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STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

REDONDO BEACH ENERGY PROJECT
APPLICATION FOR CERTIFICATION

SUPPLEMENTAL BRIEF IN SUPPORT OF INTERVENOR CITY OF REDONDO BEACH'S MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM TO SOUTHERN CALIFORNIA EDISON AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

October 12, 2015

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Supplemental Brief in Support of City’s Motion for Issuance of Subpoena Duces Tecum
STATE OF CALIFORNIA
California Energy Commission

In the Matter of:

REDONDO BEACH ENERGY PROJECT
APPLICATION FOR CERTIFICATION

Docket No. 12-AFC-03

SUPPLEMENTAL BRIEF IN SUPPORT OF INTERVENOR CITY OF REDONDO BEACH'S MOTION FOR ISSUANCE OF SUBPOENA DUCES TECUM TO SOUTHERN CALIFORNIA EDISON AND THE CALIFORNIA PUBLIC UTILITIES COMMISSION

INTRODUCTION

On August 27, 2015, Intervenor City of Redondo Beach ("City") filed a Motion for Issuance of Subpoena Duces Tecum to Southern California Edison and the California Public Utilities Commission ("Motion"). On September 24, 2015, the California Public Utilities Commission ("CPUC") and Southern California Edison ("SCE") submitted comments in response to the Motion (hereinafter, collectively referred to as "CPUC/SCE Responses").

The City hereby provides the following supplemental brief to address a number of issues raised in CPUC/SCE Responses:

(i) Contrary to the assertions of both SCE and the CPUC, California Public Utilities Code Section 583 ("PUC Section 583" or "Section 583") does not bar the Committee from issuing a subpoena for the requested information, nor does it bar SCE or the CPUC from complying with the subpoena. All it requires is that—in order for the CPUC to comply with the subpoena—the requested information must be released "on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding." It does not say that the CPUC cannot comply with a subpoena; it merely sets forth the procedure for complying. Moreover, it does not restrict SCE's ability to comply with the subpoena in any way.

(ii) SCE has failed to meet its burden of proof to establish that the requested information is confidential; and
(iii) The information requested is directly relevant to the alternatives analysis that must be performed by CEC Staff and the Committee.

In light of the above, the City respectfully requests that the Committee issue a subpoena duces tecum to SCE and the CPUC to produce the specified unredacted Testimony or, at a minimum, the names and locations of the 195 proposed gas-fired power plants that were not awarded power purchase agreements by SCE.

I. PUC SECTION 583 DOES NOT BAR THE COMMITTEE FROM ISSUING A SUBPOENA, NOR DOES IT BAR SCE OR THE CPUC FROM COMPLYING WITH A SUBPOENA

The CEC has the authority to issue subpoenas to secure "such information as is relevant and necessary in carrying out the purposes of the proceeding." (20 Cal. Code of Regs. §1204.)

Both SCE and the CPUC assert—without any basis—that PUC Section 583 bars the Committee from issuing a subpoena requesting confidential information, and bars SCE and the CPUC from complying with such a subpoena. This is a gross misreading of Section 583.

Section 583 provides:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding. Any present or former officer or employee of the commission who divulges any such information is guilty of a misdemeanor.

Nowhere in Section 583 is there a reference to subpoenas of any kind, nor any discussion of the CEC's authority to issue subpoenas, nor the CPUC's obligation to comply with them. Section 583 merely specifies that the CPUC cannot release such information without an order of the Commission or the action of a Commissioner. It does not relieve the CPUC from the obligation to comply with a subpoena from the CEC; it merely specifies how that compliance can be achieved.
CPUC Decision 06-06-066 confirms that Section 583 is merely a procedural requirement; it does not determine what information the CPUC can or cannot disclose:

As we stated in the OIR, § 583 does not limit our ability to disclose information. As the United States Court of Appeals for the Ninth District noted in *Southern California Edison Company v. Westinghouse Electric Corporation* (9th Cir. 1989) 892 F. 2d 778, 783: "Section 583 does not forbid the disclosure of any information furnished to the CPUC by utilities. Rather, the statute provides that such information will be open to the public if the commission so orders, and the commission’s authority to issue such orders is unrestricted." Similarly, *In Re Southern California Edison Company [Mohave Coal Plant Accident], D.91-12-019, 42 CPUC 2d 298, 300 (1991)*, states that § 583 "assures that staff will not disclose information received from regulated utilities unless that disclosure is in the context of a Commission proceeding or is otherwise ordered by the Commission" but does not limit our broad discretion to disclose information.

In addition, we note that Section 583 has no applicability whatsoever to the issuance of a subpoena to SCE. It merely restricts the manner in which the CPUC can release information.

Finally, both SCE and the CPUC argue that the City must take certain steps in the CPUC proceeding in order for this information be released. This is a red herring. The City is not the entity issuing a subpoena; the Committee is. The Committee has independent statutory authority to issue subpoenas for "such information as is relevant and necessary in carrying out the purposes of the proceeding." Its authority does not require the involvement of the City or any other party.

**II. SCE HAS FAILED TO MEET ITS BURDEN OF PROOF TO ESTABLISH THAT THE REQUESTED INFORMATION IS CONFIDENTIAL**

In its Response, the CPUC asserts that since no challenge to the confidentiality of the information was made in the CPUC proceeding, the information is presumed to be confidential:

None of the parties in proceeding A.14-11-012 have challenged the confidential treatment of the information, and as a result, the Commission hearing no challenges, has received SCE’s Exhibit under seal.

(CPUC Response, TN# 206200 at 1-2.)
This approach is the *opposite* of the established rule. CPUC Decision 06-06-066 expressly provides that information must be presumed *not* to be confidential, and the burden of proof is on the party seeking confidentiality:

We start with a presumption that information should be publicly disclosed and that any party seeking confidentiality bears a strong burden of proof. *Indeed, as discussed below, a party seeking protection of its documents always bears the burden of proof.*

(CPUC Decision 06-06-066 at 2.)

Moreover, the party seeking confidentiality must bring a motion to establish that the material does, in fact, meet the substantive requirements for confidential treatment:

As both courts and this Commission have stated in the past (and as reiterated in the OIR), § 583 does not require the Commission to afford confidential treatment to data that does not satisfy substantive requirements for such treatment created by other statutes and rules. This is important because several of the parties claim that there is a legal presumption of confidentiality for all data. If this were true, the Commission would be legally obligated to protect whole swaths of information without first considering whether the information meets relevant legal tests for trade secrets, privilege, or other established provisions protecting data from disclosure.

Section 583 sets forth a process for dealing with claims of confidentiality, and does not contain any substantive rules on what is and is not appropriate for protection…

Thus, § 583 sets out the first procedural step for a party claiming confidentiality. That party has the right to submit relevant material under seal when it first submits it to the Commission. *However, the material is not entitled to remain confidential forever based on the invocation of § 583. Rather, the affected party must accompany its records with a motion establishing the legal and factual basis for confidential treatment.*

(CPUC Decision 06-06-066 at 26-27.)

The City is not aware of any motion filed by SCE to establish the legal and factual basis for confidential treatment of the requested information.

The CPUC and SCE are asserting that information submitted under seal is automatically deemed to be confidential, absent challenges seeking a determination to the contrary. This is clearly not the case. The procedure set forth in CPUC Decision 06-06-066 provides that the party seeking confidential treatment must file a motion in the CPUC proceeding “establishing the legal and factual basis for confidential treatment.”
III. THE INFORMATION REQUESTED IS DIRECTLY RELEVANT TO THE ALTERNATIVES ANALYSIS THAT MUST BE PERFORMED BY CEC STAFF AND THE COMMITTEE.

SCE and the CPUC both assert—without basis—that the information requested is not relevant to the CEC proceeding. This is clearly not the case.

A critical portion of the Commission's Alternatives Analysis is the investigation of alternative potential sites. (CEC Preliminary Staff Assessment at 4.2-2.) Based on the numerous offers for power plant sites in the Western Los Angeles Basin received by SCE in response to its RFO, it is apparent that many viable sites do, in fact, exist. Thus, to fulfill its obligation to consider "a reasonable range of project alternatives for examination" under CEQA, the Commission must consider alternative sites that can be reasonably ascertained by soliciting the redacted information from the CPUC or SCE.

Furthermore, by its own admission, SCE confirms that "[r]eveling the location of potential new/incremental generation facilities will reveal the size and competition of the market within a specific local area….", namely the Western Los Angeles Basin. (SCE Response, TN#206209 at 4.) This is precisely the type of the information needed by CEC Staff and the Committee to perform a meaningful Alternatives Analysis.

CONCLUSION

The City respectfully requests that the Committee issue a formal request or subpoena to the SCE and CPUC, requiring them to produce the unredacted version of pages 35-39 of the "Testimony Of Southern California Edison Company on the Results of its 2014 Local Capacity Requirements Request For Offers For The Western Los Angeles Basin" or, at a minimum, the name and location for each proposed site in the 198 "indicative offers" for gas-fired power plants received by SCE.
DATED: October 12, 2015

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By: ______________________

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Attorneys for Intervenor CITY OF REDONDO BEACH

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