

## DOCKETED

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OFFICE OF COUNTY COUNSEL  
COUNTY OF RIVERSIDE

3960 ORANGE STREET, SUITE 500  
RIVERSIDE, CA 92501-3674  
TELEPHONE: 951/955-6300  
FAX: 951/955-6322 & 951/955-6363

February 3, 2016

CALIFORNIA ENERGY COMMISSION  
1516 Ninth Street, MS-4 (Dockets Unit)  
Sacramento, CA 95814

Re: Docket No. 09-AFC-7C (Palen Solar Power Project) – County of Riverside Comments on Petition for Transfer of Ownership and Petition for Extension of Deadline for Commencement of Construction

Dear Commissioners:

The County of Riverside (“County”) submits the following comments on Palen SEGS I, LLC’s Petition for Ownership Transfer from Palen SEGS I, LLC to Maverick Solar, LLC, as well as Palen SEGS I, LLC’s December 22, 2015 Petition for Extension of Deadline for Commencement of Construction. Respectfully, the petitions do not comply with the clear terms of the September 9, 2015 Commission Order<sup>1</sup> and should be denied. Further, most concerning to the County is the stated intent that an extension of the construction deadline is necessary to afford Maverick Solar, LLC time to file a petition with the Commission “to convert the Project from solar parabolic trough technology to solar photovoltaic (“PV”) technology under Section 25502.3 of the Warren-Alquist Act.”

As set forth in greater detail below, Petitioner’s contention that Public Resources Code<sup>2</sup> section 25502.3 permits the Petitioner to voluntarily elect to seek review by the Commission of an amendment for a PV facility is erroneous. The Commission does not have jurisdiction for PV projects under section 25502.3. The meaning that Petitioner is asking the Commission to give section 22502.3 would inappropriately deprive counties of their constitutionally conferred police powers. Although the Palen Solar Power Project is on federal land in Riverside County, the County is concerned about the precedential effect of such an order by the Commission on other energy projects throughout the County and state. While a petition to amend is not currently before the Commission, the County strongly opposes any request by the Petitioner that would have the effect of the Commission assuming the County’s land use jurisdiction in future cases.

*The Petitions Are Untimely and Do Not Comply with the September 9, 2015 Commission Order*

The County respectfully disagrees with the Petitioner’s argument that the Petition to Transfer Ownership was timely filed prior to the December 15, 2015 start-of-construction deadline. The

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<sup>1</sup> TN#206118, docketed September 16, 2015, certifying the September 9, 2015 Order of the Energy Commission

<sup>2</sup> All statutory references are to the Public Resources Code, unless otherwise indicated.

Petition to Transfer Ownership was submitted to the Dockets Unit at 5:17 p.m. on December 15, 2015<sup>3</sup>. Code of Regulations section 1208 clearly states documents submitted after 5 p.m. on a business day “shall be deemed filed the next business day.” (See Cal. Code Regs., Title 20, § 1208, subd.(b)(2).) Per this mandatory language, the Petition to Transfer Ownership must be deemed received on December 16, 2015, which is after the start-of-construction deadline. Please also see Commission Standing Order 11-Gen Admin-01, dated October 17, 2013, which states, “All documents submitted after 5 p.m. on a business day will be deemed received on the next business day.” Therefore, the Petition to Transfer Ownership was not filed prior to the start-of-construction deadline and any possible extensions afforded under section 25534, subdivision (j) due to a timely change of ownership are not applicable in this case.

Additionally, Petitioner appears to be taking the position that the September 9, 2015 Commission Order (“Order”) contained two distinct orders by the Commission, instead of one conditional order. The Order extended the term of the permit for one year on the condition that Palen SEGS I, LLC was required to submit a new amendment adding storage to the solar trough project. The Order clearly states:

If the petition for amendment is not received by 5:00 p.m. on December 22, 2015, this order is automatically rescinded and the permit for the PSPP shall be deemed to have expired as of December 15, 2015.<sup>4</sup>

The Petitioner did not file the petition for amendment by December 22, 2015. Moreover, the documents filed by the Petitioner on December 22, 2015 made it clear that the Petitioner had no intention of filing an amendment adding storage to the previously licensed solar trough project, as was expressly called for under the Order. Therefore, since the Petitioner did not file the required documents by December 22, 2015, the permit expired automatically as of December 15, 2015. Further, since the Petitioner did not file a timely request to transfer ownership prior to December 15, 2015, any possible extensions under Public Resources Code section 25534, subdivision (j) do not apply.

*Public Resources Code Section 25502.3 Does Not Authorize the Commission to Permit a Photovoltaic Solar Power Plant Project*

Even though a petition to amend is not currently before the Commission, the County disagrees with the Petitioner’s argument that Public Resources Code section 25502.3 allows a developer for a PV power project to voluntarily elect to file an amendment with the Commission. The County opposes any request to have the Commission take jurisdiction of a PV power project under section 25502.3.

The Commission’s jurisdiction is limited and specified under the Warren-Alquist State Energy Resources Conservation and Development Act (“Act”). The Commission possesses only those powers that the Legislature has clearly granted it by the Act. Per section 25500, “the commission shall have the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility.” “Site” is defined under the Act as “any location on which a facility is constructed or is proposed to be

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<sup>3</sup> TN#207034

<sup>4</sup> TN#206118

constructed.<sup>5</sup>” “Facility” means “any electric transmission line or thermal powerplant.<sup>6</sup>” Further, “thermal powerplant” expressly “does not include any wind, hydroelectric, or solar photovoltaic electrical generating facility.<sup>7</sup>”

Where the Legislature has not conferred jurisdiction on an administrative agency, the agency lacks jurisdiction. (See *Public Utilities Comm’n v. Energy Resources Conserv. & Dev. Comm’n* (1984) 150 Cal.App.3d 437, 450-454 [court affirmed ruling interpreting the extent of the Commission’s jurisdiction over transmission lines under section 25107; in interpreting the Commission’s jurisdiction, the court limited the Commission’s interpretation of its jurisdiction]; *Security Nat. Guar., Inc. v. California Coastal Comm’n* (2008) 159 Cal.App.4th 402, 419 [“[A]n agency literally has no power to act . . . unless and until [the Legislature] confers power upon it.”].) The Commission’s jurisdiction depends on the Legislature, not on the unilateral act of a private applicant.

The Petitioner’s contention that section 25502.3 allows the proponent of a PV project to voluntarily submit to the Commission’s exclusive certification jurisdiction misconstrues the plain text of the section and contradicts the Act’s legislative history. Section 25502.3 addresses a jurisdictional waiver for excluded “facilities” which, as set forth above, are defined under the Act as electric transmission lines or thermal powerplants. “Thermal powerplant,” by its very definition, excludes PV projects. Further, as the County of Riverside stated in the Ridgecrest Solar Power Project matter<sup>8</sup>:

- Section 25502.3 has meaning in the Act’s historical context. The waiver provisions of sections 25502.3 and 25501.7 are vestiges of the original statute. These provisions were adopted to address problems with grandfathering provisions that excluded projects from the Commission’s jurisdiction. Both waiver provisions only apply to grandfathered projects. (See Pub. Resources Code, §§ 25501.7, 25502.3; 58 Ops.Cal.Atty.Gen. 729, 736-737 (1975). The Attorney General recognized the two waiver provisions in a formal opinion on the grandfathering provision. The opinion stated: “[T]he next issue is to determine the circumstances under which PG&E could waive the exemption, absent any legislative action to revoke it. First of all, the Energy Act itself provides *two alternative methods for waiving the exemption*. One can either submit a notice of waiver to the Energy Commission . . . section 25501.7, or one can submit to the Commission a notice of intent to file an application for certification . . . [section] 25502.3. In either case, the exemption is waived . . .” (58 Ops.Cal.Atty.Gen., *supra*, at p. 736 [emphasis added].)
- Section 25502.3 is not an open-ended waiver for projects outside the scope of the Act. Section 25502.3’s waiver worked in connection with former section 25501.5’s list of exempt facilities and former section 25501, subdivision (b)’s criteria for exclusion. With the repeal of former sections 25501 and 25501.5,

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<sup>5</sup> Section 25119

<sup>6</sup> Section 25110

<sup>7</sup> Section 25120

<sup>8</sup> TN#63512, page 13 (09-AFC-9). The County of Riverside, with the California State Association of Counties, submitted several comments in opposition to a similar jurisdictional waiver request brought in the Ridgecrest Solar Power Project siting case (09-AFC-9) which was never decided upon by the full Commission and is now terminated. Those opposition documents (TN#63512, TN#62253, #TN62269) are incorporated herein by reference.

section 25502.3 became obsolete. (See Pub. Resources Code, § 25502.3; Pub. Resources Code, §§ 25501, 25501.5 (1978) [repealed]; 58 Ops.Cal.Atty.Gen., *supra*, at pp. 736-738.)

- Nothing in the Act’s legislative history suggests that projects outside the scope of the Act could elect to be subject to the Commission’s jurisdiction. Rather, the Act’s legislative history evidences the Commission’s lack of jurisdiction over non-thermal projects, such as PV facilities. (See Statement on SB 928 Before the Sen. Com. on Energy and Public Utilities – May 5, 1987 [“The purpose of SB 928 is to clarify existing law relating to the California Energy Commission’s jurisdiction over renewable energy resources. Currently, the Commission has authority to regulate development of thermal powerplants over 50 MW but not wind, solar or hydroelectric plants which are not thermal.”]; See also Sen. Com. on Energy and Public Utilities, Analysis of Sen. Bill No. 928 (1986-1987) May 5, 1987; Consent Calendar, Sen. 3d reading, Analysis of Sen. Bill No. 928 (1986-1987) as amended Aug. 1, 1988; Rosenthal Floor Statement on SB 928; 8/1/88 Letter from Charles R. Imbrecht, Chairman, California Energy Commission, to John Vasconcellos, Chairman, Assembly Ways and Means Committee<sup>9</sup>)
- Petitioner’s position contradicts the outcome the Legislature intended to preserve when adopting Senate Bill 928. In 1987, SB 928 added an express exclusion to section 25120’s definition of thermal powerplant. SB 928 expressly excluded a solar PV facility. (See Sen. Com. on Energy and Public Utilities, Analysis of Sen. Bill No. 928 (1986-1987) May 5, 1987.) SB 928’s Bill Analysis explains: “CEC is responsible for siting thermal powerplants of a size equal to or greater than 50 megawatts (MW). *Electrical generating facilities which are not thermally powered are exempt from the CEC’s siting authority.* . . . SB 928 was introduced . . . to clarify existing law and to give assurances to businesses engaged in renewable energy development, such as wind, hydro and solar energy developers, that they will not be subject to regulatory burdens associated with CEC siting jurisdiction.” (Sen. Com. on Energy and Public Utilities, Analysis of Sen. Bill No. 928 (1986-1987) May 5, 1987 [emphasis added].<sup>10</sup>) SB 928 was a confirmation of existing law that the Commission specifically did not have jurisdiction over non-thermal projects, such as PV facilities.
- Petitioner’s position renders Senate Bill 226 superfluous. SB 226 added section 25500.1 to the Warren-Alquist Act. The section provides a specific jurisdictional waiver for certain applicants seeking to convert to PV facilities under certain circumstances. If section 25502.3 already provides a general jurisdictional waiver to any project, as Petitioner argues, there was no need for the Legislature to add section 25500.1 to provide a specific jurisdictional waiver. (See Pub. Resources Code, § 25500.1; Sen. Bill No. 226 (2011-2012 Reg. Sess.) as adopted, Oct. 4, 2011; Pub. Resources Code, § 25502.3.) The fact that the Legislature felt required to enact SB 226 to provide a specific jurisdictional waiver to applicants

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<sup>9</sup> SB 928’s Bill Analysis can be accessed on the Commission’s website at the following link containing Warren-Alquist Act Legislative History Documents: [http://www.energy.ca.gov/reports/Warren-Alquist\\_Act/history.html](http://www.energy.ca.gov/reports/Warren-Alquist_Act/history.html)

<sup>10</sup> SB 928’s Bill Analysis can be accessed on the Commission’s website at the following link containing Warren-Alquist Act Legislative History Documents: [http://www.energy.ca.gov/reports/Warren-Alquist\\_Act/history.html](http://www.energy.ca.gov/reports/Warren-Alquist_Act/history.html)

seeking to convert to PV facilities conclusively establishes that the Act did not already provide such applicants a jurisdictional waiver. That is, the Legislature did not believe that section 25502.3 already provides a jurisdictional waiver to applicants seeking to convert to PV facilities.

- The very fact that the Legislature added a specific jurisdiction waiver in section 25500.1 confirms that the Legislature believed that the Commission would have no jurisdiction over PV facilities but for the new section. Otherwise, the Legislature's adoption of section 25500.1 would be an idle act, creating a superfluous statute. (See *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390 [97 Cal.Rptr.3d 464] [reasoning that if the Legislature intended all remedies to be available, Legislature would not have included a provision singling out remedies; "We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous."].)

Nowhere does the Act state the Commission has any authority over PV facilities except for under the very limited circumstances in recently enacted section 25500.1, circumstances that do not apply in this case. Under all other circumstances, jurisdiction over PV projects remains vested in the local land use authorities by their constitutionally conferred police powers. The California Constitution recognizes the police power of counties. (Cal. Const., art. XI, § 7.) The Legislature has not preempted the police power of counties over PV facilities. The Legislature, therefore, has not authorized the Commission to limit the police power of counties over PV facilities.

Even though the Palen Solar Power Project is on federal land in Riverside County, the County is concerned about the precedential effect that a decision in this siting case could have on other energy projects throughout the County and state. The County supports renewable energy and believes that local control over non-thermal energy projects is critical. Since the Petitioner does not intend to construct a solar trough thermal powerplant project and the Commission does not have jurisdiction over PV projects, the Petitioner's request for an extension of the construction deadline should be denied.

Thank you for your time and consideration of these comments.

Sincerely,

GREGORY P. PRIAMOS

County Counsel



TIFFANY N. NORTH

Deputy County Counsel IV-S

TNN:pt

cc: Supervisor John J. Benoit, Chairman of the Board of Supervisors  
Steve Weiss, Planning Director  
Denise Harden, Principal Management Analyst

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