7-8 ("Balloons and kites, Robotic Birds, Strobes, Eagle Eyes, Lasers, Lights and Drones would add visual elements to [the cultural landscape] that are non-conforming with the setting, feeling and associations related to [its] integrity. . . . Air or Propane Cannons, Pyrotechnics, Distress Signals, and Omni-directional speakers (and potentially drones) would add auditory elements to [the cultural landscape] that are nonconforming with the setting, feeling and associations related to [its] integrity.").

Instead of selecting a mitigation measures at this time, or conducting a thorough analysis of potential impacts, however, PSH and CEC Staff propose to defer the selection of a mitigation strategy to the Technical Advisory Committee ("TAC"). This approach violates CEQA. In *CBE*, the court of appeal considered whether the City was permitted to defer the formulation of greenhouse gas mitigation strategies to some later time. The Court emphatically rejected that approach, noting that "the development of mitigation measures, as envisioned by CEQA, is not meant to be a bilateral negotiation between a project proponent and the lead agency after project approval; but rather an open process that also involves other interested agencies *and the public*." 184 Cal.App.4th at 93 (emphasis added). The fact that agency representatives will be involved in the TAC, unlikely in *CBE*, does not bring the measure into compliance. *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 670 ("The fact that the future management plans would be

prepared only after consultation with wildlife agencies does not cure these basic errors under CEQA”).

As noted by the *CBE* court, the lack of public (or tribal) involvement in the TAC renders the deferral even more problematic. The mitigation measure does not anticipate any further consultation or public review of the selected avian deterrent strategies, even though CEC Staff acknowledges the potential for significant environmental impacts. Ex. 2018, at 7-9, 17-23 (Condition of Certification BIO-16b); 7/30/14 Transcript, at 411-12. PSH and CEC Staff have provided no compelling reason to keep TAC discussions confidential; indeed, this formulation runs directly afoul of the Commission’s repeated assertions—made in the context of tribal consultation—of the need to assure transparency and public participation in Commission decisions.

V. Use of the Approved Project as the Environmental Baseline Violates CEQA.

As the California Supreme Court recently made clear, a lead agency must use existing environmental conditions at the time of project approval as the baseline from which to compare project impacts unless warranted by unusual circumstances. *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 448, 456 (“[T]he baseline for an agency’s primary environmental analysis under CEQA must ordinarily be the *actually* existing physical conditions rather than *hypothetical* conditions that could have existed under applicable permits or regulations.”). The baseline serves as the benchmark for comparisons between the proposed project and its alternatives, and thus plays a crucial role in illustrating potential environmental impacts. If the selected baseline involves hypothetical development, the lead agency risks severely understating the project’s likely impacts.

Here, the Commission has made clear from the start of evidentiary hearings that the environmental baseline used in *this siting proceeding* is the approved solar trough project.⁸ *E.g.*, Corrected Transcript of Palen Evidentiary Hearing 10-28-13 (“10/28/13 Transcript”) (TN# 201640), at 139. Thus, in assessing the impacts of the proposed project, the Commission, its Staff, and PSH all compared the solar tower project to the trough project. *E.g.*, Presiding Member’s Proposed Decision (TN# 201434), at 6.3-1 to -62; Final Staff Assessment Part B (TN# 200564), 4.3-1 to -178; PSH’s Opening Testimony – Batch 2 (TN# 200806), at Cultural Resources 6-7.

This selection of baseline—while categorically prohibited under CEQA unless certain additional findings are made—is especially inappropriate here where PSH argues that the approved solar trough project is infeasible. Throughout the most recent evidentiary proceeding, PSH presented evidence explaining its alleged inability to build the proposed solar trough project,⁹ citing its lack of necessary proprietary technology, a Power Purchase Agreement, or a Large Generator Interconnection Agreement. *E.g.*, Ex. 1150, Infeasibility of Trough and PV Alternatives (TN# 202515). According to PSH, there is no possibility that the approved project could be built in any reasonable timeframe. 7/30/14 Transcript, at 83 (explaining perceived infeasibility of solar trough project). Consequently, the construction of the approved solar trough project is just as hypothetical

⁸ Contrary to PSH’s assertions, CRIT argues that the Commission erred in selecting a baseline for this specific proceeding. Supplemental Response to Motion to Reopen Evidentiary Record and Scheduling Order (TN# 202307), at 4-5. CRIT acknowledges that analysis has been completed comparing the approved project to the existing environmental baseline, and that this analysis has been incorporated into the documents currently before the Commission. The issue, however, is that by limiting this proceeding to the differences between the proposed project and the approved project (i.e., using the approved project as a baseline *for this proceeding*), the Commission has precluded any new testimony or evidence regarding impacts that would occur under either the proposed or approved project.

⁹ This statement is not intended to suggest that PSH’s additional data is sufficient to support a finding of infeasibility by the Commission.

as the future traffic scenario struck down by the Supreme Court in *Neighbors for Smart Rail*, 57 Cal.4th at 456.

The prejudice resulting from this legal error is evident with respect to cultural resources. Throughout this proceeding, CRIT has attempted to present evidence relating to the direct impacts that are likely to occur from the proposed Project when compared to the existing environmental conditions, including the strong possibility of discovering buried cultural artifacts and the inability of the current mitigation measures to protect these resources. *E.g.*, Ex. 8024, Opening Testimony of R. Loudbear et al. re Lessons Learned from the Unanticipated Discovery at Genesis (TN# 20090). At every turn, CRIT has been prevented from adequately presenting this evidence. PMPD, at 6.3-14; 10/28/13 Transcript, at 139.

Most recently, CEC Cultural Resources Staff confirmed that they constrained their environmental review to comparisons between the proposed project and the approved solar trough project. Ex. 2017, at 30 (“Staff only assessed impacts to cultural resources based upon only those impacts that would result from the difference between what was previously licensed and what is now proposed.”). This limitation prevented any review—in this proceeding—of the impacts that would occur as a result of either project, including direct disturbance of archaeological resources and disruption of prehistoric trails.

PSH has argued that the use of the approved solar trough project as the environmental baseline for this proceeding did not violate CEQA because the differences between the approved solar trough project and the existing environment were already evaluated in the 2010 proceeding. Supplemental Response to Motion to Reopen Evidentiary Record and Scheduling Order (TN# 202307). This argument, however, ignores the salient fact that CRIT and other affected area tribes did not participate in that proceeding. No government-to-government consultation was held and little

input was given about the likely cultural impacts from the solar trough project. Consequently, even if the 2010 proceeding adequately discussed the perceived archaeological impacts resulting from the trough project as compared to the then-existing environment, that proceeding utterly failed to capture the impacts to area tribes. Consequently, that analysis cannot substitute for conducting a robust analysis using the correct environmental baseline in this proceeding.

VI. Benefits Associated with Thermal Energy Storage Cannot Be Used in Statement of Overriding Considerations.

While deferring any development or analysis of the proposed thermal energy storage to some later date, both PSH and CEC Staff readily rely on the perceived benefits of thermal energy storage to balance out the Project’s significant environmental impacts. For example, PSH “prepared testimony elaborating on the benefits of energy storage” (7/30/14 Transcript, at 30), and outlined “the importance of energy storage to the state, [and] the inherent storage advantages of tower versus trough technology” *Id.* at 174.

Similarly, CEC Staff Deputy Director Roger Johnson notes that one of the primary justifications for his statement regarding overriding considerations is the “significant project benefit” of adding a storage component to Unit 2. Ex. 1206, Staff’s Comments Regarding a Possible Energy Commission Finding of Overriding Considerations (TN# 202823); *see also* 7/30/14 Transcript, at 198 (noting that he would not have reached the same conclusion regarding the possibility of making override findings if one assumes that the project modification to add thermal energy storage does not occur).

However, the record is replete with evidence that the thermal energy storage component may never be built.¹⁰ First, PSH acknowledges that it will need both a new Power Purchase Agreement and a new air permit to add thermal energy storage. A Power Purchase Agreement, in particular, can be difficult to obtain. Ex. 1147, Why Not Build TES Now? (TN# 202503); 7/30/14 Transcript, at 114. Second, PSH acknowledges that certain policy considerations must shift in order for thermal energy storage to become financially feasible. 7/30/14 Transcript, at 50 (“There [are] not the economic conditions that enable us to do that today.”), 120. Finally, PSH acknowledges that instead of moving forward with thermal energy storage to comply with condition PD-1, it instead may petition the Commission to remove the condition entirely. *Id.* at 128-29, 133 (explaining that the condition would obligate PSH to either “take out the condition” or “amend the potential license to have some design of energy storage”).

The record also demonstrates that the complete benefits of thermal energy storage may not be realized at this particular site. 7/30/14 Transcript, at 37, 66 (Center for Biological Diversity Witness Bill Powers explaining that the proposed thermal energy storage may add only 15 minutes of generation at the rated output, and that storage would be more beneficial within the L.A. Basin), 63 (PSH Witness Bruce Kelly agreeing that the modification may only produce 15 minutes of storage under the current design), 90, 136-38 (PSH Witness Arne Olsen explaining that, in the future, the most beneficial thermal energy storage projects will provide six to ten hours of storage). Moreover, PSH has not committed to providing any particular amount of thermal energy storage at the Project site. 7/30/14 Transcript, at 56.

¹⁰ This evidence, however, does not change the determination that thermal energy storage is a reasonably foreseeable consequence of the Project under CEQA if condition PD-1 is adopted, as discussed in Section III, *supra*. Moreover, the analysis is flawed either way: if thermal energy storage is reasonably foreseeable, it must be analyzed now; if it is too uncertain, its benefits cannot be counted in the override findings.

CEQA does not permit lead agencies to rely on hypothetical benefits to justify approval of a project. An agency must adopt a statement of overriding considerations whenever it approves a project in spite of significant, unavoidable environmental impacts that cannot be sufficiently mitigated. § 21081(b); 14 Cal. Code Regs. § 15093. These overriding considerations must be supported by substantial evidence in the record; statements will be struck down if they “mislead[] the reader about the relative magnitude of the impacts and benefits the agency has considered.” *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 717-18 (statement of overriding considerations insufficient where benefits described in such a way that it “applied a thumb to the scale”).

Beyond PSH’s last minute effort to bolster the apparent “benefits” of their proposed Project by adding the proposed phasing plan,¹¹ all other factors now weigh more strongly in favor of rejecting the project than in December 2013. For example:

- **Avian Impacts:** While the Commission now has a more complete picture of avian mortality across various utility-scale solar projects in the region, this data indicates that solar power towers—such as those proposed by PSH—result in disproportionately negative impacts on a wide variety of avian species. *See, e.g.*, Ex. 2017, at 7-14; Comments of the USFWS (TN# 202896). Moreover, existing data indicates the proposed site may be particularly harmful in terms of species diversity and migration paths. *Id.* Finally, the available data presents an incomplete picture, given the less-than-one-year term of systematic monitoring, concerns about searcher efficiency, and unknowns regarding baseline impacts to avian species. *Id.*

¹¹ PSH partially frames this benefit as the CSP tower technology’s ability to *potentially* accommodate thermal energy storage. 7/30/14 Transcript, at 165. This ability, however, has not changed since the Committee previously recommended denial of the project.

- **Cultural Resources:** Real-world experience with the Ivanpah Project indicates that glint and glare impacts will be significantly greater than anticipated in Fall 2013. Ex. 2017, at 25, 50. This heightened visual disturbance will result in even greater destruction of the cultural landscape of the Chuckwalla Valley. *Id.* at 50. Moreover, the parties have been unable to develop adequate mitigation measures that address the disproportionate impact on area tribes.
- **Transportation:** As discussed above, the Ivanpah Project has demonstrated that glint and glare impacts to pilots and motorists may remain significant even after the application of proposed mitigation measures. *See* Section II, *supra*.

Consequently, CRIT believes that the Commission would be unable to adequately support any statement of overriding consideration necessary for Project approval.

CONCLUSION

For the foregoing reasons, CRIT respectfully requests that the Commission deny the proposed petition to amend the Palen Solar Electric Generating System.

DATED: August 15, 2014

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