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Comments of the Independent Energy Producers Association on the 2014 Draft Regulations of the California Energy Commission 14-OII-01

Additional submitted attachment is included below.

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October 23, 2014

Karen Douglas
Lead Commissioner
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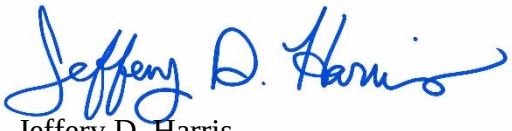
1516 Ninth Street
Sacramento , CA 95815

RE: 2014 Revisions: Title 20 Commission Process and Procedure Regulations (14-OII-01)
Comments of the Independent Energy Producers Association

Dear Commissioner Douglas:

The Independent Energy Producers Association ("IEP") thanks the California Energy Commission ("Commission") for the opportunity to provide the attached comments on the draft revisions to the Commission's regulations relating to process and procedure. IEP looks forward to participating in the upcoming workshop to discuss the draft revisions.

Sincerely,



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COMMENTS
OF
THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION
ON THE 2014 DRAFT REGULATIONS
OF THE
CALIFORNIA ENERGY COMMISSION
14-OII-01

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Submitted on behalf of the
Independent Energy Producers Association

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COMMENTS
OF
THE INDEPENDENT ENERGY PRODUCERS ASSOCIATION
ON THE 2014 DRAFT REGULATIONS
OF THE
CALIFORNIA ENERGY COMMISSION

The Independent Energy Producers Association is pleased to comment on the 2014 Draft Regulations ("draft rules") of the California Energy Commission ("CEC" or "Commission").[1] The Independent Energy Producers Association ("IEP") is California's oldest and leading nonprofit trade association, representing the interest of developers and operators of independent energy facilities and independent power marketers. IEP members collectively own and operate approximately one-third of California's installed generating capacity, much of which was licensed under the CEC's siting regulations.

Part I of these comments provides a general overview of our comments, focusing on those aspects of the draft rules that raise the most serious concerns.

Part II contains a section-by-section commentary on the draft rules. Some of our comments address editorial or clarifying issues. A number of the comments are more substantive.

I. OVERVIEW

We commend the Commission for undertaking a comprehensive review of its rules of practice and procedures (collectively, the "Rules"). We support many of the proposed changes which update the Rules, remove obsolete provisions, and consolidate similar provisions in a single section.

We see the draft rules as an excellent opportunity to begin a dialogue among stakeholders regarding the improvement of the Commission's power plant siting process, in addition to the other improvements to the Commission's Rules. However, the draft rules will require significant reconsideration and revision before the Commission proceeds to formal rulemaking.

The draft rules do not merely reorganize or recodify the Commission's Rules. The draft rules also propose sweeping changes to the procedures for reviewing siting applications. Consistent with the intent and statutory prescriptions embedded in the Warren Alquist Act, under the current rules the Commissioners play an active role in the hearing and decision making process in each siting case. The draft rules would significantly diminish the role of the Commissioners as decision makers in the siting process. Moreover, the proposed changes relax the rules of evidence that have traditionally applied in Commission adjudicatory proceedings, diminish due

[1] California Energy Commission's 2014 Draft Regulations, Title 20 Sections 1000s, 1100s, 1200s, and 1700s (dated September 29, 2014), available at http://docketpublic.energy.ca.gov/PublicDocuments/14-OII-01/TN203129_20140930T132537_2014_Draft_Regulations_Title_20_Sections_1000s_1100s_1200s_and.pdf.

process protections of parties (other than Staff) in these proceedings and thereby risk undermining the integrity and durability of Commission decision making.

We believe that many of these changes are contrary to the intent and purposes of the Warren Alquist Act. For the reasons set forth below, we believe that those provisions that fundamentally alter the role of the Commissioners and the rights of the parties should be rejected.

We also have serious concerns with the proposed revisions to the procedures governing complaints, investigations and proposed "claims."

We note a number of instances where existing rules are not merely renumbered, but also rephrased. In many instances, it is not clear whether the paraphrasing of an existing rule or a statute is intentional or inadvertent. However, words matter – particularly when used in draft rules which, upon their adoption, are intended to be binding and could increase litigation risks. Therefore, we support the formulation of rules that reference statutes, rather than paraphrase a statute. Similarly, we support the relocation, but not the rephrasing, of existing rules, unless there is a compelling reason to alter the language.

While our comments on the draft rules are extensive, they are not exhaustive. The draft rules cover 74 pages and make hundreds of additions, deletions and revisions to the Rules. In the limited time available to review the initial draft rules, we did not have time to propose specific changes to the draft rules, but we would be pleased to do so as the dialogue continues. We welcome the opportunity to discuss the draft rules further with the Committee at the workshop on October 27, 2014. We believe that it is important that this workshop provide an opportunity for the parties to better understand the underlying problems that the substantive provisions of the draft rules were intended to resolve, and that the Committee open a dialogue with all parties to find solutions to these problems. We also hope that the workshop will help all parties to understand why siting and non-siting rules may need to be addressed in different ways.

In the remainder of these comments, IEP provides general comments on specific sections of the proposed rules. In addition, we provide as appropriate suggestions on how improvement in the siting process may be effectuated. Following this section, we provide a specific Section-by-Section analysis for the Commission's consideration.

II. General Comments Regarding Proposed Rule Changes

A. Many Of The Draft Rules Are Not Consistent With The Purposes and Intent of the Warren Alquist Act.

The siting of new thermal power plants larger than 50 megawatts in California is one of the core functions of the Commission. While the Commission has many important responsibilities, siting power plants remains a very important job for this agency. Timely siting decisions are a critical path element in achieving California's climate and energy goals under Governor Brown.

When the Legislature created the Commission, it pre-empted the siting authority of all other local and state agencies and transferred that authority exclusively to five appointed Commissioners. Moreover, the Legislature specifically directed that these five Commissioners

assume direct responsibility for gathering the evidence, resolving disputes and preparing the final decision.

Public Resources Code section 25221[2] requires that the Commission hold hearings on each application for certification ("AFC" or "Application") and that these hearings be presided over by at least one Commissioner. Section 25221 specifies that these hearings before the Commissioner "shall provide reasonable opportunity for the public and all parties to the proceeding to comment upon the Application and the commission staff assessment and shall provide the equivalent opportunity for comment as required pursuant to Division 13 (commencing with Section 21000)."

Under the current rules, upon publication of the Staff assessment, the decision making phase of the proceeding begins. Consistent with express statutory direction, the assigned committee conducts evidentiary hearings, at which time the various parties may present evidence in support or opposition to the Application. The evidentiary hearings allow the parties to present testimony and comments on the proposed AFC, the Staff assessment and on the evidence of other parties. Following the close of evidentiary hearings and the submission of briefs, the assigned committee is charged with preparing a proposed decision containing its reasoned judgment on the matters in dispute and its recommendations on the licensing of the project. Following publication of the PMPD, parties are allowed a minimum of 30 days to comment on the PMPD before the matter is brought before the full Commission for a vote.

The draft rules would make sweeping changes to the role of the Commissioners as decision makers in the AFC process. We do not believe that the draft rules should be changed to the extent that these rules would diminish the role of the Commissioners. Specifically, these draft rules would result in the following negative outcomes:

- Retain evidentiary hearings, but not for the purpose of commenting on the contents of the Final Staff Assessment ("FSA"). (Draft rules, § 1244.[3])
    - This is inappropriate because the right to comment on the Staff Assessment during the hearings before a Commissioner is an express right under Section 25211;
- Allow the FSA to be received into evidence, without the need for the contents to be supported by sworn, sponsoring witnesses. (Draft rules, § 1212(a).)
    - This is inappropriate because the reasonable right of parties to comment on the Staff assessment is denied, if the Staff is not required to affirmatively support the document with sworn witnesses;
- Eliminate the assigned committee's exercise of informed judgment on contested issues, and delegate the responsibility of responding to all comments on topics covered by the FSA to the Staff (with the presumption that the Staff's "technical experts [will] respond

[2] Hereafter all references to Sections 21000 et seq. are to the Public Resources Code, unless expressly noted otherwise.

[3] Draft rule §1744 deletes §1748(c) of the current rules which provides that the staff and agency assessments shall be presented during the evidentiary hearings.

to the comments, rather than the [decision makers, the] Committee") (Note for draft rule § 1742.)
    - This is inappropriate because Section 25221 allows parties the right to comment on the AFC and the Staff assessment to a Commissioner during the hearings. It is unlawful for the Commission to fully delegate to the Staff the task of receiving and responding to comments;
- Eliminate the ability of the parties and the public to comment on the PMPD. Comments would be allowed only if the PMPD contains "significant new information, not contained in the Final Staff Assessment". If the PMPD adopted the Staff's recommendations as contained in the FSA without adding "new information", the draft rules would preclude parties from commenting on the PMPD. (Draft rules, § 1745(c).)
    - This is inappropriate because Section 25523 requires the Commission to prepare a written decision after the public hearing on an Application. This is not a task that can be delegated to the Staff. Section 25523 strongly infers that the Commission should consider the information received at the hearings before the Commissioner before preparing the decision. The draft rules would abrogate this intent by creating a presumption that there is no need for parties to comment on the PMPD if it contains the same information as in the FSA published before the hearings.

In summary, the combination of these draft rules would significantly diminish the role of Commissioners as decision makers contrary to the Warren Alquist Act, and the changes to draft rules described above should not be adopted.

B. <u>The Draft Rules Should Not Diminish The Role Of The Commissioners To Be The Decision Makers In The Proceeding.</u>

When the Legislature enacted the Warren Alquist Act, one of the primary purposes of creating the Energy Commission was to ensure active participation of the Commissioners personally in the siting process. Indeed, the Warren Alquist Act requires the Energy Commissioners to be actively engaged in hearing and deciding the original controversy. At least one Commissioner must be present at all hearings, and the presiding member is charged with preparing the proposed decision. Accordingly, it is vital that Commissioners become more engaged, not less engaged, in the decision making phase of a siting proceeding.

As we explain in Section I.A, above, the Legislature has charged the Commissioners with the duties of serving personally in siting proceedings as fact finders and adjudicators. These are tasks that cannot be delegated to staff.

As explained in a memorandum from Assemblyman Charles Warren (co-author of the Warren Alquist Act) to Don Livingston (Director of Policy for Governor Reagan) in 1974, one of the reasons for transferring siting functions from the California Public Utilities Commission ("CPUC") to the Commission was the perception that the procedures of the CPUC "did not promote open deliberations and full public participation", and further stated:

> The PUC relies on hearing officers to collect the information relevant for deciding a case before the commission…The hearing officer forwards the hearing record and a preliminary decision to the commissioners for final action. The commissioners are in fact relying on digests of the debate and are never required to be involved in the original proceedings.
>
> There are, of course, good reasons for this type of system due to the number of cases before the [Public Utilities] Commission. However, it is not a system which will achieve the open deliberation and public participation criteria of the siting process in AB 1575. In AB 1575 the commissioners hear the original controversy, the general public is heard without elaborate rules, and the house counsel is required to insure as much public participation as possible. Because of the standard procedures within the PUC, I do not feel the matter would be handled with these same objectives in mind.[4]

For these reasons, the Warren Alquist Act requires the Commissioners to be actively engaged in hearing and deciding the original controversy. At least one Commissioner must be present at all hearings.[5]

The draft rules would depart from the Legislature's direction that Commissioners be active decision makers by delegating to the Staff the responsibility for receiving and responding to comments from other parties, other agencies, and the public, and by denying parties and the public the opportunity to even comment on the PMPD if the presiding member adopts the FSA as his or her decision. (See Draft rules, §§ 1742, 1744 and 1745)

The draft rules appear to be based on an assumption that the Commissioners lack the time or ability to respond to technical comments from the parties and should therefore delegate this responsibility to the Staff.[6] However, this is contrary to the intent of the Warren Alquist Act because the Legislature expressly addressed this issue by specifying that the members of the Commission should have specific technical qualifications. As Assemblyman Warren explained, "I believe it is essential that the members of the energy commission have technical expertise in order to avoid being confused by the technical arguments of the parties before the commission."[7]

We understand that the duty to preside personally over a siting proceeding imposes great burdens and responsibilities upon each Presiding Member. We are sympathetic to the time and effort that that is required. If there is a need for additional technical support to prepare a PMPD, delegating

[4] 1973-74 AB 1575 Correspondence, Analyses and Statements, pdf page p. 91, at this link: http://www.energy.ca.gov/reports/Warren-Alquist_Act/history/1973-74_AB_1575_corresp_analyses_stmts.pdf

[5] Public Resources Code § 25211.

[6] The note to Draft Rule §1742 states that requiring the Staff to respond to comments from other parties, rather than the Committee "will allow the technical experts to respond to the comments as opposed to the Committee when comments were on the PMPD."

[7] 1973-74 AB 1575 Correspondence, Analyses and Statements, pdf page p. 75, at this link: http://www.energy.ca.gov/reports/Warren-Alquist_Act/history/1973-74_AB_1575_corresp_analyses_stmts.pdf

this function to the advocacy staff is not the solution.[8] Instead, the Commission should utilize the resources of advisory staff or independent consultants with technical expertise, clearly separate from the advocacy functions, to assist in the preparation of the PMPD.

Finally, we recognize that the role of Commissioner as decision-maker can be strengthened if the Presiding Member is allowed sufficient time to prepare a reasoned decision, rather than one that would simply adopt the contents of the FSA. Therefore, in Section I.H., below, we offer some suggestions for how to allow more time for the decision making phase of the proceeding.

C. The Draft Rules Should Not Try To Apply All Rules To All Proceedings Before The Commission.

The Commission conducts several different types of proceedings. Some proceedings, such as rulemaking or standard-setting proceedings are "quasi-legislative" proceedings. Other proceedings, such as siting or complaint proceedings are "quasi-adjudicative" proceedings. Under the current rules, there are separate provisions regarding use of testimony, the rights of parties, questioning, basis for decision and other matters throughout the 1200s and 1700s. The 1200s generally relate to quasi-legislative proceedings, the 1700s generally relate to quasi-adjudicative siting proceedings.

The draft rules seek to consolidate these various rules in one section. The note explaining these changes states that the duplication is "unnecessary and outmoded". We disagree.

The idea that judicial and legislative matters are distinct is a fundamental tenet of administrative law.[9] Kenneth Culp Davis, a legal scholar who pioneered the field of administrative law, distinguished adjudicative from legislative facts, arguing that the former are facts which are specific to an individual while the latter are facts on matters of public policy which are weighed and balanced.[10] Adjudicative facts, for Davis, "answer the questions of who did what, when, how, why, with what motive or intent."[11] Adjudicative facts are the kind of facts that go to a jury, whereas legislative facts are not immediate to specific parties but are more general facts that help clarify matters of policy.

Because of the distinction between adjudicative and legislative facts, administrative agencies typically apply different evidentiary rules to quasi-legislative and quasi-judicial proceedings. Rules regarding intervention, questioning of witnesses, the formality of hearings, and the rules of evidence may be more lax where an agency is engaged in formulating policies or rules of general applicability. But rules of evidence and the rules of practice must be stricter when the agency is determining whether or not to issue a license precisely because they involve the adjudication of

[8] A primary purpose of the PMPD is to resolve disputes between the parties regarding questions of fact or law that are relevant to the decision whether to license a project, and if so, under what conditions. When there are differences between the Staff and other parties, it would be patently unfair to delegate to the Staff the responsibility for resolving these disputes.

[9] Quasi-judicial and Quasi-legislative Hearings in Minnesota Law, Bench and Bar, Vol. 60, No. 8 | September 2003, http://www.mnbar.org/benchandbar/2003/sep03/quasi.htm

[10] Id.

[11] Id.

an individual right or approval. Therefore, while it may be appropriate to allow hearsay in quasi-legislative proceedings, California law is quite clear that uncorroborated hearsay cannot constitute substantial evidence to support an agency's decision in a quasi-judicial proceeding. (See, *TURN v. PUC*, 223 Cal. App. 4th 945, 962 (Feb. 2014). We strongly recommend that the Commission not conflate the rules of evidence that should apply to different types of proceedings.

D. The Proposed Changes To The Rules Of Evidence In Siting Proceedings Are Not Consistent with California Law.

In an effort to consolidate all rules, without apparent regard to whether they apply to quasi-legislative or quasi-judicial proceedings, the draft rules make sweeping changes regarding the hearsay rule, public comment, the admissibility of evidence, the burden of proof and the types of information that a Commission siting decision may rely upon to support a finding. These draft rules are not consistent with California law and would unnecessarily expose CEC decisions to a very high risk of being annulled by reviewing Courts.

1. Relaxation of the Hearsay Rule is Contrary to California Law.

The Commission's current rules provide "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions." (Rules, § 1212(d).) The draft rule significantly departs from the current rule and would provide, instead, that hearsay can be used in and of itself to support a finding if the hearsay "has attributes of reliability and probative value." (Draft rules, § 1212(c)3.) This provision is inconsistent with California case law regarding the role of hearsay in administrative adjudicatory proceedings. If adopted and implemented in siting proceedings, the draft rule regarding hearsay would expose CEC decisions to a very serious and avoidable risk of being reversed by reviewing courts.

Just recently, the California Court of Appeal annulled a decision of the CPUC because the CPUC relied on hearsay evidence to support a finding of fact regarding the need for a new power plant. In *The Utility Reform Network v. Public Utilities Com.*, 223 Cal. App. 4th 945 (Feb. 2014) (hereinafter, "*TURN v. PUC*") one of the issues before the Court was whether the CPUC properly relied on hearsay evidence to support a finding of fact regarding the need for a power plant facility. The Court held that absent a specific statutory authorization providing otherwise, under California law "uncorroborated hearsay cannot constitute substantial evidence to support an agency's decision." (*TURN v. PUC*, 223 Cal. App. 4th at 962.) Similarly, because there is no specific statutory authorization in the Warren-Alquist Act authorizing the use of hearsay to support a Commission decision, the CEC cannot lawfully adopt a rule that would allow hearsay standing alone to support a finding in a CEC decision.

One of the hearsay documents that the Court held the CPUC could not rely upon was a declaration submitted by the CAISO executive director of market analysis. The CAISO was not a party to the proceeding and the CAISO did not offer a witness to support the declaration. The Court held that the CPUC was required to support its decision with substantial evidence and "Because the Commission's finding is based upon uncorroborated hearsay evidence, and the

truth of the CAISO's extra record statements is disputed, the finding cannot be sustained." The Court held that "unless the CAISO materials are corroborated by other competent evidence, they do not constitute substantial evidence to support the Commission's decision. Thus, whatever evidentiary weight is due the CAISO materials, they cannot alone support the Commission's finding of need for the Oakley Project." (*TURN v. PUC*, 223 Cal. App. 4th at 962.)

It is not just the proposed revisions to the hearsay rules that are inconsistent with California law. Other revisions in the draft rules similarly undermine the ability of the CEC to support its siting decisions with substantial evidence and expose CEC decisions to being annulled on the same grounds at in *TURN v. PUC,* that is – whether the decision's findings are supported by substantial evidence. The draft rules would appear to allow the decisions in a Commission decision to be supported by evidence that is not supported by witnesses testifying under oath, nor tested by questioning and cross-examination of other parties. For example, the draft rules would:

- Allow the FSA to be received into evidence without sponsoring witnesses (Draft rules, § 1212(a));
- Allow communications from other agencies (such as the CAISO declaration in *TURN v. PUC*) to be received into evidence up until the close of the record, regardless of whether the truth of these statements are disputed (Draft rules, § 1212(b)(2)); and
- Allow a finding to be based on "any evidence in the record" (Draft rules, § 1212(c)(2)).

The combination of these changes, if adopted, would risk rehearing or reversal of the Commission's siting case decisions.

2. Public Comment Should Be Encouraged, But Not Elevated to Carry the Same Weight as Sworn Testimony and Subject to Cross Examination.

The draft rules have conflicting provisions regarding the treatment of public comments, which are contrary to California law. Unsworn public comment is hearsay, and uncorroborated hearsay standing alone is not substantial evidence to support a finding of fact. These provisions of the draft rules are more confusing and cumbersome than existing rules, seriously erode longstanding evidentiary rules regarding the admissibility and use of hearsay evidence. The proposed relaxations on the use of public comment should not be adopted.

The draft rules propose that the record shall contain "public comments accepted by the committee or commission at a hearing." (Draft rules, §1212(b)(1).) If this draft rule means to say the record shall contain all public comments accepted *into evidence* by the Commission or Committee at a hearing, we agree with the formulation because acceptance into evidence at a hearing provides notice to other parties, an opportunity to object to or to rebut the comment that is received into evidence, and an opportunity to question or cross-examine the sponsor of the evidence. However, another section of the draft rules suggests that a comment in itself may support a finding "unless the information has been excluded" (Draft rules, § 1212(c)(2)), suggesting that it does not have to be actively received into evidence at a hearing in order to be used as evidence in support of a decision.

In yet a third variation, the draft rules also state the Committee may rely upon public comment to support a finding "upon notice to the parties" and an "opportunity for questioning of the commenter" (Draft rules, § 1212(c)(2)). This variation begs the question of whether such comments must be then moved into evidence or whether such comments require a "sustained objection" in order to be excluded. How this would be implemented in practice is unclear. Would the "commenter" be sworn in for questioning? And is it consistent with the entire concept of "public comment" to subject members of the public to questioning? What chilling effect might questioning have on public comment and how would that potential chilling effect be weighed against an applicant's due process rights?

If adopted as proposed, the draft rules would actually make proceedings longer and more contentious, if the only way to ensure that unsworn comments are not given the same weight as sworn testimony is for a party to formally object to each and every comment that is docketed and to object to each and every unsworn statement at a hearing.

3. The Discovery Provisions of the Rules Should Reflect Established Rules for Administrative and Judicial Proceedings

Draft rule §1203(a) proposes to revise the standard for the production of evidence in a manner that is inconsistent with current Commission practice and the California Code of Civil Procedure. Draft rule §1203(a) provides that the chair of a committee, either "[o]n his or her own motion, or on the motion of any party, order any party to provide such information as is relevant, or potentially able to lead to the securing of information that is relevant and necessary in carrying out the purposes of the proceeding."

Contrary to the note explaining this proposed rule, the proposed language does not "more closely track the rule in civil litigation". Section 2017.010 of the Code of Civil Procedures, which describes the "matters subject to discovery", provides that discovery is limited to either relevant matters, or matters that appear "reasonably calculated to lead to the discovery of admissible evidence." Thus, rather than the broad standard proposed in Draft rule Section1203 that information be "potentially able to lead", the Code of Civil Procedures instead requires that such information be "reasonably calculated to lead" to admissible evidence. We are concerned that the use of "potentially able" as a standard for discovery can lead to fishing expeditions for broad categories and types of information, rather than a "reasonably calculated" request for information relevant to the proceeding. Expanding the rules of discovery beyond the scope of the Code of Civil Procedures could be used by some parties to further delay the proceedings.

To ensure that the proposed regulation is to conform with the standard in civil discovery, the draft rule should be revised as follows: "or potentially able to lead to the securing of reasonably calculated to lead to the discovery of admissible evidence."

E. Informal Hearings Should Be Limited to Circumstances Where There are Few Issues in Controversy and the Parties Agree to Proceed Informally.

The current rules permit the Commission to utilize "informal hearing procedures" described in Government Code section 11445.10 in siting cases. Consistent with this code section, language

should be added to proposed Rule 1210 to provide the right of parties to object to informal hearing procedures with respect to any or all of the issues in a case, and that "An objection to use of the informal hearing procedure in a power plant licensing proceeding shall be resolved in favor of the applicant or certificate holder."

Government Code section 11445.20 describes the types of proceedings where an administrative agency may employ informal hearing procedures.[12] Clearly, a siting proceeding does not meet any of these criteria. Siting cases are proceedings where an evidentiary hearing for the determination of facts is required by statute. Siting cases involve disputed issues of fact involving hundreds of millions of dollars in investments by an applicant in the proceeding.

While this statute allows informal hearing procedures in proceedings "where, by regulation, the agency has authorized use of an informal hearing", it is clearly implied from the context of this statute that the Legislature intended the application of informal hearing procedures to be authorized in proceedings where the disputed issues of material fact involved small monetary disputes, where evidentiary hearings are not required to determine statutory facts, and where the resolution of the proceeding does not result in a material sanction. It is inconceivable that the Legislature would forbid the use of informal hearing procedures in any proceeding that could result in the revocation of a license or even suspension of a license for more than 5 days, but then sanction and intend that informal hearing procedures be applied in a siting case where the decision could result in the denial of a license for a project valued at hundreds of millions of dollars.

The Administrative Procedure Act ("APA") provides that parties should be provided the right to object to the application of informal hearing procedures, and that "An objection to use of the informal hearing procedure in a disciplinary proceeding involving an occupational license shall be resolved in favor of the licensee." (Gov. Code §11445.30). Similarly, we ask that language be added to proposed Rule 1210 to provide the right of parties to object to informal hearing procedures with respect to any or all of the issues in a case, and that "An objection to use of the informal hearing procedure in a power plant licensing proceeding shall be resolved in favor of the applicant or certificate holder."

[12] As set forth in Government Code section 11445.20, the circumstances for informal proceedings are limited as follows:

(a) A proceeding where there is no disputed issue of material fact.

(b) A proceeding where there is a disputed issue of material fact, if the matter is limited to any of the following:

- A monetary amount of not more than one thousand dollars ($1,000).
- A disciplinary sanction against a student that does not involve expulsion from an academic institution or suspension for more than 10 days.
- A disciplinary sanction against an employee that does not involve discharge from employment, demotion, or suspension for more than 5 days.
- A disciplinary sanction against a licensee that does not involve an actual revocation of a license or an actual suspension of a license for more than five days.
- A proceeding where an evidentiary hearing for determination of facts is not required by statute but where the agency determines the federal or state Constitution may require a hearing.

F. It is Unnecessary to Establish A New "Claims Process" Because Existing Procedures Provide Adequate Opportunity for Members of the Public to Inform the Commission of Alleged Violations.

The draft rules create new Claim and Complaint processes. (Article 5, § 1230 *et seq*.) We generally support the new Complaint process and agree that Complaints should be brought by the Executive Director. On the other hand, we do not believe it is necessary to establish a new "claims process" for power plants licensed by the Commission.

The "claims process" is not needed for power plants because there are already procedures in place to address complaints concerning power plants.[13] In the area of power plant licensing, each license contains specific procedures for resolving complaints. Typically, these licenses designate the Compliance Project Manager ("CPM") as the person responsible for compliance monitoring, ensuring that the design, construction, operation, and closure of the project facilities are in compliance with the terms and conditions of the license and for resolving complaints. [14]In light of the specific complaint procedures that apply to each licensed power plant, an additional layer of a new "claims process" is unnecessary and would undermine and conflict the well-established procedures that have existed for decades.

In addition to the siting complaint procedures described above, the procedures for filing requests for investigation set forth in current Rule 1230 et seq. also provide a means for the public to inform the Commission of alleged violations of laws under the Commission's jurisdiction serves this function.

The draft rule would eliminate the process for requesting investigation and would replace it with a new "claims" process. (Draft rules, § 1230 *et seq*.) There are many specific aspects of the proposed "claim process" that concern us, especially as these claims would apply to power plants.

First, the claim process, unlike requests for investigation, would result in the filing and widespread dissemination, through the docket's electronic service, of even the most frivolous claims. The initiation of any claim, complaint or request for investigation can have very important consequences for a respondent, even if it is ultimately vindicated. The allegations contained in a claim or complaint requires time and money to respond to, and can even involve the preparation of a defense. In many cases, the filing of a claim or complaint requires

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[13] The claims process also appears unnecessary to address appliance issues, because there are already procedures being developed to address alleged violations involving regulated appliances. See, the appliance efficiency program enforcement (http://www.energy.ca.gov/appliances/reg_enforcement/) and the proposed administrative enforcement process for appliance efficiency (http://www.energy.ca.gov/appliances/enforcement/notices/2104-09-02_SB_454_nopa.pdf). The Commission has proposed a very well thought out set of rules for enforcement of appliance efficiency standards involving a system that will employ notices of violation. The proposed claims process in these draft rules would conflict with this enforcement scheme.

[14] For example, "The CPM is the contact person for the Energy Commission and will consult with appropriate responsible agencies, Energy Commission, and staff when handling disputes, complaints, and amendments." (Mariposa Energy Project (09-AFC-03) Final Decision, p. 4.) Each license contains very specific procedures for handling noise and lighting complaints, as well as procedures for more general complaints. (See, for example, Sutter Power Plant Project (97-AFC-2) Decision, Conditions of Certification NOISE-2 and VIS-3.)

disclosure to investors and lenders, with the potential for serious financial consequences. In some cases, frivolous claims may be brought solely for the purpose of inflicting such harms on a respondent.

Second, the draft rule states that the claim will be filed, but unlike the current request for investigation process, does not otherwise provide procedures for the target of the claim to have notice or an opportunity to respond to the claim. (Draft rules, §§ 1231, 1232.)

There are two mechanisms, both present in the current request for investigation process, which help to screen out frivolous claims. The first requirement is that the petition be filed under penalty of perjury, to discourage the intentional submission of false claims. The second requirement is that the petition be screened by the Chief Counsel before it is disseminated more widely. The newly proposed claims process lacks both of these important due process safeguards.

Third, the draft rule would compel the Executive Director to conduct an investigation, file a written response, and provide a right of appeal to the Chair or the full Commission for every claim, no matter how frivolous. (Draft rules, §§ 1232, 1232.5.) This new process will impose extraordinary and unnecessary burdens on the resources of the Commission, particularly where the existing rules allow for several acceptable mechanisms for the public to inform the Commission of potential violations.

In summary, the procedures for requesting investigations should be retained, and the new claims process should not be adopted.

G. <u>There Are Better Ways To Improve The Quality Of The Decision Making Process in Siting Cases.</u>

The draft rules appear to be intended to make preparation of the PMPD easier and save time by framing the FSA as the primary document upon which the PMPD would be based.[15] At the same time, the draft rules would attempt to save even more time by eliminating the presentation of the FSA during the evidentiary hearings and eliminating the comment period on the PMPD if the PMPD contains the same information as in the FSA. As we explain in Sections I.A. and I.B, above, these changes are inconsistent with the Warren Alquist Act and would diminish the role of Commissioners as decision makers in siting proceedings.

We believe that there are better ways to improve the timeliness of the decision making process, as discussed below.

In order for the Commission to make better and more timely decisions, it should require timelier issuance of the FSA, rather than eliminate public comment on the PMPD. The typical twelve month AFC schedule published by the Commission calls for the FSA to be issued between Day 200 and 220, leaving five months for the decision making phase of the case.[16] In most, if not all of the cases where the Commission has failed to meet the twelve month deadline, the delay has

[15] The note to Draft Rule §1745 states that Staff should conform "the FSA to the required information in the PMPD, making the development of the PMPD easier and saving time".

[16] See, http://www.energy.ca.gov/sitingcases/12-month_SPPE_Processes.pdf

arisen in the first phase of the proceeding leading to the issuance of the FSA, and not in the decision making phase. If the issuance of the FSA is timelier, there will be more time available for a decision making phase that allows careful deliberation by the assigned committee and an opportunity to comment on the PMPD.

If, at any time during the proceeding, Staff reports problems to maintaining the schedule, the presiding member should work with the Executive Director to manage and prioritize Staff resources:

- We have observed several instances where the issuance of the entire Staff assessment is delayed because one or two portions of the document are lagging. If timely publication of all sections cannot be obtained, the Staff should be required to issue the document in separate parts.
- If the Staff reports delays in preparation of the Staff assessment due to the inability to obtain necessary information from an applicant, a public agency or a third party, the presiding member should convene a conference to determine whether the information is really necessary and to compel a satisfactory response.
- The Commission should seriously examine, through consultation with independent third party CEQA consultants, whether Staff is being appropriately instructed regarding the scope and level of detail that is required by CEQA.[17]

[17] The CEQA Guidelines, in a section titled "Page Limits," state "The text of draft EIRs should normally be less than 150 pages and for proposals of unusual scope or complexity should normally be less than 300 pages. (14 C.C.R. §15141.) Similarly, the Council on Environmental Quality's ("CEQ") regulations implementing the National Environmental Policy Act ("NEPA") state that the text of environmental impact statements ("EIS") shall "normally be less than 150 pages and for proposals of unusual scope or complexity shall normally be less than 300 pages." (40 C.F.R. § 1502.7; see also 16 C.C.R. §15141.) In marked contrast, the size of the average Staff assessment has grown considerably over the past fifteen years. For example, the FSA for the Delta project, issued in three parts in 1999, totaled 489 pages. The recent FSA published for the Huntington Beach project totaled 1074 pages. The voluminous size of recent FSA's may be a cause for the delay in meeting publication deadlines.

The lengthy documents are actually contrary to one of the "Basic Purposes of CEQA": "Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities." (14 C.C.R. § 15002.) CEQA documents "shall be written in plain language and may use appropriate graphics so that decision makers and the public can rapidly understand the documents." (14 C.C.R. § 15140.) This directive for plain language that can allow decision makers and the public to "rapidly understand" immediately precedents CEQA's admonition that documents should be 150 pages and 300 pages for "proposals of unusual scope or complexity." (14 C.C.R. § 15141.) Documents that are over one thousand pages in length do not meet the basic purposes of CEQA.

As Staff assessments have grown larger in recent years, so have the proposed decisions. One of the reasons why these decisions have grown larger is that some decisions tend to adopt verbatim large portions of the Staff assessment. Contrary to what is proposed in the draft rules, the PMPD does not have to look like the FSA, and there is no need for a Commission decision to be so voluminous. A decision does not need to recite all of the evidence, all of the applicable laws, nor provide an exhaustive discussion of all topics. Instead, a Commission decision should contain:

- A determination on whether to approve or disapprove the project;
- If approved, a set of conditions that will govern construction and operation of the project;
- A reasoned analysis and determination of disputed questions of fact and law; and
- Specific findings on specific matters as required by law.

- The Commission should encourage more direct communication between parties, especially during the discovery phase of the proceeding. Our experience is that in those cases where the Project Manager and Staff Counsel permit a dialogue to take place among the parties, the process moves more quickly. But where the Project Manager and Staff Counsel limit communications to only formal data requests and noticed workshops, the process takes much longer.

In summary, if the Commission can find ways to have more timely publication of the Staff assessment – such as those described above - this will free up time for the Presiding Member to be able to become actively engaged in the decision making phase and, more time for the Presiding Member to produce a reasoned PMPD and still allow parties to comment on the PMPD.

H. The Presiding Member's Proposed Decision ("PMPD"), Should Be the CEQA Document.

Under the typical California Environmental Quality Act ("CEQA") process, once a Negative Declaration or Environmental Impact Report ("EIR") has been certified by the Lead Agency, Responsible Agencies may use the EIR to support other discretionary actions that may be taken regarding the project.

The Commission's power plant siting process is a "certified regulatory program" under CEQA (Public Resources Code § 211080.5.) As such, it is exempt from the requirements for preparing EIRs. In place of an EIR, the Commission prepares a series of documents (including the FSA, PMPD and Final Decision) that collectively constitute a "program" that satisfies the requirements of CEQA.

Public Resources Code section 25519(c) provides in part that "If the commission prepares a document or documents in the place of an environmental impact report or negative declaration under a regulatory program certified pursuant to Section 21080.5, any other public agency that must make a decision that is subject to the California Environmental Quality Act, Division 13 (commencing with Section 21000), on a site or related facility, shall use the document or documents prepared by the commission in the same manner as they would use an environmental impact report or negative declaration prepared by a lead agency."

The question that is left unanswered by section 25519(c) is, assuming that another agency must make a discretionary decision regarding a power plant project licensed by the Commission, is which document or documents "prepared by the Commission" should it use?

The Commission should designate the PMPD as the "CEQA document" where another local or state agency must make a discretionary decision regarding the project during the AFC proceeding, such as amending a general plan or other change to a local land use regulation. The draft rules should continue to allow the PMPD to reflect the exercise of the Commission decision makers' independent judgment regarding the contents of the FSA based on the entire hearing record which document should the local agency use in the same manner as they would use an EIR in their process?

The FSA, standing alone, should not be the "CEQA document". While the FSA has many of the characteristics of a Final EIR ("FEIR"), it is lacking one very important requirement.

Under the current Rules, where an FSA is more than merely an informational document and also contains recommendations by the Staff, the FSA may make very controversial recommendations regarding the significance of impacts, compliance with environmental laws, ordinances, regulations, and standards ("LORS") and the need for mitigation. Under the current Rules, parties have an opportunity to contest these recommendations during the evidentiary hearings, and the committee may accept or reject these recommendations in the PMPD if the committee finds them to be incorrect. Therefore, under the current Rules, the PMPD can serve as the "CEQA document" because it reflects the independent judgment and analysis of the decision makers after the review of testimony and other evidence, including the FSA, by the assigned committee.

Under the draft rules, however, the FSA would represent only the views of one independent party to the proceeding (the Staff) and not a balancing of the evidence submitted by all parties by the decision maker. While the draft rules would allow parties to comment on the Preliminary Staff Assessment ("PSA") and would require the Staff to respond to these comments in the FSA, the rules provide no recourse to parties who may disagree with the Staff's response. Instead, the draft rules provide that the FSA would be received into evidence automatically, without affording parties the opportunity to contest its recommendations, and the assigned committee would not exercise independent judgment with respect to the contents of the FSA before it became the CEQA document to be used by other agencies. Under these circumstances, other responsible agencies would be using a flawed document that does not reflect the Commission decision makers' independent judgment and analysis.

Further, under the draft rules, no party would be allowed even to comment on the PMPD if the PMPD contains the same information that is in the FSA. This provision would effectively nullify the testimony of the applicant (who bears the burden of proof), the testimony of other parties, and, indeed, the entirety of the evidentiary hearing process. Because the Committee, not the Staff, is the ultimate fact-finder, basic due process compels the Commission to afford parties the right to comment on the fact-finders' proposed decision prior to adoption.

III. SECTION BY SECTION COMMENTARY

§ 1003. Computation of Time.

Comment: Most administrative rules do not define holiday or require reference to an agency posted list. The better practice, such as that set forth in the CPUC's Rules, is to state ". . . Saturday, Sunday, holiday or other day when the Commission offices are closed. . ." This formulation also allows for extensions for instances in which the offices may be closed due to unforeseen circumstances.

§ 1200. Scope.

Comment: This section refers to "assigned commissioner". Should the term here be "assigned commissioner" or "Presiding Member"?

§ 1201(j). Definitions-"Impact Area".

Comment: It is not necessary to define terms that are not used elsewhere in the rules. The "Impact area" definition should be deleted if it does not appear later in the rules.

§ 1201(k). Definitions- "Intervenor".

Comment: The section defines intervenors as persons granted leave to intervene in adjudicative proceedings; however, the term "adjudicative proceeding" is not defined. What are the types of proceedings that will constitute an "adjudicative proceeding"?

§ 1201(o). Definitions- "Party".

Comment:

(1) This revision is confusing. Language has been added restricting the definition to "adjudicative proceedings". However, as noted above, the term "adjudicative proceeding" is not defined.

(2) It is not clear what is meant by defining the Staff as a Party "depending on its role in the proceeding". As we explain above, it is critical that the rules clearly define the Staff's role, and when it is serving a delegated function of the Commission or when it is a Party in the proceeding.

§ 1200(t). Definitions- "Service list".

Comment: The service list does not need to be a new defined term. The scope of the service list should be defined by the presiding member or by Section 2011. This rule, as written, would seem to preclude the presiding member from adding persons to the service list.

§ 1202(a). Right of Any Person to Comment.

Comment: This draft rule adds language allowing oral comments on the subject matter of "any public event" in any proceeding. Because "public event" is not a defined terms, the purpose of this change is not clear. Is it intended to expand or limit public comment?

§ 1202(b). Right of Any Person to Comment (cont.).

Comment: This draft rule changes a requirement stated clearly in the current rules to a more ambiguous phrasing. Rather than state that the submission of written comments is "governed" by another section, it is clearer to state, "Any person submitting written comments to the Commission shall meet the requirements of Section 1208."

§ 1203. Powers Authority of the Chairman to Manage Proceedings

Comment:

(1) The current Rule 1203 defines the role of the Chair of the Commission and of Presiding Members. It is confusing for the draft rule to strike the reference to presiding members in this section, and then to re-designate the authority to the presiding member in Rule 1204(d).

(2) Please see Section I.A.3 of these comments, above, for a discussion of this draft rule.

§ 1204(d). Designation of Committees and Presiding Member; Quorum.

Comment: Section 1204(d) should refer to authority conferred by section 1203, not to authority conferred by "this article", unless the authority is also conferred elsewhere in the article.

§ 1204(e). Designation of Committees and Presiding Member; Quorum (cont.).

Comment: Under current Rule 2013(e) the authority of the presiding member is transferred only when it is delegated. Under the revised rule, the authority transfers without formal delegation whenever the presiding member is "unavailable during any portion of the proceeding". The term "unavailable" is not defined. If the Commission is not collegial, this ambiguity may lead to conflict and confusion. We recommend retaining the rule in its current form.

§ 1204.2. Questioning.

Comment:

(1) The draft rule properly says that questions from commissioners are in order at any time. However, the draft rule also says that questions from Staff are also in order at any time, elevating Staff to the same stature as Commissioners. This begs the question – What is the Staff's role in the proceeding?

The draft rule is a departure from current Commission practice, where questions from Staff, other parties and the public are in order only when recognized by the Chair, presiding member or hearing officer. The draft rule does explain the necessity of granting Staff, and only the Staff, the right to speak "at any time."

(2) The entire second sentence of Proposed Rule 1204.2 should be deleted. No one can be "compelled" to answer a question in a Commission proceeding, because the Commission does not have the power to punish for contempt. Even in the most extreme case of a witness who is testifying under oath but refuses to answer questions, the strongest sanction available to the Commission would be simply to strike the testimony. In the case of persons who are not

testifying under oath, their comments under the current rules are not sufficient in themselves to support a finding; therefore, if a person who is not testifying under oath declines to answer questions, there is no need to compel their answers or to strike their unsworn comments.

§ 1206. Representatives.

Comment: The purpose of the revisions this section is not clear. Is it intended to refer to Commissioners, Staff or parties?

§ 1207.5. Staff Meetings; Purposes.

Comment: This rule should clarify that the ability of the Staff to conduct public meetings does not preclude the Staff from communicating with individual parties in a siting proceeding for any purpose, without the need for advance written notice.

§ 1208. Filing of Documents.

Comment: There are quite a few technical problems with this draft rule. We cite a few of these problems here and recommend that the Commission hold a workshop specifically to address Proposed Rules 1208 and 1208.1 before proceeding further with revision of these rules.

(1) To avoid confusion, the rule should use one term, either "filed" or "docketed", consistently.

(2) Section 1208(a) states that filing is "complete and docketed" when it has been endorsed. A document may be deemed filed when it is endorsed, but that does not mean the filing is complete.

(3) Proposed Rule 1208(b) provides that the Docket Unit may reject for filing any document that does not substantially comply with the requirements of Proposed Rule 1208.1. However, if a document is filed when endorsed by the electronic filing system, how does the Docket Unit "reject the filing"?

(4) Proposed Rule 1208(b) gives the Docket Unit authority to reject filings that do not comply with 1208.1. The Commission's rules should also provide for the rejection of filings that are not timely or that are incomplete, improperly captioned or fail to meet other specified criteria.

§ 1208.1. Media, Format, Content, and Other Required Characteristics of Filed Documents; Changes in the Requirements by the Executive Director.

Comment: Please see the comment above regarding the need for a workshop to address filing of documents.

One problem with the current docketing system is that parties to a proceeding are often flooded with emails containing notice of individual comments from persons who are not parties to the proceeding. While every comment is important and worthy of consideration, it is burdensome to sort through mountains of emails to identify the filings by parties or rulings of the committee. We would recommend that the rule require each filer to indicate whether they are a party and that these filings be coded differently for the purpose of electronic service, so that recipients can more easily sort the comments as necessary.

§ 1209. Notice of Public Events.

Comment:

(1) The term "public event" needs to be defined. If "notice" means giving notice to the public, then the phrase "publicly noticed" is redundant.

(2) Pursuant to Public Resources Code section 25222, the role of the public adviser is to "insure that full and adequate participation by all interested groups and the public at large is secured" in Commission proceedings. Therefore, Proposed Rule 1209(c) should be revised "so as to promote full and adequate public participation", not "maximum" participation.

§ 1210. Adjudicative Proceedings.

Comment: Please see the comments in Section I.D above regarding adjudicative proceedings and the use of informal proceedings.

§ 1211.7. Intervenors.

Comment: The proposed revisions confuse and complicate the issues of the timing and scope of intervention.

Current rules provide an explicit requirement that motions to intervene should be filed at least 30 days prior to the first evidentiary hearing. The draft rule describes the deadline as the deadline established by the presiding member, which means that the deadline could vary from case to case, and could be earlier or later than 30 days prior to the first evidentiary hearing. We believe the current language regarding the deadline in siting cases should not be revised.

§ 1212(a). Rights of Parties, Record, and Basis for Decision.

Comment: We support the language of 1212(a) regarding the rights of the parties, but it is not clear how this language will be applied in relation to the changes made in section 1242. For example, while a party will have the right under section 1212(a) to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, how will a party be able to cross-examine staff witnesses relative to the contents of the Staff assessment, if the Staff assessment is not supported by sworn witnesses? Please see our comments under Section 1742 for discussion of our concerns.

§ 1212(b). Rights of Parties, Record, and Basis for Decision (cont.).

Comment:

(1) This draft rule makes very substantive changes in the definition of the hearing record because it eliminates a very important distinction between the type of evidence which on its own can support a finding and that the type of evidence which may be considered by the Commission, but which cannot standing alone, support a finding. For example, the draft rule would allow into evidence "all letters" from other governmental agencies, even if the letters are not supported by a sworn witness, even if the letter would not meet the test for a matter that may be judicially

noticed, and even if the letter is submitted on the last day of evidentiary hearings when no other party would have an opportunity to rebut such evidence.

The Commission has an established process for requesting and receiving comments from other agencies. The process encourages these agencies to submit their comments early in the siting process, not immediately prior to the close of the record. Any relevant letters can be moved into evidence by motion of a party, by the Committee's own motion, or by taking official notice of such comments if the comments meet the test for official notice. Therefore, Proposed Rule 1212(b)(2) should be deleted. Agency comments can be received into evidence under the provisions of Proposed Rule 1212(b)(1), the same as all other evidence.

§ 1212(b)(4). Rights of Parties, Record, and Basis for Decision (cont.).

Comment: The draft rules negate the current practice under which the FSA is supported by sworn declarations by Staff's expert witnesses. This revision eliminates transparency and accountability, and provides Staff an evidentiary advantage not enjoyed by any other party. While the draft rule appears to allow parties to move to exclude portions of the FSA on narrowly defined grounds, this only further underscores the unfairness of the draft rule because it elevates the rights of one party to a proceeding, in this instance Staff, over all other parties. No other party is granted a similar right to have testimony automatically included in the hearing record.

§ 1212(c)(2). Rights of Parties, Record, and Basis for Decision (cont.).

Comment:

(1) This draft rule is in conflict with the Proposed Rule 1212(b). Proposed Rule 1212(b)(1) correctly defines the record to include all evidence "accepted" by the committee or Commission at a hearing. In contrast, Proposed Rule 1212(c)(2) provides that any evidence in the record can be used to support a finding, unless it has been excluded under section (b). The correct formulation of admissibility is that the hearing record in a siting proceeding shall contain only that evidence which is formally accepted or received into evidence by the committee or commission. Such evidence may be received by motion of a party or upon the committee or Commission. Evidence should not be received into the record by the mere docketing of a document.

(2) To compound the confusion, this draft rule says that any evidence, unless excluded, can be used to support a finding "if it is the sort of information on which responsible persons are accustomed to rely in the conduct of serious affairs."[18] The draft rule does not explain the basis

[18] The source of this proposed language regarding "the sort of information that may be relied upon" may be Sections 340.44(a)(4) and (5) of the rules of the California Department of Industrial Relations. https://www.dir.ca.gov/title8/340_44.html
However, this language in the DIR rules addresses not the admissibility of unsworn comments, but instead addresses the relevance of sworn testimony. The draft rule impermissibly conflates standards of relevancy with standards of admissibility. Of equal importance, the DIR rules apply the traditional hearsay standards contained in the CEC current rules, which effectively negate the proposition that unsworn comments can be relied upon, standing alone, to support a finding. Section 340.44 provides in part:

"(a)(4) The Presiding Officer shall receive evidence under oath or affirmation under penalty of perjury….

for this formulation of admissibility, nor does it explain how, when or who would determine whether evidence met this test.

(3) The draft rule further states that the Committee may rely on public comment to support a finding "upon notice to parties", but does not explain how such notice is given. Presumably notice would be provided to allow parties to object or rebut the contents of the comments which are being relied upon, but since 1742 would effectively end hearings on the PMPD it is not clear how such objections would be heard or how such rebuttal testimony would be received.

§ 1212(c)(3). Rights of Parties, Record, and Basis for Decision (cont.).

Comment: We have addressed the draft rule revisions to the hearsay rule in Section I.A of these comments.

§§1213 & 1214.

Comment: Current Rules 1213 and 1214 were deleted from the draft rules because they are said to be covered in the new Rule 1212. However, we do not find the deleted language in the new Rule 1212. These sections should be restored.

§ 1230. Claims; Scope.

Comment: We have discussed the "complaint" process proposed in the draft rules earlier in these comments.

The draft rule purports to delegate to the Executive Director the authority to take certain action, such as sending a cease and desist letter, or proposing a settlement. We are not aware of the authority of the Executive Director to take these particular actions.

For the reasons set forth above, we urge the Commission not to adopt the proposed Claims process.

§ 1233. Complaint; Scope.

Comment: We support the underlying premise of Proposed Rule 1233.1 that Complaints should be issued by the Executive Director. However, we do not see the necessity for replacing the procedure for requesting with a new "claims process". Please see our comments in Section I.E, above.

§ 1709.5. Prefiling Review.

Comment: In the early years of the Commission, the Warren Alquist Act provided a process for the Commission to provide guidance on the siting, design, construction and operation of proposed projects prior to the filing of an AFC. This process involved the filing and review of a

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(b) The hearing shall not be subject to the technical rules relating to evidence or witnesses. However, only relevant evidence of the sort responsible persons are accustomed to rely upon in conducting serious affairs shall be admitted and relied upon in rendering a decision. Hearsay evidence is admissible but, if objected to, may not be solely relied upon without other supporting evidence unless the hearsay would be admissible over objection in a civil proceeding."

Notice of Intent ("NOI"). However, when the electric industry was deregulated, the Legislature removed the requirement that applicants seek and receive guidance from the Commission prior to filing an AFC. The current rule reflects the statutory intent that a prefiling meeting is voluntary. The current rule also clearly indicates that the purpose of the meeting is for the purpose of ensuring that the information the applicant intends to submit is sufficient to meet the information requirements for the AFC. The current rule also provides the opportunity for an applicant to request a workshop with the Staff to discuss any matter relevant to the preparation of the AFC.

The draft rule would impose *a mandatory* requirement that applicant meet with the Commission's Executive Director. The draft rule also changes the purpose of the meeting from receiving guidance on the adequacy of the Application, to receiving guidance on the actual siting, design, construction, and operation of the project. Finally, the draft rule would require the meeting to occur "as early as possible", with the implication that Applicants would be expected to modify the size, location or design of projects in response to the Commission's guidance before preparing an Application.

We have two primary concerns with this draft rule. First, the draft rule seeks to fundamentally alter the regulatory compact that was codified when the electric industry was deregulated in California. With the elimination of the NOI process and the siting of merchant power plants without captive ratepayers, it is not the Commission's role to choose the site to build a power plant, or to design the power plant. It is the Commission's responsibility to review the Application that is presented to it and to approve that Application if it complies with CEQA and all applicable LORS, whether or not the Commission might prefer a different location or design.

Second, is not practicable for an applicant to meet with Staff to disclose the details regarding projects in the development stage. This information is highly confidential, and there is a high risk that early meetings with the Commission Staff might cause premature disclosure of a project. Premature disclosure of a project could violate the strict confidentially requirements of the request-for-offers ("RFO") processes, where applicants cannot even divulge whether they are bidding in a RFO process, much less disclose the details of the proposed project. In addition, while a project is in development there are many sensitive issues to be confidentially resolved, such as acquisition of site control, rights of way and mitigation properties. If the location of a project is prematurely disclosed, such disclosure could cause the cancellation of the project or cause the acquisition of rights of way to become much more expensive.

Therefore, we recommend that section 1709.5 not be revised.

§ 1709.7(d). Informational Hearing, Site Visit, and Schedule.

Comment: If the Staff will have an advocacy role in the proceeding, we recommend that the presiding member or hearing officer, rather than the Staff, be charged with describing how the proceeding will be conducted.

§ 1709.7(e). Informational Hearing, Site Visit, and Schedule (cont.).

Comment: Because the AFC process is a certified regulatory proceeding, the Commission is not required to have a CEQA scoping meeting. Moreover, even under the normal CEQA process, scoping meetings are required only for projects of statewide, regional or area-wide significance pursuant to Section 15206 of the CEQA Guidelines. Most power plant proposals do not meet these criteria.

However, if the Commission chooses to have a scoping meeting, the informational hearing should not be the scoping meeting. The purpose of a scoping meeting is for the public and other interested agencies to provide input on potentially affected resources, environmental issues to be considered, and the agency's planned approach to analysis. The purpose of the informational hearing, on the other hand is to introduce the project to the Commission and the public for the first time. Because many members of the public will be learning about the project for the first time at the informational hearing, it would be premature to expect the public to be in a position to provide significant input into the scope and content of environmental information that should be required.

§ 1710. Staff as an Independent Party.

Comment: This section, which has been renumbered but is otherwise unchanged, states that Staff "shall be an independent party" to the proceeding. By "independent", we presume that this means the Staff is independent of direction and supervision from the Committee and Commissioners who are the decision makers in the proceeding. See our comments on Proposed Rule 1711 below.

An EIR must be "certified" by agency decision makers. While an agency can assign the task of preparing the document, before using the document, however, "the lead agency must subject the document to its own review and analysis, so that the draft EIR sent out for public review reflects its own independent judgment." Therefore, when Staff is carrying out its duties to prepare the Staff assessment, is it doing so as a party independent of direction and supervision by the Committee, or does the document reflect the judgment of the Committee? (See also our comments in Section I above.)

§ 1711. Public notice of Discussions Among Parties.

Comment: Before the Commission can formulate an appropriate rule regarding communication between the Staff and other parties, the Commission must define the Staff's role. If the Staff is serving as an independent party in the proceeding, such as the role of ORA in CPUC proceedings, then there is no reason to restrict communications between the Staff and other parties, whether it is for the purpose of gathering information, discussing substantive issues or reaching settlements. On the other hand, if the Staff is serving in the proceeding with the authority of a governmental agency, or for the purpose of performing duties delegated to it by the decision making body, then communications between the Staff and other parties, governmental agencies and the public should be governed by the same ex parte rules that apply to decision makers.

§ 1714. Distribution of Copes to Public Agencies; Request for Comments.

Comment: The current rules require notice be given to any Native American government having an interest in matters relevant to the site and these rules allow these governments to make comments and recommendations regarding the project.

The draft rule raises more questions than it answers. The draft rule should not be adopted. Instead, the Commission should conform its tribal consultation procedures to the requirements set forth in AB 52.

The draft rule would greatly confuse, rather than clarify, the role of tribal governments. The draft rule introduces new terms which are not defined in the rules or elsewhere, such as governments "deemed culturally affiliated" with a "project area" by the Native American Heritage Commission. What does "culturally affiliated" mean? How big is the "project area"? Is there a current procedure by NAHC for making such determinations? What constitutes a "consultation"? And with whom at the Commission are tribal governments required to "consult" (staff, Executive Director, Commissioners)? What are the rights of the Applicant and other parties during the consultation process? How are the results of consultation to be applied in the AFC proceeding? Are these consultations intended to supplant or supplement the rights of interested parties to intervene or submit comments in the proceeding?

Given the recent enactment by the Legislature of amendments to the California Environmental Quality Act ("CEQA") to specifically provide for and govern lead agency consultations with California Native American tribes for the purposes of CEQA, the proposed rule could potentially confuse, rather than clarify, the consultation process for the purposes of the Commission's siting process.

For example, Assembly Bill 52 provides that consultation should be conducted with California Native American tribes "traditionally and culturally affiliated with the geographic area of the proposed project" if: (1) the tribe has requested, in writing, to be informed through "formal notification of proposed projects in the geographic area that is traditionally and culturally affiliated with the tribe and (2) the tribe responds, in writing, within 30 days of receipt of the formal notification and requests the consultation. The Commission's proposed rule would remove CEQA's requirement that a California Native American tribe affirmatively request, in writing, formal notification of a project. Furthermore, Assembly Bill 52 requires formal notification to the designated contact or tribal representative of a tribe that has requested notice "within 14 days of determining that an application for a project is complete". The proposed rule is inconsistent with this provision, as it provides for notice to tribal governments "30 days after" the filing of an AFC or a petition to amend.

§ 1720.4. Effective Date of Decisions and Other Determinations.

Comment: The draft rule provides that a decision, order or "any other determination" is final and effective when docketed, unless it states otherwise. The reference to "any other determination" is confusing. What other determinations are intended to be covered by this ruling? Written rulings? Rulings from the bench? Actions other than rulings, orders or

decisions? To avoid confusion, the rule should explicitly identify any determinations that are intended to be covered by this ruling.

§ 1742. Staff Assessment.

Comment: In a typical AFC proceeding a number of documents are prepared – a PSA and an FSA, prepared by the Staff (though only a single "Staff assessment" is required by current regulations [20 CCR § 1747), and a PMPD and a Final Decision, prepared by the decision makers.

Because the Commission's siting program is a certified regulatory program, none of these documents are labeled as a DEIR or FEIR. The idea of the certified regulatory program is that the entirety of the process satisfies CEQA, and there is not a definitive requirement for a DEIR to be issued, for comments to be received on the FEIR, for an FEIR to be issued, and for the agency to certify the FEIR before voting to approve or disapprove the project.

In a typical CEQA proceeding, parties receive only one or two opportunities for submitting written comments on the environmental effects of the project – during the 45 day public comment on the FEIR. During the CEC process, parties are afforded multiple opportunities for written comment, in addition to opportunities for oral comment – first in comments on the PSA, second in comments on the FSA, third during evidentiary hearings, and fourth in comments on the PMPD, and fifth at the Commission adoption hearing. In the EIR process, parties receive only one or two rounds of response on their comments – in the FEIR, and occasionally, during the hearing to certify the FEIR. In the AFC process, parties receive three rounds of responses – in the FSA, in the PMPD and often in errata to the PMPD as well as oral comments at the Business Meeting for the Final Decision.

The draft rules would eliminate the four rounds of comments in the AFC process (comments on the FSA, third during evidentiary hearings, comments on the PMPD, and oral comments fifth at the Commission adoption hearing. Instead, as proposed, the Rules provide only one opportunity – an opportunity to comment on the PSA. The draft rules also would eliminate the three rounds of responses, and provide only one.

Finally, the note for this section of the draft rule states that "Currently there is no comment period on any staff document..." This is incorrect. There are typically, at least three opportunities in an AFC proceeding to comment on staff documents (1) comments on the PSA, (2) comments on the FSA, when those comments are invited by Staff, and (3) comments on Staff testimony during the evidentiary hearings.

§ 1744. Evidentiary Hearings; Purposes; Burden of Proof; Schedule for Filings and Service of Evidence.

Comment: First, it appears that this proposed rule is incorrectly numbered, as there is already a Rule 1744 (Review of Compliance with Applicable Laws).

Second, while the draft rules revise the section pertaining to evidentiary hearings, it is not clear what purpose the hearings will serve if (1) the FSA is received into evidence without sponsoring

witnesses, (2) parties cannot comment on the FSA because upon issuance it has become the final "CEQA" document, and (3) introduction of any "new evidence" not contained in the FSA, if referenced in the PMPD will trigger recirculation of the PMPD and further delay of the proceeding. This third provision would be a strong disincentive to other parties who might wish to offer information into the record that is not already contained in the published FSA.

§ 1745. Presiding Member's Proposed Decision; Distribution; Comment Period; Basis, Contents, Hearing.

Comment: The stated purpose of Proposed Rule 1745 is to "allow Staff to conform the FSA to required contents of a PMPD, making the development of the PMPD easier and saving time." We are concerned with the premise of this revision, which appears to be that the FSA should be a draft of the PMPD, and that the Committee will be able to save time by simply adopting the FSA as the PMPD, and eliminate any comment by parties on the PMPD. This is the wrong approach.

The FSA should not be the decisional document in the AFC proceeding, because Staff are not the decision makers. As we explain earlier in these comments, the Legislature and the public expect the Commissioners to be active participants in the hearing process and to exercise their own reasoned judgment with respect to disputed questions of law and fact, including the recommendations of Staff presented in the FSA.

As we also explain above, the PMPD should not simply repeat the FSA. The PMPD should reflect the exercise of independent judgment by the trier of fact – and should demonstrate that the decision makers have seriously considered the contested issues and the positions of all the parties, have weighed the evidence thoroughly and fairly and have reached a reasoned conclusion. It is not the Staff that must perform this function – it is the five appointed Commissioners.

Imagine the furor that would arise in a court of law if the proposed order of the Court were simply to adopt verbatim the position of one party to the case. Moreover, the furor would be even greater if the decision maker then announced that it would not allow other parties to comment on the proposed order because the proposed order did not contain any "new information" different from the position of the party whose position it had adopted.

The current rule states that the presiding member shall "prepare" a PMPD. The draft rule strikes the word prepare, presumably because the PMPD would already be prepared by Staff. The draft rule states instead that the Committee will "file" the PMPD. We submit that the preparation of the PMPD is not a task that the Committee can delegate to the Staff.

Proposed Rule 1748(b)(1) and (2) describe the contents of the PMPD in terms that mirror the FSA, but much of the described content in this rule does not need to be in a PMPD. Rather than repeating the FSA, the PMPD should focus on resolving disputes between the parties, including disputes involving the contents of the FSA, regarding relevant questions of fact or law.

Proposed Rule 1745(b)(17), for example, provides that the PMPD would include responses to all significant environmental points raised during the proceeding "not already addressed" in the FSA. It is not clear exactly what is meant by the term "already addressed", but we presume it

means “not already addressed” in the FSA. However, it should not be enough that the Staff may have “addressed” a comment in the FSA. The critical question for the decision makers is whether the comment was addressed correctly, and if it was not, an aggrieved party should have the right to raise the issue to the Committee both in evidentiary hearings and in comments on the PMPD.

§ 1745(b)(3)(C). Presiding Member’s Proposed Decision; Distribution; Comment Period; Basis, Contents, Hearing (cont.).

Comment: The Draft rules have confused the roles of the California Coastal Commission (“CCC”) and the Bay Conservation and Development Commission (“BCDC”) in the CEC’s siting process. Specifically, the CCC and the BCDC have different statutory roles and responsibilities with respect to (1) a NOI and (2) an AFC. As proposed, the draft Rules impose NOI obligations and authorities on CCC and BCDC that are expressly only applicable in an AFC proceeding.

Public Resources Code section 30413(d), which is referenced in the draft rule, only applies in the NOI setting. In the NOI setting, the CCC’s participation in the CEC’s NOI processes is mandatory: the CCC “shall” participate in NOIs.

In marked contrast, in an AFC proceeding, the CCC’s participation in the CEC’s AFC process is discretionary, and governed by Public Resources Code section 30413(e): “The [California Coastal] commission may, at its discretion, participate fully in other proceedings conducted by the State Energy Resources Conservation and Development Commission pursuant to its power plant siting authority. In the event the commission participates in any public hearings held by the State Energy Resources Conservation and Development Commission, it shall be afforded full opportunity to present evidence and examine and cross-examine witnesses.”

As the CEC correctly argued to the California Supreme Court in 2012:

> The language of Section 30413 make it abundantly clear that the requirements for a "report" from the Coastal Commission involves "notices of intent," or the "NOI" as it is commonly referred to. NOI proceedings are required for certain kinds of power plant siting (e.g., nuclear facilities or coal plants), but not new gas-fired turbines. (§ 25540.6, subd. (a)(l).)[19]

Accordingly, Section 1745(b)(3)(C) of the draft rules should be revised as follows to reflect that in the distinction that AFC proceedings, as opposed to NOI proceedings, the CCC’s participation is discretionary, and the CCC does not file a “report”:

> 1745(b)(3)(C): to the extent not already covered under subdivisions (1) or (2), and for sites in the Coastal Zones, San Francisco Bay Zones or the Suisun Marsh for which an application

19 Respondent California Energy Commission's Preliminary Opposition to Petition For Writ Of Mandate, City Of Carlsbad, Petitioners, v. California Energy Resources Conservation And Development Commission, et al., Case No. S203634, July 9, 2012.

for certification as defined in Public Resources Code Section 25102 has been filed, a discussion of the issues raised by the California Coastal Commission, if any, pursuant to section 30413(e) of the California Public Resources Code; or issues raised by the submitted by the Bay Conservation and Development Commission, if any, pursuant to section 6630 et seq. of the Government Code:

1745(b)(3)(D): to the extent not already covered under subdivisions (1) or (2), and for sites in the Coastal Zones, San Francisco Bay Zones or the Suisun Marsh for which an notice of intent as defined in Public Resources Code Section 25113 has been filed:

(i) a discussion of provisions to meet the objectives of the California Coastal Act, as may be specified in the applicable report submitted by the California Coastal Commission under section 30413(d); or to meet the requirements of objectives of the Bay Conservation and Development Act, as may be specified in the applicable report submitted by the Bay Conservation and Development Commission under section 66645 of the Government Code;

(ii) if the provisions described in paragraph (i) would result in greater adverse effect on the environment or would be infeasible, an explanation of why; and

(iii) a statement of whether the approval of the public agency having ownership or control of the land has been obtained, whether or not such approval…

§ 1745(b)(5) and 1745(b)(6). Presiding Member's Proposed Decision; Distribution; Comment Period; Basis, Contents, Hearing (cont.).

Comment: Proposed Rules 1745(b)(5) and (b)(6) purport to simply re-state the requirements of Public Resources Code section 25529 for power plants proposed to be located in the Coastal Zone. However, these provisions do not apply to *existing* sites and related facilities in existence at the time of enactment of the California Coastal Act. (Public Resources Code sections 3001(d), 30260, and 30264.) Instead, they apply to new facilities proposed: "When a facility is proposed to be located in the coastal zone...."

These draft rules also truncate the full requirements of Section 25529. Since these provisions only apply to new facilities and rather than omitting key provisions of Section 25529, the language of Proposed Rules 1748(b)(5) and (b)(6) should be revised as follows:

> (b)(5) for new sites proposed for location in the coastal zone or any other area with recreational, scenic, or historic value, proposed conditions relating to land that should be acquired, established, and maintained by the applicant for public use and access the Commission shall make the findings required by Public Resources Code Section 25529;
>
> (b)(6) for new sites proposed for along the coast or shoreline of any major body of water, proposed conditions on the extent to which the proposed facilities should be set back from the coast or shoreline to permit reasonable public use and to protect scenic and aesthetic values, the Commission shall make the findings required by Public Resources Code Section 25529;

Conforming changes need to be made to Proposed Rule 1748, related to the CEC's Final Decision.

§ 1747. Hearing on Presiding Member's Proposed Decision.

Comment: The draft rules would renumber but retain the section regarding the final adoption hearing on the PMPD. Section 1747(a) states the hearing before the full Commission shall be held "after the comment period." However, elsewhere the draft rules abolish this comment period. This section also allows parties and the public to submit final statements and comments. If parties have been previously been barred from commenting on the PMPD, does the draft rule intend that they not be allowed to comment at the adoption hearing as well?

§ 1748. Final Decision.

Comment: Section 1748(a) states the Commission shall adopt a final written decision "in conformity" with section 25523. The draft rule would change this to state that the Commission shall adopt a final written description "as described by section 25523". The necessity of this change is not explained.

§ 1748(b)(3). Final Decision (cont.).

Comment: Public Resources Code section 25525 describes the CEC's statutory authority to approve a project notwithstanding the inconsistency with applicable LORS. The proposed new subsection 1745(b)(3)(B) attempts to paraphrase this authority, but the paraphrasing is incomplete and confusing.

The paraphrasing omits, for example, the statute's language about the consideration of "the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability." Rather than paraphrasing a portion of Section 25525, the rules should instead simply refer to Section 25525 as follows:

> (B) a description of all applicable state, regional, and local laws, ordinances, regulations and standards, the project's compliance

> with them, and, in the case of noncompliance, a proposed determination made pursuant to the requirements of Section 25525 of the Public Resources Code.
>
> (i) a description of all staff communications with the agencies responsible for enforcing the laws, ordinances, regulations and standards for which there is noncompliance, in an attempt to remove the noncompliance; and
>
> (ii) if the noncompliance cannot be eliminated, the assessments shall discuss whether the proposed project is required for public convenience and necessity and whether there are more prudent and feasible means of achieving such public convenience and necessity; and…

Moreover, the current section on the contents of the PMPD (current section 1752) and the section on PMPD Air Quality Findings (current Section 1752.3) also paraphrase and truncate the requirements of Section 25525. Thus, regardless of whether the new language is accepted or the current language remains, we recommend simplifying the Rules by simply referencing Section 25525, instead of paraphrasing or truncating the statutory language.

§ 1748(b)(4). Final Decision (cont.).

Comment: This draft rule paraphrases an important statutory provision. Instead of paraphrasing the requirement, the rule should expressly refer to Section 25525 of the Public Resources Code, as follows:

> (4) if the site or facility does not comply with an applicable state, local or regional laws, ordinances, regulations and standards: the facility is required for public convenience and necessity, and there are no more prudent and feasible means of achieving such public convenience and necessity, a finding made pursuant to the requirements of Section 25525 of the Public Resources Code;

§ 1756. Schedule for Review of Applications.

Comment: This section pertains to the Schedule for Review of Applications, and was deleted in earlier revisions to the regulations. This provision should be restored, to make explicit that the Commission takes seriously its obligations to follow the law and meet statutory deadlines.