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09-AFC-9
DATE July 05 2011
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State of California
Energy Resources Conservation
and Development Commission

In the Matter of:	)	Docket No. 09-AFC-9
	)	
Application for Certification	)	**STAFF'S REPLY BRIEF**
For the Ridgecrest Solar Energy Project	)	

INTRODUCTION

On June 17, 2011, Solar Trust of America, (Applicant) filed a motion requesting the Ridgecrest Solar Power Project Committee to issue an order affirming, in effect, that Public Resources code section 25502.3 allows an applicant to elect the California Energy Commission's (Energy Commission) jurisdiction for a project proposed to be entirely photovoltaic (PV). During the status conference on June 21, 2011, the Committee set July 6, 2011, as the deadline for parties to file responses to the Applicant's motion. Staff's response, set forth below, discusses the applicability of section 25502.3 and explains why it does not provide the election that Applicant claims. As stated during the status conference, Staff does not object to project suspension as requested by the Applicant, but notes that correct resolution of the jurisdictional issue with respect to the PV project that Applicant contemplates would make the requested suspension moot.

Staff has reviewed the Applicant's contention that Public Resources Code section 25502.3 allows an applicant to voluntarily come under the Energy Commission's jurisdiction and file a project that would otherwise not be subject to the Energy Commission's exclusive siting jurisdiction. Staff does not agree with the Applicant's interpretation of section 25502.3 to allow for Energy Commission jurisdiction over an entirely PV project.

I.
PUBLIC RESOURCES CODE SECTION 25502.3 DOES NOT ALLOW APPLICANTS TO "OPT IN" FOR ENERGY COMMISSION JURISDICTION OVER PROJECTS THAT ARE NOT "SITES AND RELATED FACILITIES."

Public Resources Code section 25502.3 provides as follows:

> *Except as provided in Section 25501.7, any person proposing to construct a* ***facility*** *excluded from the provisions of this chapter may waive such exclusion by submitting to the commission a notice of intention to file an application for certification, and any and all of the provisions of this chapter shall apply to the construction of such facility*

(Pub. Resources Code, § 25502.3, emphasis added.) The Applicant's argument requires that the Energy Commission ignore the statutory definition of the word "facility." "Facility" means any electric transmission line or thermal powerplant or both…regulated according to the provisions of this division." (Pub. Resources Code, § 25110.) The definition of "facility" is pertinent, as it is also used in section 25502.3.

Public Resources Code sections 25110 and 25120 collectively define *facility* as a thermal powerplant with a generating capacity of 50 MW or more and specifically exclude PV. ("*Thermal powerplant" does not include a PV electrical generating* facility. See section 25120.) The Applicant concludes that, based on this definition, section 25502.3 would be meaningless as there is no such thing as a thermal power plant 50MW or larger which is excluded from the Energy Commission's jurisdiction (other than a small power plant that is exempted under Public Resources Code section 25541). The Applicant poses the question of how a section in the statute allows for an applicant to voluntarily submit to the Energy Commission's jurisdiction an already jurisdictional project and concludes that this would not make sense. The Applicant's solution, contrary to the express definitions of sections 25110 and 25120, is to change the meaning of *facility* only in section 25502.3 and have it mean all other energy generating technologies such as PV.

"Facility" is a defined term of art in the Warren-Alquist Act, and appears frequently in the statute. Applicant proposes to disregard the statutory definition in an effort to conclude that there is no jurisdictional limit on energy-producing projects that the Energy

Commission may license so long as a project proponent “volunteers” to file an application with the Energy Commission. This is a strained interpretation that is unsupported by any reference to legislative history or case law. In fact, the legislative history of the Warren-Alquist Act, and subsequent Attorney General Opinions, suggest that section 25502.3 is a legacy “grandfathering” provision that no longer has applicability to any proposed site or related facility.

II
HISTORICAL CONTEXT IS NECESSARY TO UNDERSTAND SECTION 25502.3

The Warren Alquist Act was adopted in 1974. At that time it required a two-stage process for power plant projects: the Notice of Intent (NOI) stage, requiring 18 months, and the Application for Certification stage, requiring an additional 18 months. Thus, when the statute was enacted, the state faced a potential hiatus of more than three years in power plant construction. It addressed this problem with grandfathering provisions that excused entire categories of power plants from Energy Commission jurisdiction, including those already licensed by the California Public Utilities Commission or a municipal utility and those “for which construction is planned to commence within three years from the effective date of this provision.” (Former Section 25501, subd. (b), as enacted in 1974. See excerpts from the 1978 Warren Alquist Act, p.41 attached as Exhibit A.) Moreover, the Legislature included a long list of projects “found” by the Legislature (legislative findings) to be “planned to commence within three years.” (Former Section 25501.5 as enacted in 1974. Exhibit A, pp. 41-43)

These listed projects did not yet have permits, but were deemed to meet the three-year criterion for exclusion from the Act and, therefore, the Energy Commission’s jurisdiction.

The Legislature included two provisions among the grandfathering statutory sections that allowed projects to waive their grandfathered status and seek a license from the Energy Commission. These two anachronistic legacy provisions remain part of the statute to allow any project that obtained a license prior to 1975 to file a “waiver” of the exclusion with the Energy Commission (Section 25501.7 Exhibit A, p.43), or, alternatively, to file a Notice of Intent to file an application for certification. (Section

25502.3, Exhibit A, p.43) These “two alternative methods” of voluntarily submitting to the Energy Commission’s siting jurisdiction were recognized and discussed by the Attorney General in a formal opinion on the grandfathering provision in 1975 (58 Ops. Atty. Gen. 729, 736. See Exhibit C pp. 736-737). Nothing in the Attorney General’s opinion suggests that Section 25502.3 applies to any project that is not a “facility” as that term is defined in the Act.

Former section 25501.5 (as originally enacted in 1974, Exhibit A, p.43) also includes reference to these two alternative waiver provisions, indicating that either could apply at an applicant’s option to the long list of projects that were exempted by that section. The reference to section 25502.3 in the initial grandfathering statute indicates that the section was applicable to “facilities” as defined in section 25510, as the power plants included in Section 25501.5 are all “facilities”:

> *“The inclusion of any site and related facility in this section means that the provisions of this chapter do not apply to any such site or facility, to the extent that Section 25501.7 or 25502.3 is made applicable, and that such site and related facility is subject to any and all other provisions of law.”* (section 25501.5, Exhibit A p.43.)

For these listed thermal powerplants or any thermal powerplants that could factually meet former section 25501(b), *planned construction within three years*, the applicant could elect to waive the exclusion provided by the legislature and file a notice of intent to file an application for certification with the Energy Commission under section 25502.3.

Because section 25502.3 has meaning in the historical context, changing the definition of words as the Applicant suggests, or attempting to deconstruct the section is not appropriate necessary to understand the purpose of the section.

III
THE PURPOSE AND MEANING OF SECTION 25502.3 DOES NOT CHANGE WITH THE REPEAL OF FORMER SECTIONS 25501(b) AND 25501.5 IN 1995.

Attorney General's Opinion No. SO 75-47, October 31, 1975 is useful in understanding the dynamics of the various relevant exemption sections. (Attached as Exhibit 3) The opinion addresses construction timing issues associated with PG&E Nuclear A powerplant. Nuclear A is one of the named facilities listed in former section 25501.5 for which the legislature found construction was planned to commence in three years. (See Section 25501.5(a), Exhibit A p.42,)

The primary issue addressed in the opinion is the time limit Pacific Gas & Electric had to commence construction to continue to qualify for the three year exemption. In addition, the opinion discussed the mechanics of the section 25502.3 waiver.

The opinion states:

> "*The three-year exemption period created by section 25501(b) must be interpreted in light of these two policies-to protect the public from the disruptive effects of a three-year moratorium on new electric generating facilities, and to submit the construction of such facilities to the higher degree of scrutiny and resulting public resources protection required by the Energy Act…Therefore, as long as PG&E diligently pursues its plans in the normal course of business to commence construction of Nuclear A within three years of the effective date of the Energy Act, its conduct could be said to be consistent with the policy of the legislature as expressed in section 25501(b), and the exemption would remain in effect."* (Exhibit C Opinion excerpts p.738)

The opinion also discusses waiver:

> *"…the next issue is to determine the circumstance 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 Energy Commission a notice of intent to file an application for certification… section 25502.3. In either case the exemption is waived…"* (Exhibit C Opinion excerpts p.736)

As the Attorney General's opinion evidences, the waiver found in section 25502.3 connects to the exemption of facilities listed in former section 25501.5, due to the legislative finding that their construction was planned to commence within three years, thus, meeting one of the criteria for exclusion under former section 25501(b). For 20 years, until 1995, these three sections complemented each other with section 25502.3 allowing an applicant to waive exclusion from Energy Commission jurisdiction by filing a notice of intent for the facilities identified in former section 25501.5 and section 25501(b) providing the criterion for exclusion that these facilities were legislatively found to meet.

With the removal of section 25501(b), *the three year exemption*, and the listed facilities of section 25501.5, section 25502.3 has become obsolete. While staff generally agrees with the Applicant's analysis of statutory construction, the Applicant overlooks the role of legislative history and historical context that do give meaning to section 25502.3. As the Court noted in *Smith v. Superior Court* 39 Cal.4th 77, 137 P.3d 218 Cal.,2006.

> In construing a statute, our fundamental task is to ascertain the Legislature's intent so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) We begin with the language of the statute, giving the words their usual and ordinary meaning. (*Ibid.*) The language must be construed "in the context of the statute as a whole and the overall statutory scheme, and we give 'significance to every word, phrase, sentence, and part of an act in pursuance of the legislative purpose.' " (*People v. Canty* (2004) 32 Cal.4th 1266, 1276, 14 Cal.Rptr.3d 1, 90 P.3d 1168.) In other words, " 'we do not construe statutes in isolation, but rather read every statute "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 222, 17 Cal.Rptr.3d 842, 96 P.3d 141.) If the statutory terms are ambiguous, we may examine extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day, supra,* 25 Cal.4th at p. 272, 105 Cal.Rptr.2d 457, 19 P.3d 1196.) In such circumstances, we choose the construction that comports most closely with the Legislature's apparent intent, endeavoring to promote rather than defeat the statute's general purpose, and avoiding a construction that would lead to absurd consequences. (*Ibid.*)

Given the clear definitions of "*facility*", "*thermal power plant*", specific language in the Act which states "*Thermal powerplant*" does not include any wind, hydroelectric, or solar

photovoltaic electrical generating facility, (Sections 25110, 25120) and the historical context of sections 25501, 25501.5, and 25502.3, the Applicant's contention that the Warren Alquist Act allows one to voluntarily elect to file a PV project with the Energy Commission was not the Legislature's intent and is incorrect.

CONCLUSION

For the above reasons the Committee should find the Energy Commission does not have jurisdiction to license a PV project. If the Applicant decides to pursue such a project in lieu of the originally proposed Ridgecrest Solar Power Project the Application for Certification should be terminated.

July 5, 2011

Respectfully submitted,

/S/

JARED J. BABULA
Senior Staff Counsel

Exhibit A

WARREN-ALQUIST ACT

California Energy Commission

DEC 1978

§ 25501. Inapplicability of chapter to certain sites and facilities.

The provisions of this chapter do not apply to any site and related facility which meets either of the following requirements:

(a) For which the Public Utilities Commission has issued a certificate of public convenience and necessity before the effective date of this division.

(b) For which construction is planned to commence within three years from the effective date of this division.

§ 25501.3 Proposed sites and related facilities; requirements.

A proposed site and related facility shall be deemed to be one for which construction is planned to commence within three years from the effective date of this division within the meaning of subdivision (b) of Section 25501, if all of the following are satisfied:

(a) The planned operating date and the planned capacity are consistent with the forecast of electric loads either set forth in a report submitted under Sections 2 and 3 of General Order 131 of the Public Utilities Commission as of March 31, 1974, or otherwise disclosed in a report of a public agency as of March 31, 1974.

(b) The need to commence construction within three years from the effective date of this division is reasonably related to the planned operating date of such site and related facility.

(c) Substantial funds have been expended or committed for planning, site investigations, site acquisition, or equipment procurement for such site and related facility prior to the effective date of this division.

§ 25501.5 Legislative finding; certain proposed sites and facilities in compliance with § 25501(b)

The Legislature finds and declares that the following proposed sites and facilities with the associated estimated generating capacities meet the requirements of subdivision (b) of Section 25501:

(a) As designated in the report of the Pacific Gas and Electric Company submitted to the Public Utilities Commission on March 1, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Comission, three gas turbine powerplants, each having a generating capacity of 52 megawatts, commonly known as Potrero Unit 4, Potrero Unit 5 and Potrero Unit 6, to be located in the City and County of San Francisco; a gas turbine powerplant having a generating capacity of 52 megawatts, commonly known as Hunters Point Unit 1, to be located in the City and County of San Francisco; a gas turbine powerplant having a generating capacity of 200 megawatts, commonly known as Station C; a geothermal powerplant having a generating capacity of 106 megawatts, commonly known as Geysers Unit 12, to be located in Sonoma County; a geothermal powerplant having a generating capacity of 110 megawatts, commonly known as Geysers Unit 14, to be located in Sonoma County; a geothermal powerplant having a generating capacity of 55 megawatts, commonly known as Geysers Unit 15, to be

located in Sonoma County; a geothermal powerplant having a generating capacity of 135 megawatts, commonly known as Geysers Unit 13, to be located in Lake County; a geothermal powerplant having a generating capacity of 110 megawatts, planned for operation in 1978, to be located in Sonoma County or Lake County; a geothermal powerplant having a generating capacity of 110 megawatts, planned for operation in 1979, to be located in Sonoma County or Lake County; a combined-cycle powerplant having a generating capacity of 800 megawatts, commonly known as Thermal 78, to be located in Contra Costa County near the City of Pittsburg; two combined-cycle powerplants, each having a generating capacity of 800 megawatts, commonly known as Thermal 79 and Thermal 81, to be located in Contra Costa County or Solano County; and a nuclear powerplant having a generating capacity of 1,100 megawatts, commonly known as Nuclear A to be located in Region 1, as shown on page 27 of the report of the Pacific Gas and Electric Company submitted March 1, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, or at the location commonly known as Diablo Canyon in San Luis Obispo County.

(b) As described in the report of the Southern California Edison Company submitted to the Public Utilities Commission on March 8, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, two combined-cycle powerplants, each with a generating capacity of 236 megawatts, commonly known as Cool Water Unit 3 and Cool Water Unit 4, to be located in San Bernardino County; six combined-cycle powerplants, each having a generating capacity of 236 megawatts, commonly known as Huntington Beach Unit 6, Huntington Beach Unit 7, Huntington Beach Unit 8, Huntington Beach Unit 9, Huntington Beach Unit 10 and Huntington Beach Unit 11, to be located in the City of Huntington Beach; three combined-cycle powerplants, each with a generating capacity of 414 megawatts, commonly known as Lucerne Valley Unit 1, Lucerne Valley Unit 2 and Lucerne Valley Unit 3, to be located in San Bernardino County; and two nuclear powerplants, each having a generating capacity of 760 megawatts, commonly known as the Desert Nuclear Project.

(c) As described in the report of the San Diego Gas and Electric Company submitted to the Public Utilities Commission on March 22, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, two gas turbine powerplants, each having a generating capacity of 64 megawatts, commonly known as South Bay Gas Turbine Unit 3 and South Bay Gas Turbine Unit 4, to be located in San Diego County; a fossil-fueled powerplant having a generating capacity of 292 megawatts, commonly known as Encina Unit 5, to be located in San Diego County; a combined-cycle powerplant having a generating capacity of 404 megawatts, planned for operation in 1979, to be located in San Diego County; and a nuclear powerplant having a generating capacity of 1,200 megawatts, commonly known as the Desert Nuclear Project, to be located in Riverside County.

(d) As described in the report of the Pacific Gas and Electric Company to the Public Utilities Commission submitted March 1, 1974, in response to Sections 2 and 3 of the General Order 131 of the Public Utilities Commission, a gas turbine powerplant having a generating capacity of 150 megawatts, commonly known as SMUD Gas Turbines, to be located in Sacramento County; and a nuclear powerplant having a generating capacity of 1,100 megawatts, commonly known as Rancho Seco Unit 2, to be located in Sacramento County.

(e) As described in the report of the Department of Water and Power of the City of Los Angeles submitted to the Public Utilities Comission on March 18, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, a nuclear powerplant having a generating capacity of 1,300 megawatts, commonly known as the San Joaquin Nuclear Project, to be located in Kern County near the City of Wasco.

(f) Four geothermal powerplants, each having a generating capacity of 55 megawatts, presently planned to be constructed by the City of Burbank and to be located in Imperial County.

(g) Four geothermal powerplants, each having a generating capacity of 55 megawatts, presently planned to be constructed by the City of Burbank and located in Inyo County.

(h) Two geothermal powerplants, each having a generating capacity of 110 megawatts, presently planned to be constructed by the Northern California Power Agency and located in Sonoma County.

Nothing in this section shall be construed to indicate that the sites and facilities specified in this section are approved by the Legislature. The inclusion of any site and related facility in this section means that the provisions of this chapter do not apply to any such site or facility, to the extent that Section 25501.7 or 25502.3 is made applicable, and that such site and related facility is subject to any and all other provisions of law.

§ 25501.7 Facility or site; proposed construction; waiver of exclusion; application of chapter

Any person proposing to construct a facility or a site to which Section 25501 applies may waive the exclusion of such site and related facility from the provisions of this chapter by submitting to the commission a notice to that effect on or after July 1, 1976, and any and all of the provisions of this chapter shall apply to the construction of such facility.

§ 25502. Thermal powerplant or transmission line; proposed construction; notice of intention

Each person proposing to construct a thermal powerplant or electric transmission line on a site shall submit to the commission notice of intention to file an application for the certification of such site and related facility or facilities. The notice shall be an attempt primarily to deterine the suitability of the proposed sites to accommodate the facilities and to determine the general conformity of the proposed sites and related facilities with standard of the commission and forecasts adopted pursuant to Sections 25216.3 and 25309. The notice shall be in the form prescribed by the commission and shall be supported by such information as the commission may require.

Any site and related facility once found to be acceptable pursuant to Section 25516 is, and shall continue to be, eligible for consideration in an application for certification without further proceedings required for a notice under this chapter.

§ 25502.3 Facility; proposed construction; waiver of exclusion; application of chapter

Except as provided in Section 25501.7, any person proposing to construct a facility excluded from the provisions of this chapter may waive such exclusion by submitting to the commission a notice of intention to file an application for certification, and any and all of the provisions of this chapter shall apply to the construction of such facility.

§ 25502.5 Alternative sites and related facilities; exemption of certain existing sites; notice

The notice is not required to contain three alternative sites and related facilities for additional generating facilities on land owned by an electric utility before the effective date of this division at existing sites east of the town of Clay Station in Sacramento County, in the location commonly known as Diablo Canyon in San Luis Obispo County, and near the City of Pittsburg in Contra Costa County.

§ 25503. Alternative sites and related facilities; notice; contents

Each notice of intention to file an application shall contain at least three alternative sites and related facilities, at least one of which shall not be located in whole or in part in the coastal zone. In addition, the alternative sites and related electrical facilities may be proposed from an inventory of sites which have previously been approved by the commission in a notice of intent or may be proposed from sites previously examined.***

(Amended by Stats. 1978, Ch. 1010, § 2)

§ 25504. Statement by applicant; contents

The notice of intention shall include a statement by the applicant describing the location of the proposed sites by section or sections, range and township, and county; a summary of the proposed design criteria of the facilities; the type or types of fuels to be used; the methods of construction and operation; the proposed location of facilities and structures on each site; a preliminary statement of the relative economic, technological, and environmental advantages and disadvantages of the alternative site and related facility proposals; a statement of need for the facility and information showing the compatibility of the proposals with the most recent biennial report issued pursuant to Section 25309; and any other information that an electric utility deems desirable to submit to the commission.

§ 25504.5 Proposal for site accommodating excess capacity; notice; contents

An applicant may, in the notice, propose a site to be approved which will accommodate a potential maximum electric generating capacity in excess of the capacity being proposed for the initial approval of the commission. If such a proposal is made, the notice shall include, but not be limited to, in addition to the information specified in Section 25504, all of the following:

Exhibit B

WARREN-ALQUIST ACT

JANUARY 1995

STATE OF CALIFORNIA
ENERGY COMMISSION

Pete Wilson, *Governor*

P160-95-001

§ 25500. Authority; necessity of certification

In accordance with the provisions of this division, 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. The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

After the effective date of this division, no construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facility by the commission, as prescribed in this division.

§ 25500.5. Certifications sufficient to accommodate projected demand

The commission shall certify sufficient sites and related facilities which are required to provide a supply of electric power sufficient to accommodate the demand projected in the most recent forecast of statewide and service area electric power demands adopted pursuant to subdivision (b) of Section 25309.

§ 25501. Inapplicability of chapter to certain sites and facilities

~~The provisions of t~~This chapter ~~do~~ does not apply to any site and related facility ~~which meets either of the following requirements: (a) (F)~~for which the Public Utilities Commission has issued a certificate of public convenience and necessity or which any municipal utility has approved before the effective date of this division.

~~(b) For which construction is planned to commence within three years from the effective date of this division.~~

~~**§ 25501.3. Proposed sites and related facilities; requirements**~~

~~A proposed site and related facility shall be deemed to be one for which construction is planned to commence within three years from the effective date of this division within the meaning of subdivision (b) of Section 25501, if all of the following are satisfied:~~

~~(a) The planned operating date and the planned capacity are consistent with the forecast of electric loads either set forth in a report submitted under Sections 2 and 3 of General Order 131 of the Public Utilities Commission as of March 31, 1974, or otherwise disclosed in a report of a public agency as of March 31, 1974.~~

~~(b) The need to commence construction within three years from the effective date of this division is reasonably related to the planned operating date of such site and related facility.~~

~~(c) Substantial funds have been expended or committed for planning, site investigations, site acquisition, or equipment procurement for such site and related facility prior to the effective date of this division.~~

~~§ 25501.5. Legislative finding; certain proposed sites and facilities in compliance with § 25501(b)~~

~~The Legislature finds and declares that the following proposed sites and facilities with the associated estimated generating capacities meet the requirements of subdivision (b) of Section 25501:~~

~~(a) As designated in the report of the Pacific Gas and Electric Company submitted to the Public Utilities Commission on March 1, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, three gas turbine powerplants, each having a generating capacity of 52 megawatts, commonly known as Potrero Unit 4, Potrero Unit 5 and Potrero Unit 6, to be located in the City and County of San Francisco; a gas turbine powerplant having a generating capacity of 52 megawatts, commonly known as Hunters Point Unit 1, to be located in the City and County of San Francisco; a gas turbine powerplant having a generating capacity of 200 megawatts, commonly known as Station C; a geothermal powerplant having a generating capacity of 106 megawatts, commonly known as Geysers Unit 12, to be located in Sonoma County; a geothermal powerplant having a generating capacity of 110 megawatts, commonly known as Geysers Unit 14, to be located in Sonoma County; a geothermal powerplant having a generating capacity of 55 megawatts, commonly known as Geysers Unit 15, to be located in Sonoma County; a geothermal powerplant having a generating capacity of 135 megawatts, commonly known as Geysers Unit 13, to be located in Lake County; a geothermal powerplant having a generating capacity of 110 megawatts, planned for operation in 1978, to be located in Sonoma County or Lake County; a geothermal powerplant having a generating capacity of 110 megawatts, planned for operation in 1979, to be located in Sonoma County or Lake County; a combined cycle powerplant having a generating capacity of 800 megawatts, commonly known as Thermal 78, to be located in Contra Costa County near the City of Pittsburg; two combined cycle powerplants, each having a generating capacity of 800 megawatts, commonly known as Thermal 79 and Thermal 81, to be located in Contra Costa County or Solano County; and a nuclear powerplant having a generating capacity of 1,100 megawatts, commonly known as Nuclear A to be located in Region 1, as shown on page 27 of the report of the Pacific Gas and Electric Company submitted March 1, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, or at the location commonly known as Diablo Canyon in San Luis Obispo County.~~

~~(b) As described in the report of the Southern California Edison Company submitted to the Public Utilities Commission on March 8, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, two combined cycle powerplants, each with a generating capacity of 236 megawatts, commonly known as Cool Water Unit 3 and Cool Water Unit 4, to be located in San Bernardino County; six combined cycle~~

~~powerplants, each having a generating capacity of 236 megawatts, commonly known as Huntington Beach Unit 6, Huntington Beach Unit 7, Huntington Beach Unit 8, Huntington Beach Unit 9, Huntington Beach Unit 10 and Huntington Beach Unit 11, to be located in the City of Huntington Beach; three combined-cycle powerplants, each with a generating capacity of 414 megawatts, commonly known as Lucerne Valley Unit 1, Lucerne Valley Unit 2 and Lucerne Valley Unit 3, to be located in San Bernardino County; and two nuclear powerplants, each having a generating capacity of 760 megawatts, commonly known as the Desert Nuclear Project.~~

~~(c) As described in the report of the San Diego Gas and Electric Company submitted to the Public Utilities Commission on March 22, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, two gas turbine powerplants, each having a generating capacity of 64 megawatts, commonly known as South Bay Gas Turbine Unit 3 and South Bay Gas Turbine Unit 4, to be located in San Diego County; a fossil-fueled powerplant having a generating capacity of 292 megawatts, commonly known as Encina Unit 5, to be located in San Diego County; a combined-cycle powerplant having a generating capacity of 404 megawatts, planned for operation in 1979, to be located in San Diego County; and a nuclear powerplant having a generating capacity of 1,200 megawatts, commonly known as the Desert Nuclear Project, to be located in Riverside County.~~

~~(d) As described in the report of the Pacific Gas and Electric Company to the Public Utilities Commission submitted March 1, 1974, in response to Sections 2 and 3 of the General Order 131 of the Public Utilities Commission, a gas turbine powerplant having a generating capacity of 150 megawatts, commonly known as SMUD Gas Turbines, to be located in Sacramento County; and a nuclear powerplant having a generating capacity of 1,100 megawatts, commonly known as Rancho Seco Unit 2, to be located in Sacramento County.~~

~~(e) As described in the report of the Department of Water and Power of the City of Los Angeles submitted to the Public Utilities Commission on March 18, 1974, in response to Sections 2 and 3 of General Order 131 of the Public Utilities Commission, a nuclear powerplant having a generating capacity of 1,300 megawatts, commonly known as the San Joaquin Nuclear Project, to be located in Kern County near the City of Wasco.~~

~~(f) Four geothermal powerplants, each having a generating capacity of 55 megawatts, presently planned to be constructed by the City of Burbank and to be located in Imperial County.~~

~~(g) Four geothermal powerplants, each having a generating capacity of 55 megawatts, presently planned to be constructed by the City of Burbank and located in Inyo County.~~

~~(h) Two geothermal powerplants, each having a generating capacity of 110 megawatts, presently planned to be constructed by the Northern California Power Agency and located in Sonoma County.~~

~~Nothing in this section shall be construed to indicate that the sites and facilities specified in this section are approved by the Legislature. The inclusion of any site and related~~

~~facility in this section means that the provisions of this chapter do not apply to any such site or facility, to the extent that Section 25501.7 or 25502.3 is made applicable, and that such site and related facility is subject to any and all other provisions of law.~~

§ 25501.7. Facility or site; proposed construction; waiver of exclusion; application of chapter

Any person proposing to construct a facility or a site to which Section 25501 applies may waive the exclusion of such site and related facility from the provisions of this chapter by submitting to the commission a notice to that effect on or after July 1, 1976, and any and all of the provisions of this chapter shall apply to the construction of such facility.

§ 25502. Thermal powerplant or transmission line; proposed construction; notice of intention

Each person proposing to construct a thermal powerplant or electric transmission line on a site shall submit to the commission a notice of intention to file an application for the certification of the site and related facility or facilities. The notice shall be an attempt primarily to determine the suitability of the proposed sites to accommodate the facilities and to determine the general conformity of the proposed sites and related facilities with standards of the commission and assessments of need adopted pursuant to Sections 25305 to 25308, inclusive. The notice shall be in the form prescribed by the commission and shall be supported by such information as the commission may require.

Any site and related facility once found to be acceptable pursuant to Section 25516 is, and shall continue to be, eligible for consideration in an application for certification without further proceedings required for a notice under this chapter.

§ 25502.3. Facility; proposed construction; waiver of exclusion; application of chapter

Except as provided in Section 25501.7, any person proposing to construct a facility excluded from the provisions of this chapter may waive such exclusion by submitting to the commission a notice of intention to file an application for certification, and any and all of the provisions of this chapter shall apply to the construction of such facility.

~~**§ 25502.5. Alternative sites and related facilities; exemption of certain existing sites; notice**~~

~~The notice is not required to contain three alternative sites and related facilities for additional generating facilities on land owned by an electric utility before the effective date of this division at existing sites east of the town of Clay Station in Sacramento County, in the location commonly known as Diablo Canyon in San Luis Obispo County, and near the City of Pittsburg in Contra Costa County.~~

§ 25503. Alternative sites and related facilities; notice; contents

Each notice of intention to file an application shall contain at least three alternative sites and related facilities, at least one of which shall not be located in whole or in part in the coastal zone. In addition, the alternative sites and related electrical facilities may

Exhibit C

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Opinion No. SO 75-47—October 31, 1975

SUBJECT: CONSTRUCTION OF NUCLEAR POWER PLANT—While there is no specific time limit within which PG&E must commence actual construction of a nuclear power plant in Stanislaus County, PG&E must diligently pursue its plans to do so within three years of effective date of the Warren-Alquist State Energy Resources Conservation and Development Act (Energy Act), or it could, under appropriate circumstances, be deemed to have impliedly waived exemption as provided in Public Resources Code section 25501(a) through inaction or unreasonable delay. Site testing, including erection of weather tower and excavation of deep trenches, does not constitute construction within meaning of section 25105. Since the Energy Act provides that the state energy commission evaluate, regulate, and approve thermal power plant sites and facilities, a county government would not have power to regulate or prohibit construction of such plant if the plant should fall under jurisdiction of the state commission. But the commission must solicit extensive comments and recommendations from county government concerning power plant site and facility proposals. Neither the Williamson Act (regarding preservation of agricultural, recreational, and open space land) nor the Energy Act intends that existence of an open space preservation contract should necessarily prohibit construction of nuclear power plant on land under contract, where there is no other land on which it is reasonably feasible to locate proposed plant.

Requested by: ASSEMBLYMAN, 27th DISTRICT

Opinion by: EVELLE J. YOUNGER, Attorney General
Robert B. Keeler, Deputy

The Honorable John E. Thurman, Assemblyman, Twenty-Seventh District, has requested the opinion of this office on the following questions:

In view of the inclusion of a nuclear power plant in Stanislaus County as "Nuclear A" in the Warren-Alquist State Energy Resources Conservation Act, Section 25501.5(a) and in view of provisions of the act in Public Resources Code[1] sections 25501.5(h), 25500, 25500.5, 25501, 25501.3, 25501.7, 25502.3 and the definitions contained in section 25105:

(1) By what date must PG&E commence construction of Nuclear A to qualify as an exception to the act? Is there any time limit at all?

(2) If there is a time limit, what constitutes construction? Does site testing, including erection of a weather tower and deep trenches, constitute construction within the meaning of the act?

(3) If Nuclear A does fall under provisions of the act, rather than the exceptions, what powers does a county government have to regulate, comment upon or prohibit construction of the nuclear plant?

[1] Unless otherwise indicated, all statutory references hereinafter will be to the Public Resources Code.

PG&E could reasonably rely in proceeding with the construction of Nuclear A so that the Legislature would thereafter be estopped from changing the Public Utilities Code or any other present law as it applies to the facility and imposing additional requirements on its approval, or entirely precluding its construction.

If the inclusion of Nuclear A in section 25501.5 is not an approval of the project, and if the Legislature can therefore change the present law to impose additional requirements on its approval or to entirely preclude its construction, then it must be concluded that the Legislature can at any time remove the exemption granted Nuclear A under section 25501.5 and submit it to the requirements of the Energy Act, even if PG&E acts in so-called "reliance" on the exemption by proceeding in the normal course of business with plans and preparations for the facility.[5] If the Legislature cannot be estopped from imposing additional requirements on the approval of Nuclear A under present law, it cannot be estopped from accomplishing the same thing by revoking the section 25501.5 exemption.

(3) *Waiver*

Having concluded that the section 25501.5 exemption does not constitute a basis for asserting any vested or estoppel rights against the Legislature's revoking the exclusion, the 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 on or after July 1, 1976, section 25501.7, or one can submit to the Commission a notice of intent to file an application for certification of a site and related facility. § 25502.3 In either case, the exemption is waived "and any and all of the provisions of this chapter shall apply to the construction of such facility." §§ 25501.7 and 25502.3.

Secondly, a waiver may occur as a result of conduct which is so inconsistent with a plan to commence construction within three years of the effective date of the Act as to induce a reasonable belief that any such plan has been relinquished.[6]

[5] It should be pointed out that whether Nuclear A were exempted from the Energy Act or not, PG&E would in all likelihood proceed in the ordinary course of business with plans and preparations for the facility, assuming the company's decision to build the plant is still operable. Such plans and preparations are necessary no matter which governmental body is to consider the project, whether the Public Utilities Commission, the Energy Commission, or any other body. It is therefore highly unlikely that PG&E's proceeding with such plans could be said to be "in reliance on" the section 25501.5 exemption.

[6] We are of the opinion that the judicial maxim *expressio unius est exclusio alterius*—the express mention of one thing implies the exclusion of others—would not apply in this situation. This maxim, like all others, must give way where it would operate contrary to legislative intent or purpose. *Irwin* v. *City of Manhattan Beach*, 65 Cal. 2d 13, 21 (1966); *People* v. *Hacker Emporium, Inc.*, 15 Cal. App. 3d 474, 477 (1971). As we conclude below, if PG&E's conduct with respect to Nuclear A proves so inconsistent with the intent to commence construction within the three-year period that one could reasonably conclude that such intent had been abandoned, the facility would be placed outside the legislative policy upon which section 25501 subdivision (b) is based—protecting the public from the potential disruption of a *de facto* three-year moratorium on the construction of new thermal power plant facilities—and within the broader legislative intent or policy of subjecting all such facilities for which construction is planned to commence after the three-year period to

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See, e.g., Crest Catering Co. v. *Superior Court,* 62 Cal. 2d 274, 278 (1965); *Dalzell* v. *Northwestern Mutual Ins. Co.,* 218 Cal. App. 2d 96, 101-102 (1963).

The inclusion of Nuclear A in section 25501.5 means that the Legislature found and declared that Nuclear A met the requirements of section 25501 subdivision (b); that is, that as of the effective date of the Act, construction was planned to commence on the facility within three years of that date and that the provisions of the Act therefore would not apply to it. Since the process of obtaining Energy Commission approval of a particular thermal power plant can take up to three years or more under the various time periods specified in the Act (§§ 25509, 25510, 25513, 25514, 25515, 25516, 25519 subdivision (a), 25522), it is reasonable to assume that one of the basic purposes of the three-year exemption period of section 25501 subdivision (b) is to assure that the public's need for additional electrical energy during the first three years of the Act's existence will continue to be met by allowing those new thermal power plans to be commenced during that period for which a public need has been shown as suggested in section 25501.3 subdivision (a). If it were not for the three-year exemption period created by section 25501 subdivision (b), no new thermal power plants not actually approved and commenced before the Energy Act could be commenced between the effective date of the Act and the date when the first Energy Commission certificate is granted (*see* §§ 25500, 25517)—up to three years from the Act's effective date. Thus it appears that the Legislature created the three-year exemption period of section 25501 subdivision (b) to protect the public from the potential disruption of such a three-year moratorium on new power plant construction.[8]

On the other hand, the Legislature created the Energy Commission and set up the elaborate power plant approval process of the Energy Act in response to the "present rapid rate of growth in demand for electrical energy." § 25002. In an effort to prevent the "serious depletion or irreversible commitment of energy, land and water resources, and potential threats to the state's environmental quality," *id.,*

the high degree of scrutiny which the Act requires the Energy Commission to exercise. *See* text accompanying footnote 9, *infra.* To mechanically apply the above maxim and conclude that the enumeration of the express waivers of sections 25501.7 and 25502.3 excludes the application of an implied waiver as discussed herein, would be directly contrary to that legislative policy.

[7] Note that the exemption provided by section 25501 subdivision (b) applies to a facility for which construction is "planned to commence" within the three-year period, not for which construction "shall" or "will" commence within that period. As originally introduced in the Legislature, the section read "for which construction is planned to commence and shall have commenced" within the three-year period; but "shall have commenced" was later deleted, evidencing a legislative intent not to insist on the actual commencement of construction within that period. *See* Assembly Bill 1575, 1973-74 Regular Session, section 25501 subdivision (b), as amended April 4, 1974. *See also Rich* v. *State Board of Optometry,* 235 Cal. App. 2d 591, 607 (1965): "The rejection by the Legislature of a specific provision contained in an act as originally introduced is most persuasive to the conclusion that the act should not be construed to include the omitted provision."

[8] A secondary reason for creating the exemption might be to allow the Energy Commission sufficient time to establish its certification procedures before requiring it to begin processing applications. It could not be said, however, that the three-year exemption period had been created to protect the rights of the utility companies in their planned facilities. We have already established that the companies have no vested or estoppel rights against the Legislature's revoking the exemption if it so chooses.

the Legislature declared it to be the policy of this state "to establish and consolidate the state's responsibility for energy resources; . . . and for regulating electrical, generating and related transmission facilities." § 25006. In other words, it is the established policy of this state to submit the future construction of electric generating facilities to the high degree of scrutiny required by the Energy Act in order to more carefully balance our increasing demand for electrical energy with the increasing need to slow the depletion of natural resources caused by that demand.

The three-year exemption period created by section 25501 subdivision (b) must be interpreted in light of these two policies—to protect the public from the disruptive effects of a three-year construction moratorium on new electric generating facilities, and to submit the construction of such facilities to the higher degree of scrutiny and resulting public resources protection required by the Energy Act. In striking a balance between these two policies, the Legislature has declared that facilities "for which construction is planned to commence within three years of the effective date" of the Energy Act do not need to be subjected to Energy Commission scrutiny, but those for which construction is planned to commence after that period do. Therefore, as long as PG&E diligently pursues its plans in the normal course of business to commence construction of Nuclear A within three years of the effective date of the Energy Act, its conduct could be said to be consistent with the policy of the Legislature as expressed in section 25501 subdivision (b), and the exemption would remain in effect.

If, however, the conduct of PG&E with respect to Nuclear A should prove to be so inconsistent with the intent to commence construction within the three-year period as to induce a reasonable belief that the company could no longer have that intent because of unreasonable delay (*see Crest Catering Co. v. Superior Court, supra*, 62 Cal. 2d 274, 278; *Dalzell* v. *Northwestern Mutual Ins. Co., supra*, 218 Cal. App. 2d 96, 101-02), one could conclude that PG&E had abandoned or waived the exemption conferred by section 25501.5. This would be so not merely because rights conferred by statute can be waived by inaction or delay (*see Chesney* v. *Byram*, 15 Cal. 2d 460, 469 (1940); *People* v. *Sierra*, 117 Cal. App. 2d 649, 652 (1953); *McHugh* v. *County of Santa Cruz*, 33 Cal. App. 3d 533, 541-42 (1973), but more importantly because such a delay would place Nuclear A outside and in conflict with the policy consideration on which section 25501 subdivision (b) is based—to protect the public against a three-year new power plant construction moratorium—and within the larger policy considerations of subjecting all thermal power plant facilities for which construction is planned to commence after the three-year period to the scrutiny of the Energy Commission.[9]

[9] *Cf. People ex rel. S.F. Bay etc. Com.* v. *Town of Emeryville*, 69 Cal. 2d 533 (1968), where the Supreme Court held that the Town of Emeryville had abandoned whatever exemption it may have had from the McAteer-Petris Act creating the San Francisco Bay Conservation and Development Commission, because the town had been forced to substantially alter the development project it had planned to construct as of the effective date of the Act. One reason for the Court's holding was that the exemption provision should be strictly construed so as to further the "objective sought to be achieved" by the Act: the protection of San Francisco Bay from the destructive effects of further indiscriminate shoreline development projects. *See* 69 Cal. 2d at 543-49.

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We conclude, therefore, that although there is no specific time limit within which PG&E must commence actual construction of Nuclear A, it must diligently pursue its plans to commence construction within the three-year exemption period. As long as the Legislature does not revoke the exemption provided by section 25501.5, as long as PG&E does not specifically waive the exemption under section 25501.7 or 25502.3, and as long as PG&E diligently, and in the ordinary course of business, pursues its plans to commence construction within the three-year period, the exemption will remain effective. But if PG&E fails to diligently pursue the exemption through inaction or unreasonable delay, it can be deemed to have impliedly waived the exemption, and Nuclear A will become subject to the scrutiny of the Energy Commission.[10]

III

IF THERE IS A TIME LIMIT, WHAT CONSTITUTES CONSTRUCTION? DOES SITE TESTING, INCLUDING ERECTION OF WEATHER TOWER AND DEEP TRENCHES, CONSTITUTE CONSTRUCTION WITHIN THE MEANING OF THE ACT?

Given our conclusion that there is no specific time limit within which actual construction must commence on Nuclear A, it is unnecessary to answer this question in any detail. However, it is appropriate to observe here that the term "construction" is specifically defined in section 25105 of the Energy Act:

> "'Construction' means onsite work to install permanent equipment or structure for any facility. 'Construction' does not include any of the following:
>
> "(a) The installation of environmental monitoring equipment.
>
> "(b) A soil or geological investigation.
>
> "(c) A topographical survey.
>
> "(d) Any other study or investigation to determine the environmental acceptability or feasibility of the use of the site for any particular facility.
>
> "(e) Any work to provide access to a site for any of the purposes specified in subdivision (a), (b), (c), or (d)."

Assuming that the erection of the weather tower is to monitor the local environment and the deep trenches are to investigate the soil or geology of the site—both of

[10] It should be noted that the above analysis would also apply to a proposed facility which met all the criteria of section 25501.5 as of the effective date of the Energy Act. The second criterion of that section is that the need to commence construction within three years of the effective date of the Act is reasonably related to the planned operating date of the facility. If the plan to commence construction within three years is substantially changed through inaction or unreasonable delay, the planned operating date of the facility must also necessarily be delayed—otherwise there would not be the required "reasonable relationship" between the planned construction and operating dates. Consequently, such inaction or unreasonable delay would place the proposed facility outside the policy considerations of section 25501.3 subdivision (b)—and so outside the policy of section 25501 subdivision (b)—just as it would with respect to section 25501.5 subdivision (a).

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION
For the *RIDGECREST SOLAR POWER PROJECT*

Docket No. 09-AFC-9

PROOF OF SERVICE
(Revised 7/5/2011)

APPLICANT

*Solar Trust of America
Billy Owens
Director of Project Development
1111 Broadway, 5th Floor
Oakland, CA 94607
owens@solarmillennium.com

*Solar Trust of America
Alice Harron
Senior Director of
Project Development
1111 Broadway, 5th Floor
Oakland, CA 94607
harron@solarmillennium.com

AECOM
Elizabeth Copley, Project Manager
2101 Webster Street, Suite 1900
Oakland, CA 94612
elizabeth.copley@aecom.com

Galati/Blek, LLP
Scott Galati
Marie Mills
455 Capitol Mall, Suite 350
Sacramento, CA 95814
sgalati@gb-llp.com
mmills@gb-llp.com

Paul, Hastings, Janofsky & Walker, LLP
Peter Weiner, Matthew Sanders
55 2nd Street, Suite 2400-3441
San Francisco, CA 94105
peterweiner@paulhastings.com
matthewsanders@paulhastings.com

*Solar Trust of America
Jim Migliore, Associate
Environmental Management
1111 Broadway, 5th Floor
Oakland, CA 94607
E-mail preferred
migliore@solarmillennium.com

INTERVENORS

Desert Tortoise Council
Sidney Silliman
1225 Adriana Way
Upland, CA 91784
gssilliman@csupomona.edu

California Unions for Reliable Energy (CURE)
Tanya A. Gulesserian
Elizabeth Klebaner
Marc D. Joseph
Adams, Broadwell, Joseph
& Cardozo
601 Gateway Boulevard,
Suite 1000
South San Francisco, CA 94080
tgulesserian@adamsbroadwell.com
eklebaner@adamsbroadwell.com

Basin and Range Watch
Laura Cunningham
Kevin Emmerich
P.O. Box 70
Beatty, NV 89003
bluerockiguana@hughes.net

Western Watersheds Project
Michael J. Connor, Ph.D.,
California Director
P.O. Box 2364
Reseda, CA 91337-2364
mjconnor@westernwatersheds.org

Kerncrest Audubon Society
Terri Middlemiss, Dan Burnett
P.O. Box 984
Ridgecrest, CA 93556
catbird4@earthlink.net
imdanburnett@verizon.net

*Center for Bioligical Diversity
Ileene Anderson
Public Lands Desert Director
PMB 447
8033 Sunset Boulevard
Los Angeles, CA 90046
E-mail preferred
ianderson@biologicaldiversity.org

*Center for Bioligical Diversity
Lisa Belenky
Senior Attorney
351 California Street, Suite 600
San Francisco, CA 94104-2404
E-mail preferred
lbelenky@biologicaldiversity.org

INTERESTED AGENCIES

California ISO
E-mail Preferred
e-recipient@caiso.com

U.S. Department of the Interior,
Bureau of Land Management
Janet Eubanks, Project Manager,
California Desert District
22835 Calle San Juan de los Lagos
Moreno Valley, California 92553
janet_Eubanks@ca.blm.gov

*indicates change

INTERESTED AGENCIES (Cont.)

Naval Air Warfare Center Weapons Division
Michael Owens, Energy Coordinator
1 Administration Circle
China Lake, CA 93555-6100
E-mail preferred
michael.t.owens@navy.mil

Naval Air Warfare Center Weapons Division
Michael Owens, Energy Coordinator
575 "I" Avenue, Suite 1
Point Mugu, CA 93042-5049
E-mail preferred
michael.t.owens@navy.mil

Naval Air Weapons Station, China Lake
CAPT Jeffrey Dodson, Commanding Officer
1 Administration Circle, Stop 1003
China Lake, CA 93555-6100
E-mail preferred
jeffrey.dodson@navy.mil

*Naval Air Weapons Station, China Lake
Tim Fox
Community Plans & Liaison Officer
429 E Bowen Rd, Stop 4003
China Lake, CA 93555-6100
E-mail preferred
timothy.h.fox@navy.mil

ENERGY COMMISSION

JAMES D. BOYD
Vice Chair and Presiding Member
jboyd@energy.state.ca.us

Kourtney Vaccaro
Hearing Officer
kvaccaro@energy.state.ca.us

Tim Olson
Adviser to Commissioner Boyd
tolson@energy.state.ca.us

Eric Solorio
Project Manager
esolorio@energy.state.ca.us

Jared Babula
Staff Counsel
jbabula@energy.state.ca.us

Jennifer Jennings
Public Adviser
E-mail preferred
Pao@energy.state.ca.us

*indicates change

DECLARATION OF SERVICE

I, Chester Hong, declare that on July 5, 2011, I served and filed copies of the California Energy Commission "Staff's Reply Brief", dated July 5, 2011. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at: [http://www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest].

The document has been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(*Check all that Apply*)

FOR SERVICE TO ALL OTHER PARTIES:

__X__ sent electronically to all email addresses on the Proof of Service list;

____ by personal delivery;

__X__ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses NOT marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

__X__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 09-AFC-9
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

/s/
CHESTER HONG