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California Energy Commission
Dockets Office, MS-4
Re: Docket No. 16-MISC-01
1516 Ninth Street
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RE: California Energy Commission Request for Qualifications Delegate Chief Building Official Services for the STEP Division, Docket No. 16-MISC-01

Calpine Corporation appreciates the opportunity to comment on the proposed procedures for the Designated Chief Building Official ("DCBO") selection process. We compliment California Energy Commission ("Commission") Staff on the transparency of the efforts to create a new selection process. The information provided at the stakeholder roundtable discussion on July 8, 2016 was invaluable in helping us to understand the proposal.

Calpine Corporation is America's largest generator of electricity from natural gas and geothermal resources. Our fleet of 84 power plants in operation or under construction represents more than 27,000 megawatts of generation capacity, including over 20 power plants in California licensed by the Commission. Through wholesale power operations and our retail business, Champion Energy, Calpine serves customers in 21 states and Canada. We specialize in developing, constructing, owning and operating natural gas-fired and renewable geothermal power plants that use advanced technologies to generate power in a low-carbon and environmentally responsible manner. Calpine has a strong interest in helping the Commission to ensure that the procedures for selecting and supervising DCBOs are fair, efficient and cost-effective.

As we understand the proposal, the Siting, Transmission and Environmental Protection Division ("STEP") proposes to issue, every two years, a Request for Qualifications ("RFQ") to select one firm to provide DCBO services for minor amendments or O&M work requiring chief building official review/inspection. The STEP will also issue an RFQ to select one firm to provide DCBO services for each major facility construction, modification or closure activities. Concurrent with the RFQ process, STEP proposes to conduct a market survey of rates for comparable services performed in California. Once each contractor is selected, STEP proposes to use this rate survey to negotiate a standard set of hourly fees and charges with each contractor. Thereafter, each project owner would be required to enter into a contract with the selected firm to perform DCBO services for each project, based upon the hourly fees and charges previously negotiated by the Commission Staff.

We appreciate the thought and effort that has gone into the proposed DCBO selection process. However, we believe that this process needs further evaluation before it is implemented. To aid this evaluation process, we offer the following comments, suggestions and questions.

1. *Rather than select a single "best qualified" DCBO for project specific services, the Commission should create a list of all qualified DCBOs – and let the project owner select which DCBO from the qualified list it wants to use.*

If the project owner has the flexibility to select a site-specific DCBO from a list of qualified firms, the project owner will have the best chance of achieving the best price for these services and of obtaining the DCBO that can best meet the needs and circumstances of the specific project. By having multiple-qualified firms, the project owner could ask these firms to bid to the project owner, thus ensuring the best price. Alternatively, the project owner and a qualified DCBO might find that the best approach is to negotiate a fixed-price contract for the entire package of services, eliminating the red-tape and additional costs of periodic time accounting and billing.

We are concerned that selecting only one DCBO will not provide the project owner the flexibility to negotiate specific prices or terms, and will make any contract negotiations decidedly one-sided in favor of the DCBO.

Another factor which would limit the selection of firms is the proposal that the qualifying firm must meet all of the minimum expertise position requirements in Table 1. There are very few, if any, firms that can meet all of these requirements; thus, the condition will severely limit the pool of eligible DCBOs, and we are not certain that all of these positions will be required for every project. If there is a list of many qualified firms, project owners can select the DCBO firm with personnel that meets the expertise positions necessary for the project, with the only limitation being that a firm cannot provide services for a project with which it has a conflict.

We also believe that creating a list of all qualified DCBO's will allow the project owner the benefit of using local, or regional firms to provide DCBO services. This has multiple advantages. The costs of local firms may be lower than the firms in large metropolitan areas, travel time of DCBO staff may be reduced, and jobs can be created in local areas near the project.

2. *Rather than select a single "best qualified" DCBO for on-call services, we recommend that the Commission create a list of all qualified DCBOs – and let the project owner select which DCBO from the qualified list it wants to use for on call services.*

The reasons for this recommendation are the same as for Recommendation 1, above.

In addition, we are also concerned that limiting the selection of DCBO services for on-call services to one firm, which will then provide multiple DCBO services statewide, will disqualify many smaller, qualified firms. We note that for on-call services a project owner may wish to use the same DCBO that oversaw the original construction. There are potentially significant savings in using the same DCBO because they have familiarity with the project and access to all original plans and drawings, thus eliminating the time and cost of coming up to speed on a new project, which could be considerable. For complex engineering projects such as a power plant, engineering judgments sometimes may differ, and using multiple DCBOs on the same project raises the specter of unnecessary conflicts. Therefore, regardless of how many on-

call DCBOs are selected by the Commission, we also recommend that the Commission allow the project owner the option of using the original DCBO for subsequent on-call services

We also recommend that the Commission provide project owners with the option of using the local building official for post-operations construction activities. For example, if the activity requires a building permit involving a specific permit fee, the project owner should be allowed the option of satisfying the DCBO requirement by obtaining the permit, rather than spending significantly more for an on-call DCBO.

3. *Rather than require the project owner to use pre-negotiated fixed fees with a single DCBO firm, we recommend that project owners be allowed to negotiate fees with any firm on the list.*

The STEP has proposed conducting a survey to determine DCBO fees and then negotiating a fee schedule that the project owner would be required to use. This approach is problematic for many reasons. From our experience, the survey is likely to show wide variation of fees, depending on such factors as: (1) the regional location of the firm (rural areas vs. metropolitan areas); (2) whether the CBO services are provided by local agencies or private companies; (3) the timing or urgency that the service must be provided; and (4) other contract services that are difficult to quantify. If a single rate schedule is negotiated from a survey that shows a wide variation in fees, the resulting rate schedule will inevitably overcharge some project owners and undercharge others.

Given the large sums of money involved in DCBO contracts, and the wide variability of costs that will be incurred based on the factors listed above, we encourage the Commission to allow the project owner to negotiate rates from a list of qualified DCBOs, rather than be locked into a single fee structure.

4. *The proposed invoicing process should be discussed further at future roundtable discussions.*

The proposed process for billing project owners for on-call DCBO services may require further review. We understand that the proposed invoicing process is that the DCBO will submit an invoice to the Commission, and that the Commission will then review and pay the invoice. Thereafter, as we understand the process, the Commission will request that the project owner reimburse the Commission for the amounts paid to the Contractor. However, since the services for which the invoice is submitted will be performed for the project owner, it is not clear how the Commission will determine whether or not the invoice is accurate, or how a project owner can contest a charge that it believes is inaccurate or inappropriate, if the invoice is paid by the Commission before it is reviewed by the project owner.

5. *Project Risks and Liability.*

The Commission has proposed Third Party liability language for the agreement between the DCBO and the Project Owner, which would provide in Section 7 as follows:

> Project Owner and DCBO agree that the Energy Commission, as intended creditor third-party beneficiary, is not liable for any events or occurrences that result in harm to persons or property during the course of construction or operation of the Project. The Energy Commission assumes no liability for errors and omissions on the design elements of the Project. If Project Owner or DCBO fail to perform their obligations under [Name of Agreement between Project Owner and DCBO], the Energy Commission shall in no way have any liability to any parties that may be harmed as a result of failure of Project Owner or DCBO to perform their obligations. Further, the Energy Commission is in no way liable for payment to DCBO for its services in the event Project Owner fails to make timely payment.

We agree that the Energy Commission can by contract specify that it is not liable for payment to the DCBO in the event the project owner fails to make timely payment. However, we question whether the any contract can lawfully exempt the Commission from liability if the DCBO fails to perform its other obligations under the agreement between the DCBO and the project owner.

The Delegate CBO is, by its designated title, acting as a delegate or agent of the Commission. By the terms of the standard agreement between the DCBO and the Commission, the Commission is more than merely a third party beneficiary of the agreement between the project owner and the DCBO. The Commission has by statute pre-empted the functions of the local building official and, rather than perform those functions itself, has chosen to assign or delegate those functions to the DCBO. Per the terms of the standard agreement between the DCBO and the Commission:

> . . . the DCBO's work must be performed to the satisfaction of the Energy Commission and that the Energy Commission shall decide all questions as to the adequacy of DCBO's performance. However, lack of objection by the Energy Commission shall not constitute a waiver or estoppel of the Energy Commission's rights and remedies. Failure of DCBO to comply with the roles, responsibilities, and tasks expected of an DCBO service provider may be a basis for its termination as the delegate of the Energy Commission.

This paragraph describes precisely the relationship of a principal and an agent. It is a fundamental principle of law that if an agent acts within the scope of his/her authority, a principal is bound by the acts of its agent. This principle is embodied in California Civil Code section 2338: "Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as a part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal."

Therefore, we recommend that the Commission reconsider its relationship with the DCBO and the respective responsibilities of the parties. We suggest further roundtable discussions among the stakeholders to help clarify the respective roles of the parties. This discussion should include consideration of conflict resolution procedures to resolve conflicts that may arise between a CPM, a CBO and/or a project owner.

This letter summarizes our primary concerns with the proposed DCBO selection process. We look forward to further discussions and dialogues with all stakeholders to develop a process that will help ensure that building official and compliance functions are performed in a safe, efficient and cost-effective manner.

Sincerely,

Barbara McBride

Director, Environmental Services

Calpine Corporation