DOCKETED

Docket Number:	15-OIR-01
Project Title:	2015 Updates: Title 20 Commission Process and Procedure and Siting Regulations
TN #:	205433
Document Title:	Comments on 15-Day Language
Description:	N/A
Filer:	Eric Janssen
Organization:	Ellison, Schneider & Harris L.L.P.
Submitter Role:	Intervenor Representative
Submission Date:	7/20/2015 2:34:35 PM
Docketed Date:	7/20/2015

DOCKETED

Docket Number:	15-OIR-01
Project Title:	2015 Updates: Title 20 Commission Process and Procedure and Siting Regulations
TN #:	205432
Document Title:	Comments on 15-Day Language
Description:	N/A
Filer:	Eric Janssen
Organization:	Ellison, Schneider & Harris L.L.P.
Submitter Role:	Intervenor Representative
Submission Date:	7/20/2015 2:34:35 PM
Docketed Date:	7/20/2015

ELLISON, SCHNEIDER & HARRIS L.L.P.
ATTORNEYS AT LAW
2600 CAPITOL AVENUE, SUITE 400
SACRAMENTO, CALIFORNIA 95816
TELEPHONE: (916) 447-2166
http://www.eslawfirm.com

July 20, 2015

Commissioner Karen Douglas
California Energy Commission
1516 Ninth Street
Sacramento, California 95814-5512

Re: Docket No. 15-OIR-01: Proposed Amendments to Title 20 Commission Process and Procedure Regulations- Comments on 15-Day Language

Dear Commissioner Douglas:

On behalf of the Independent Energy Producers Association ("IEP")[1], we submit these comments on the 15-Day Language for the proposed amendments to the California Energy Commission's ("CEC" or "Commission") siting process and procedure regulations docketed on July 1, 2015 ("15-Day Language").[2] We once again reiterate our thanks for the hard work of Staff and Committee. We also acknowledge and appreciate that most of IEP's major concerns have been addressed through this iterative process. And, in the spirit of cooperation and compromise, we also observe that IEP has yielded on a number of its suggested language changes that IEP continues to believe would improve the revised Regulations.[3]

IEP is concerned that the issues identified in its comments submitted on June 23, 2015[4] remain unaddressed by the proposed 15-Day Language. The following remaining issues are of most concern to IEP, not only because these are serious matters of fairness and equity. IEP believes that these issues, if not properly addressed, will create unnecessary legal risk to the validity of CEC siting decisions. Attachment A includes proposed language for the comments below.

The Effective Date of the Revised Rules. It is not clear whether the CEC intends to apply the revised rules retroactively to currently pending proceedings. To ensure that the revised

[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 the *Express Terms 15 Day Language*, available at: http://docketpublic.energy.ca.gov/PublicDocuments/15-OIR-01/TN205211_20150701T141457_Express_Terms_15_Day_Language.pdf.
[3] For example, the Staff has not incorporated and IEP has decided to no longer pursue IEP's comments on sections 1207.5, 1208(c), 1209, 1231, and 1742, which we continue to believe add important clarification.
[4] IEP incorporates by reference the concerns and issues raised in its previous comments submitted on October 23, 2014 (TN 203249) and January 30, 2015 (TN 203586) on pre-rulemaking drafts of proposed amendments to the Commission's regulations, and comments submitted on June 23, 2015 (TN 205133) relating to the Express Terms proposed by the Commission.

rules are not applied retroactively to pending matters, IEP continues to recommend that 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 provision will bar frivolous attacks on the sufficiency of the Commission's review of pending matters and post-approval litigation risk. 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. There is no downside to the Commission clearly stating that new regulations will not be applied retroactively to pending matters.

Automatic Admissibility of the Staff Assessment. The proposed amendments to Section 1212(b) continue to elevate the CEC Staff, an independent party in siting proceedings, above the station of all other parties. By requiring that the Staff's Final Staff Assessment and any "supplemental" assessments be automatically included in the hearing record, the proposed regulations would remove important Due Process safeguards.

As proposed, Staff's Assessment would be received into the record without (a) identifying a witness, (b) having that witness sign a Declaration or take an oath supporting the testimony, and (c) making the witness available for questioning or cross examination. No other party is afforded the same treatment. Most importantly, the proposed revision would not allow either transparency or accountability in the admission of the Staff Assessment into the evidentiary record and would deny other parties the right to examine the evidence in an adjudicatory hearing. IEP is concerned that this change would so severely undermine the Due Process rights of other parties as to make any CEC decision that relied upon such evidence at risk of legal challenge.

To reiterate the Commissioners' statutory role as decision makers, to avoid the potential for public confusion about the Staff's role as an independent party, and to protect the rights of other parties, the Commission should reject the proposed revisions to Section 1212 and, instead either (a) leave 1212 un-amended on this issue or (b) incorporate the compromise language set forth in IEP's June 23, 2015 comments by striking proposed new subsection 1212(b)(1)(D). (See Attachment A for specific language changes.)

Transparency in the Investigation Process. IEP is concerned that proposed Section 1232 has not incorporated any provisions requiring notice to the subject of a request for investigation of such a request. Due process and fundamental fairness dictate that a party that is the subject of an investigation be given notice and opportunity to be heard. As drafted, the proposed regulations deprive certificate holders of these rights. New Section 1232(b) and re-numbered Section 1232(c) should be revised as set forth in Attachment A.

Public Comment, Standing Alone, As a Basis for a Finding. We continue to be concerned about how public comment will be considered under the revised section 1212(c)(2) and incorporate by reference our prior comments on this important issue. By elevating public comment, standing alone, to form the basis for a finding, the Commission deviates substantially from the accepted principles of administrative law. We also believe that despite the best of intentions, the positon set forth in the proposed Rules would both have a chilling effect on public comment and would make the Commission's siting process even more formal and adversarial, as all parties would be compelled to cross-examine public commenters much like witnesses in a judicial proceeding. Instead, IEP's proposed changes in our June 23, 2015 comments should be incorporated, as set forth in Attachment A.

Confirm the Commission's Intent to Retain the Status Quo. The 15-Day Language deleted proposed Section 1745.5(d).[5] Though admittedly complex, the language really only operates in one limited circumstance: where the local government wants to eliminate a LORS inconsistency through either a General Plan Amendment or Rezoning before the Commission's final decision, thus avoiding the need for a Section 25525 Approval (an override). All other state law approvals are preempted by the Commission's exclusive siting authority.

The record in this proceeding supports the conclusion that the provision was deleted from the 15-Day Language to retain the status quo; however, the 15-Day Language is silent on the purpose of the deletion. At the adoption hearing, the Commission should confirm that the language was deleted from the proposed Regulations in order to retain the status quo.[6]

Conclusion. IEP appreciates the opportunity to provide these comments and respectfully requests your favorable consideration of the remaining important revisions discussed above.

Sincerely,

Ellison, Schneider & Harris L.L.P.

Jeffery D. Harris
Submitted on behalf of the
Independent Energy Producers Association

[5] Proposed 1745.5(d), eliminated in the 15-Day Language: "Any governmental agency may adopt all or any part of a proposed decision, or final decision, as all or any part of an environmental analysis that CEQA requires that agency to conduct. It is the responsibility of the other agency to ensure that any such document meets the CEQA obligations of that agency."

[6] If there is some other reason, then the Commission should provide that reason or reasons and allow for public review and comment.

ATTACHMENT A
PROPOSED LANGUAGE CHANGES

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

* * *

(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~~.

§ 1232: Request for Investigation; Commission Response

* * *

(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.

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

(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.