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Comments of

The Independent Energy Producers Association

On The Proposed Amendments to

Title 20

Commission Process and Procedure Regulations

Docket No. 15-OIR-01

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**Comments of the Independent Energy Producers Association
On The Proposed Amendments to Title 20 Commission Process and Procedure Regulations
Docket No. 15-OIR-01**

Introduction and Summary

The Independent Energy Producers Association (“IEP”)¹ submits these comments on the proposed amendments to the California Energy Commission’s (“CEC” or “Commission”) siting process and procedure regulations published on April 7, 2015.²

IEP thanks the Commission for its careful consideration of the comments IEP submitted on January 30, 2015. We believe that overall the revised regulations reflect a balanced approach to concerns expressed by all interested stakeholders and the Commission.

IEP has a few remaining concerns with the proposed regulations, and hereby requests that the Commission incorporate the revisions to provide increased transparency and procedural safeguards during siting proceedings. These concerns are described below. We look forward to continuing to work with the Commission to resolve these issues in a manner that is beneficial to all stakeholders.

I. § 1701. Scope of Regulations.

As stated in IEP’s previous comments on the draft regulations, we recommend that section 1701 of the rules expressly state that any revisions of the rules will be applicable to notices of intent, applications for certification and petitions for modification filed on or after the effective date of the new regulations to avoid any possible confusion or delay regarding the applicability of the regulations to pending proceedings.

For example, we would not want to see a Proposed Decision prepared under the existing rules in a pending proceeding be withdrawn or delayed because it does not contain all of the elements as set forth in revised section 1745.5. This type of confusion can be avoided, if the revised regulations are expressly made applicable to applications, notices or petitions for modification filed after the effective date of the new rules.

To make the revised regulations applicable to pending proceedings will not just create confusion in the proceeding, but will also subject Commission decisions to unnecessary risk of being overturned. For example, we would not want to see a Final Decision issued in a pending

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.

² As set forth in 2015 Draft Regulations Express Terms, available at:
http://docketpublic.energy.ca.gov/PublicDocuments/15-OIR-01/TN204250_20150420T114331_2015_Draft_Regulations_Express_Terms.pdf

proceeding subject to a Motion for Reconsideration or subject to a judicial challenge because it did not contain all of the elements as set forth in revised section 1745.5.

To prevent attempts to apply new requirements retroactively to pending matters, a new section 1701(g) should be added to read:

(g) Unless otherwise stated, any revision to Division 2, Title 20, shall be applicable to a notice of intent, application for certification or petition for modification filed on or after the effective date of the revised regulation.

This new provision will eliminate frivolous attacks on the sufficiency of the Commission's review of pending matters. Moreover, the language is written such that all future rulemakings will enjoy the certainty that new requirements will not be applied retroactively to pending matters.

II. § 1212. Rules of Evidence, Rights of Parties, Record and Basis for Decision

IEP's two primary concerns with the proposed language for Section 1212 remain unaddressed by the proposed amendments.³ First, revised Section 1212(b)(1)(D) elevates the status of Commission Staff's "Final Staff Assessment and any supplemental assessments" above the testimony and documents filed by other parties. Specifically, the proposed revisions would allow for automatic inclusion of Staff's documents in the "hearing record" (as defined in the regulations), even if there are no witnesses to sponsor the document and no witness is made available for cross-examination on the contents of the Final Staff Assessment ("FSA"). No other parties would be afforded the right to have their testimony admitted automatically, without any review or cross-examination.

The Commission's regulations provide that Staff's position in siting proceedings is as an "independent party."⁴ All parties to siting proceedings should be placed on equal footing, entitled to the same rights and bearing the same responsibilities. Consistent with the basic tenets of due process and fundamental fairness, the Final Staff Assessment and any supplemental assessments should be sponsored by a testifying witness and subject to cross-examination before the testimony becomes a part of the hearing record – just like the testimony of all other parties.

Second, IEP acknowledges and appreciates that the Commission incorporated its suggested revisions to Section 1212 related to public comment. However, IEP remains concerned regarding the proposed use of public comment -- standing alone -- to support a finding by a committee or Commission as proposed in revised Section 1212(c)(2). Public comment is intended to be just that – the public's opportunity to comment. Public comments are made without the rights, duties, and obligations of a party who intervenes in a proceeding. Elevating "public comment" to the same evidentiary value as sworn testimony given under oath and

³ Comments were provided on October 23, 2014 and January 30, 2015 on pre-rulemaking drafts of proposed amendments to the Commission's regulations.

⁴ Proposed Section 1710 (existing 20 C.C.R. § 1712.5).

subject to cross examination is contrary to fundamental fairness and the due process rights of the parties.

Public speaking can be intimidating under the best of circumstances. The Commission's current practices and procedures are to be applauded for both affording the opportunity for public comment and for creating an open forum for those who might otherwise be reticent to speak in public, because the public knows that such comment will be received without questioning or interruption by other parties

On the other hand, elevating public comment to the same status as sworn testimony and allowing it to become the basis for a finding changes that dynamic, and does irreparable harm to the process. This change will compel other parties to question and cross-examine public commenters in order to preserve the integrity of the evidentiary record, and will create a different tone during public comment periods. It is inevitable that the dynamics of the public comment process during a siting process will change if public commenters become subject to questioning or cross-examination. IEP is concerned about the potentially chilling nature of such a changed dynamic on public comments, in addition to other potential repercussions such as the extended duration of hearings to allow parties to test the information presented by the public commenter, and if needed, present rebuttal evidence.

Accordingly, IEP recommends that the Regulations not be revised to elevate public comment to the same evidentiary value as sworn testimony.

Section 1221 should be revised as follows:

§ 1212. Rules of Evidence. Rights of Parties, Record and Basis for Decision

§ 1212. Rules of Evidence. Rights of Parties, Record and Basis for Decision.

(a) Rights of Parties. Subject to the presiding member's authority to regulate a proceeding as prescribed in section 1210, and other rights identified in specific proceedings, each party shall have the right to call and examine witnesses, to offer oral and written testimony under oath, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence.

(b) Record.

(1) The "hearing record," in an adjudicatory proceeding, is all of the information the commission may consider in reaching a decision. The hearing record shall contain:

(A) all documents, filed comments, materials, oral statements, or testimony received into evidence by the committee or commission at a hearing;

(B) public comment offered at a hearing;

(C) any materials or facts officially noticed; ~~and~~

~~(D) for siting cases, staff's Final Staff Assessment and any supplemental assessments.~~

(2) Parties may move to exclude information from consideration by the commission on the ground that it is not relevant, is duplicative of information already in the record, or on another basis. If the presiding member grants such a motion, the information shall be excluded from the hearing record. While the hearing need not be conducted according to technical rules relating to evidence and witnesses, questions of relevance and the inclusion of information into the hearing record shall be decided by the presiding member after considering fairness to the parties, hearing efficiency, and adequacy of the record.

(c) Basis for and Contents of Decisions.

1) Decisions in adjudicative proceedings shall, be based on the evidence in the hearing record, explain the basis for the decision, and shall include but need not be limited to all legally-required findings of fact and conclusions of law.

2) A finding may be based on any evidence in the hearing record, if the evidence is the sort of information on which responsible persons are accustomed to relying on in the conduct of serious affairs. Such evidence does not include, among other things, speculation, argument, conjecture, and unsupported conclusions or opinions. ~~The committee or commission may rely on public comment, standing alone, to support a finding if the committee or commission provides notice of its intent to rely upon such comment at the time the comment is presented, other parties are provided an opportunity to question the commenter, and parties are given the opportunity to provide rebuttal evidence. The committee or commission may give appropriate weight to information in the record as allowed by law.~~

3) 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.

III. §1231: Request for Investigation; Filing with the Commission

IEP previously recommended that Section 1231, which addresses requests for investigation of alleged violations of statutes, regulations, orders, programs, or other matters within the CEC's jurisdiction, contain a requirement that the allegations be supported by a declaration under penalty of perjury. Specifically, IEP recommended that the rules should retain the requirement found in current section 1232 that a complaint be accompanied by a declaration under penalty of perjury.

An allegation that a project is not operating in compliance with all applicable laws, ordinances, regulations and standards and request for investigation is a serious matter. In some cases, a request for investigation can put a project's financing at risk. Given the potential harm to a project owner's reputation and the project's financing from meritless claims, the person requesting an investigation should, at a minimum, be required to declare under penalty of perjury that their allegations are true and accurate. A new subsection (g) should be added as follows:

(g) a declaration under penalty of perjury by the complainant or petitioner attesting to the truth and accuracy of any factual allegations contained in the complaint or request for investigation. If any of the applicants are corporations or business associations, the declaration shall be dated, signed, and attested to by an officer thereof. Where a declaration is filed on behalf of a joint venture or proposed joint venture, all members of the joint venture or proposed joint venture shall date, sign, and attest to the declaration.

In the alternative, rather than a declaration under penalty of perjury, the Commission could require an attestation to the truth of the matters asserted based on the knowledge and belief of the complaining party. This slight change would remove any potential criminal liability for knowingly false statements but retain other remedies outside the Commission's processes, as follows:

(g) an attestation based on the knowledge and belief of the complainant or petitioner to the truth and accuracy of any factual allegations contained in the complaint or request for investigation. If any of the applicants are corporations or business associations, the declaration shall be dated, signed, and attested to by an officer thereof. Where a declaration is filed on behalf of a joint venture or proposed joint venture, all members of the joint venture or proposed joint venture shall date, sign, and attest to the declaration.

IV. **§ 1232: Request for Investigation; Commission Response**

As addressed above, investigations into a project's compliance with applicable LORS are serious matters, with potential implications for project financing. IEP reiterates its recommendation that Section 1232 be revised to require that the Executive Director provide notice to the subject of a request for investigation of the requested investigation. Such notice is essential to protect the due process rights of the subject of a request for investigation. In addition, any written response of the executive director and any final action summaries closing the matter should also be provided to any party that is the subject of the request. Section 1232(b) should be revised as follows:

(b) Prior to taking any actions set forth in subsection (a) the Executive Director shall provide a copy of the request to any party that is the subject of the request and allow such party to provide the Executive Director with a response to the request. However, if disclosure of the identity of the requester will pose a risk to the person making the request, a copy of the request with redacted identifying information may be provided. If in the Executive Director's discretion, there is a risk of identification even with redacting information, the Executive Director reserves the right to withhold furnishing a copy of the complaint to any party that is the subject of the request, but will provide notice of receipt of a request for investigation to the party that is the subject of the request.

(c) The written response of the executive director and any final action summaries closing the matter shall be filed and sent to the person or entity that submitted the request and to any party that is the subject of the request.

V. **§ 1742. Review of Environmental Factors; Staff and Agency Assessment.**

In its previous comments, IEP recommended that any revision to Section 1742 of the Commission's regulations should neither mandate preparation of both a preliminary and final staff assessment nor provide specific comment deadlines. The proposed amendments mandate both.

In certain cases, a two-step process may be unnecessary, and there is simply no reason to impose a mandatory publication of two Staff documents, especially when evidentiary hearings and plenty of other process follows publication of the Staff's assessment. Moreover, it is unnecessary to mandate specific comment periods in these rules. Where matters are uncontested or where urgency warrants, such mandatory time periods will cause unnecessary delay. IEP recommends that the Commission retain the flexibility of Section 1747 in its current form, and allow the presiding member of a committee to establish an appropriate schedule that corresponds to the size of the project, the complexity of the issues, and the extent of public interest or controversy.

The elimination of Section 1747 and the further elaboration in new Section 1742 does not materially improve the regulations, but does limit the Presiding Member's discretion to set the best possible schedule for the proceeding. Thus, Section 1747 should be restored and the proposed new Section 1742 should be deleted.

VI. Conclusions.

IEP appreciates the opportunity to provide its comments on these matters. We believe with the minor enhancements we have recommended, the proposed Regulations will be ready for a final round of public review and comment.