

State of California
Energy Resources Conservation and Development Commission

In the Matter of:)	Docket No. 08-AFC-2
)	
Application for Certification)	STAFF'S OBJECTION TO CURE'S
for the BEACON Energy Project)	MOTION TO COMPEL RESPONSES
)	TO DATA REQUESTS PROPOUNDED
)	ON THE APPLICANT

On March 16, 2009, California Unions for Reliable Energy, "CURE", filed a motion to compel the applicant to respond to 144 Data Requests. The Committee directed the parties to file a response to CURE's motion by 3:00pm on March 25, 2009. This is staff's response.

I.
STAFF OBJECTS TO CURE'S REQUEST TO COMPEL
PRODUCTION OF INFORMATION

According to the Energy Commission's regulations governing this proceeding, all requests for information must be submitted no later than 180 days from the date the Energy Commission determines an application for certification (AFC) is complete, "unless the committee allows requests for information at a later date for good cause shown." (Cal. Code Regs., tit 20, § 1716 subd. (e).) Staff objects to CURE's motion to compel applicant to respond to CURE's data requests on the grounds that: 1) CURE's data requests were sent 85 days past the regulatory deadline, 2) allowing CURE's late requests would be prejudicial to staff and the applicant, 3) CURE has had ample opportunity to submit timely data requests, 4) the requested information is not necessary to evaluate the project, and 5) CURE has not shown good cause to justify its late data requests. A brief summary of relevant dates is as follows:

1. May 7, 2008: The AFC for the BEACON project is found to be data adequate.
2. May 22, 2008: CURE is granted intervener status.
3. June 11, 2008: Informational hearing and site visit. (20 days since CURE intervened)
4. June 16, 2008: Staff files Data Requests. (25 days since CURE intervened)
5. July 22, 2008: Data Response Workshop. (61 days since CURE intervened)
6. August 25, 2008: Biology Issue Workshop. (95 days since CURE intervened)
7. September 30, 2008: CURE submits status report. (131 days since CURE intervened)
8. November 3, 2008: Discovery closes. (180 days since acceptance and 134 days since CURE intervened)
9. November 6, 2008: Data Response Workshop. (137 days since CURE intervened)
10. November 12, 2008: Staff confirms discovery period has closed. (143 days)
11. January 26, 2009: Cure files data requests. (218 days since CURE intervened and 233 days since AFC was determined to be complete)

Proof of Service (Revised 2/1/09) filed with original.
Mailed from Sacramento on 3-25-09.

Given that CURE's data requests are 85 days late, CURE must provide good cause in order for the Committee to grant CURE's motion. (Cal. Code Regs., tit. 20, § 1716 subd. (e).) CURE has put forth no good reason for why the Committee should grant CURE's motion and compel the applicant to respond to CURE's data requests. The fact is that CURE has made no effort, whatsoever, to explain why it waited so long into the process before submitting these data requests. Knowing that the deadline had past, CURE still took 10 weeks to propound the set of data requests. Staff also notes that as late as September 30, 2008, in its status report, CURE provided no information that it intended to submit data requests or had issues with the information that had been provided by the applicant. This is despite reviewing the applicant's responses to staff's data requests and participating in the August 25, 2008 biology issues workshop.

II. CURE, AS AN EXPERIENCED INTERVENER, HAS THE RESPONSIBILITY OF OBSERVING DEADLINES

As stated by section 1207 of the Commission's regulations, "Any person whose petition [for intervention] is granted by the presiding member shall have all the rights *and duties* of a party under these regulations." (Cal. Code Regs., tit. 20, § 1207 subd. (c); emphasis added.) In addition, the order granting CURE's intervention explicitly states, "Petitioner may exercise the rights and shall fulfill the obligations of a party as set forth in section 1712 of the Commission's regulations." The right to intervene comes with corresponding duties such as complying with the requirements of filing and service of documents. (Cal. Code Regs., tit. 20, § 1712 subd. (c)) CURE has been intervening in the Energy Commission's AFC proceedings for years and is familiar with the Commission's siting process. Indeed, footnote 37 of CURE's own motion states, "CURE has been granted intervention in most other siting cases brought before the Commission since the enactment of AB 1890." (AB 1890 was enacted on September 23, 1996.) In the same footnote, CURE also references its intervention in the High Desert Power Project in December of 1997. Therefore, CURE is an experienced intervener, represented by counsel and fully aware of the Commission's procedures and deadlines. Despite CURE's experience with the Commission's process and the schedule of this proceeding, it has chosen to file late data requests that will cause unnecessary delay without any explanation for missing the deadline.

CURE spends a portion of its motion discussing how its members are directly affected by the project and how CURE is concerned about the environment. Its claims are relevant to why CURE was given intervener status, but irrelevant to the issue at hand, which is whether CURE should be allowed to file late data requests and the applicant required to respond. CURE's motion provides no explanation for missing the deadline set by regulation and, thus, provides insufficient reason for compelling the applicant to respond to 144 data requests that are 85 days--more than two months--late. CURE, as an intervener, should be held to the deadline for data requests in this proceeding.

III.
**RESPONDING TO THE DATA REQUESTS WOULD
BE PREJUDICIAL TO STAFF AND THE APPLICANT**

CURE claims that responding to the 144 data requests would “in no way harm Beacon or otherwise prejudice any party to this proceeding.” This is not the case. First, Beacon would have to take the time to review each question, develop a response, and provide it. As discussed below, most of these questions have been answered through staff’s and agencies’ data requests. Therefore, Beacon would be wasting time and money resubmitting information it already has provided or is already in the record. Moreover, staff would also have to take additional time to review all the submitted responses to determine what, if any, new information they may contain that would change staff’s analysis.

IV.
CURE HAS HAD AMPLE OPPORTUNITY TO FILE DATA REQUESTS

CURE was granted intervention on May 22, 2008. But it allowed 218 days to pass before submitting its first set of data requests. During those 218 days, it attended three workshops, one on July 22, 2008, on data requests, another on August 25, 2008, on biological issues, and a second data response workshop on November 6, 2008. In CURE’s own status report, dated September 30, 2008, (http://www.energy.ca.gov/sitingcases/beacon/documents/other/2008-09-30_CURE_STATUS_REPORT_2_TN-48262.pdf) CURE notes that it had participated at the August 25, 2008 workshop. This workshop was held at USFWS office for the purpose of discussing potential project-related impacts to desert tortoise, Mohave ground squirrel, and other species of special concern. (http://www.energy.ca.gov/sitingcases/beacon/notices/2008-08-25_issue_resolution_workshop.html)

This workshop would have been an excellent opportunity for CURE to engage in discussions with DFG, USFWS, and staff on biological issues. The majority of CURE’s late data requests (119 out of 144) are in the area of biology. Yet, CURE, although it attended the two workshops, did not express concerns or raise any questions and, if it had questions, chose not to file data requests.

In addition to the workshops, a number of documents have been posted on the Commission website which could have been used by CURE as points of discussion and data requests long before discovery closed. Such documents include comments on the project by CDFG, Kern County, RWQCB as well as reports and memos on the streambed alteration, raven monitoring plan and desert tortoise mitigation (<http://www.energy.ca.gov/sitingcases/beacon/documents/index.html>) CURE has provided no reason why, despite a robust record of studies, workshops and discussion, it waited 218 days to propound its first set of data requests.

V.
**THE REQUESTED INFORMATION IS NOT
NECESSARY TO EVALUATE THE PROJECT**

As the applicant points out in its objections, the California Environmental Quality Act (Pub. Resources Code § 21000 et. seq.) does not require an agency to have every potential piece of available data. (Cal. Code Regs., tit 14, § 15003, subds. (i), (j).) CEQA only requires enough data to provide a reasonable evaluation of a project and its impacts. (Cal. Code Regs., tit 14 § 15151) The project is now nearing a year old, staff has timely filed 127 data requests, there have been multiple workshops and extensive coordination between staff and other agencies, both staff and the applicant have further evaluated cooling systems, DFG and USFWS have provided extensive comments on biological issues, the Regional Water Quality Control Board has provided comments on water issues, and the applicant performed an additional cultural resources study. At some point the information gathering process must end so final assessments can be drafted.

Staff has reviewed CURE's biology data requests and is of the opinion that additional responses would not change staff's analysis or proposed conditions of certification. For example, CURE claims that their data requests 21 and 22, relating to assessing and mitigating the project's impacts on the state and federally listed desert tortoise, are needed to evaluate the tortoise survey effort and to determine if the applicants adhered to established U.S. Fish and Wildlife Service protocol. Staff has coordinated closely with USFWS and CDFG and has concluded that the information supplied by the applicant regarding desert tortoise survey results are sufficient to satisfy USFWS protocol requirements and to develop an impact assessment and mitigation measures acceptable to these agencies. Staff is aware that an element of uncertainty is unavoidable in interpreting survey results for special-status species. Staff's conditions of certification therefore reflect that uncertainty and are conservative, assuming that a desert tortoise or Mohave ground squirrel might be present during construction despite negative survey results. Additional survey information would not improve the avoidance, minimization or mitigation measures developed by staff for this project because they are already based on the assumption that this information may be imperfect.

If CURE believes the studies performed by the applicant are flawed or that important information is lacking, CURE can acquire such information on its own or present a case at the evidentiary hearing that the proposed mitigation is improper or that essential data is missing. CURE should not confuse the discovery phase with the evidentiary phase.

CURE states in its Date Request, p.9, "Data obtained from these surveys [burrowing owl] led the applicant to assume that two owls may be directly impacted by the Project. This assumption cannot be deemed accurate until additional information on survey techniques is provided." If CURE believes the assumptions made by the applicant's biologist are improper, CURE can make a case that the assumptions are flawed leading to improper mitigation at the evidentiary hearing. Such data requests at this point do not assist in evaluating the project in a timely fashion. Moreover, CURE provides no reason why it took five months after the August 25, biology workshop to have a concern about the burrowing owl studies.

As for other questions asked by CURE, numbers 2, 85, and 86 request that the applicant accept a certain condition of certification. Discovery, especially at this late date, is not the appropriate venue to argue for additional conditions of certification. CURE is free to put on a case at the evidentiary hearing as to why certain conditions should be imposed on the project. Indeed, the party proposing one or more conditions of certification or other modifications to the project to protect environmental quality or public health and safety “shall have the burden of making a reasonable showing to support the need for and feasibility of the condition, modification, or provision.” (Cal. Code Regs, tit. 20, § 1748 subd. (e).) CURE should not be allowed to use data requests as a way of trying to make its case for additional conditions of certification, especially since the deadline for data requests passed 85 days ago. The Committee should not grant CURE’s motion to compel given that CURE attended workshops where it had ample opportunity to discuss issues and ask questions, chose not to comment on any study or submission though readily available, and waited 218 days to submit its first data requests with no explanation for the delay.

VI.
**THE FACT THAT THE APPLICANT HAS PROVIDED DATA
AND INFORMATION AFTER DISCOVERY CLOSED IS NOT GOOD CAUSE**

CURE argues that data gathering is still going on and that the applicant has provided information to staff past the November 3, 2008 discovery deadline. Therefore, according to CURE, it should be allowed to propound its own data requests. Once again, CURE fails to provide good cause as to why it should be able to submit 144 new questions 218 days after it intervened and 233 days after the AFC was accepted as complete. Information exchange between staff and the applicant may have continued passed the November 2008 discovery deadline, but the origin of the requests occurred during the discovery period or there were clarifying questions from the November 2008 staff workshop on data responses. There is a significant difference between the applicant providing additional data based on a timely issued data request and the applicant having to respond to 144 completely new requests. There is also significant difference in how staff conducted discovery in a timely fashion and how CURE chose not to do anything until it submitted its first set of data requests in January of 2009.

Staff’s status report number three issued November 21, 2008, clearly indicates that the applicant would be providing additional information based on requests originating prior to the November 3, 2008 discovery deadline or from the November 6, 2008 data response workshop.

Staff continues to work towards resolving the outstanding issues identified in the June 2, 2008, Issues Identification Report. On November 6, 2008, staff held a Data Response and Issues Resolution Workshop in California City. In response to workshop discussions and specific requests by staff, the applicant agreed to provide staff with additional information in the areas of Water and Soils, Biology, and Cultural Resources. (http://www.energy.ca.gov/sitingcases/beacon/documents/2008-11-21_Staff_Status_Report_03_TN-49079.PDF)

The fact that the applicant is providing additional or supplemental information is not good cause for CURE to issue its first set of 144 data requests 85 days after the discovery deadline. CURE

has provided no evidence that it requested information from the applicant at one or more workshops and that the applicant failed to respond, thus leading to data requests.

VII. CONCLUSION

For the reasons discussed above: 1) CURE's data requests were submitted late, 2) additional requests would be prejudicial to staff and the applicant, 3) CURE had ample opportunity to submit data requests in timely fashion, 4) the requested information is not necessary to evaluate the project, and 5) CURE has not provided the required good cause, staff respectfully requests the Committee to deny CURE's motion.

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Respectfully submitted,



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