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<b>Project Title:</b>	High Desert Power Plant
<b>TN #:</b>	214594
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November 30, 2016

Commissioner Karen Douglas, Presiding Member  
Commissioner Janea A. Scott, Associate Member  
California Energy Commission  
1516 Ninth Street  
Sacramento, California 95814-5512

Re: Docket No. 97-AFC-01C, High Desert Power Plant Project  
Disclosure of Communications and Notice: Participation of Prior Advocates  
Comments of High Desert Power Project, LLC

Dear Commissioners Douglas and Scott:

On November 21, 2016, the Hearing Officer in the above-titled proceeding issued a memorandum titled, *Disclosure of Communications* (TN # 214534, therein referred to as the “Notice”), making certain communications attached to the Notice (therein defined as the “Communications”) part of the record of these proceedings. The Notice stated, “The Committee requests the parties to state in writing by the above-specified date whether they waive the right to challenge the proceedings based on the Communications.” (*Id.*, p. 1.)

High Desert Power Project, LLC (the “Project Owner”) cannot discern from the Communications provided in the Notice the nature or extent of extra-record communications by Prior Advocates (Ms. Bond<sup>1</sup>, Ms. Holmes, and Mr. Kramer). Most of the Communications assert “confidential attorney client privileged communications and attorney work product,” deliberative process, or some other privilege, thus providing no substantive information as to the participants or nature of the Communications.

We can discern that the Communications with Prior Advocates may have materially influenced a number of Committee orders and decisions, as evidenced by the numerous TN numbers referenced in the Communications. As just one example, the Notice discloses that the Prior Advocates offered opinions and other extra-record Communications in May and June of 2016<sup>2</sup> regarding matters in the All-Party Stipulation filed by the Project Owner, the Staff, and the California Department of Fish & Wildlife and the Committee order that rejected the All-Party Stipulation (TN # 211790). This extra-record information was not disclosed to the parties and the parties did not have an opportunity to confront this information before the Committee issued its order. The Committee order resulting from these Communications (TN # 211790) represents

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<sup>1</sup> Though not an attorney, the Communications reveal that Ms. Bond, an advocate in the prior proceedings, was either drafting or editing decisional documents for the Committee, but the nature and content of the Communications have not been disclosed.

<sup>2</sup> Notice, Presiding Member’s Disclosure of Communications, Communications 1-4; Associate Member’s Disclosure of Communications, Communications 1-3.

an unprecedented rejection of an All-Party Stipulation and a dramatic shift in the direction of these proceedings. The Notice provides no further insight into the nature of the other extra-record Communications, only that they were soon followed with orders.

With respect to the path forward, the Notice does not state whether the Committee intends to continue to seek and use the advice from Former Advocates.

Based on the forgoing, the Project Owner does not waive the right to challenge the proceedings based on the Communications to date. This non-waiver is a reservation of rights and not a present intent to advance these past claims.

As to future proceedings, the recusal of Former Advocates is the only result consistent with due process, the law, and the Canons of Ethics.<sup>3</sup> Former advocates, lawyers and non-lawyers, should not participate as advisers to decision makers in subsequent actions on the same subject matter. Indeed, the Code of Judicial Ethics requires the disqualification of a justice, judge or presiding officer if he or she has served as a lawyer in any other proceeding *involving any of the same parties* if that other proceeding related to the *same contested issues of fact and law* as the present proceeding, or has *given advice to any party* in the present proceeding upon any issue involved in the proceeding.<sup>4</sup> Similar requirements apply to trial court judges in California.<sup>5</sup> Disqualification of the Former Advocates is mandatory and cannot be waived.<sup>6</sup>

Thank you for the opportunity to respond to the Notice. We look forward to expeditiously advancing this proceeding.

Sincerely,



Jeffery D. Harris  
Peter J. Kiel  
Samantha Neumyer  
Attorneys for High Desert Power Project, LLC

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<sup>3</sup> Whether the decision-makers are Appellate Judges, Hearing Officers, or any other adjudicator, a "...independent, impartial, and honorable judiciary is indispensable to justice in our society"; and all decision-makers should "...participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary is preserved. *California Code of Judicial Ethics*, Canon 1.

<sup>4</sup> *California Code of Judicial Ethics*, Canon 3E(5)(a); Emphasis added.

<sup>5</sup> The Advisory Committee Commentary for Canon 3E(5)(a) notes its consistency with the Code of Civil Procedure: "Canon 3E(5)(a) is consistent with Code of Civil Procedure section 170.1, subdivision (a)(2), which addresses disqualification of trial court judges based on prior representation of a party in the proceeding."

<sup>6</sup> In addition, off the record consultation between these individuals and the Committee is a potential violation of the Commission's *ex parte* rules. Under the *ex parte* provisions of the Administrative Procedure Act adopted by the Energy Commission, while this proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication. (California Government Code Section 11430.10(a).)