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BY MAIL AND BY FACSIMILE AT 916/654-4493 (5 pages)

February 4, 2000

California Energy Commission
1516 Ninth Street, MS-12
Sacramento, CA 95814-5512

Re: Delta Energy Center, 98-AFC-3

Dear Commissioners:

My office has been retained to represent **CA**lifornians for **R**enewable **E**nergy (**CARE**), a so called "intervenor" in the captioned matter previously referred to by the acronym "CRE," as well as others who are not **CARE** members but have legal standing to participate in and litigate regarding your proceedings. Our role is to focus on the institution of legal proceedings and other remedies for the violation of laws and regulations that include CEQA, the Warren-Alquist Act, and the federal and state constitutions.

Though far from complete, our initial review, research and analysis shows there is ample if not overwhelming probable cause, in any sense of that concept, to institute such legal proceedings based on issues that include those raised by **CARE**, and other intervenors and members of the public, as well as public agencies and staff, all of which are incorporated by this reference as though fully set forth here. This is particularly true where the failure to institute such action will foreclose ever raising or litigating those and other issues in the future.

The primary purpose of this hastily drafted letter, any defects in which due to the hastiness I sincerely apologize for, is to make a good faith effort to exhaust administrative remedies to the fullest extent possible under the present circumstances. We also hope to prevail upon you to give us additional time to get fully acquainted with the complex issues and circumstances and explore with you and the project applicants the possibilities of resolving the many problems and disputes amicably, without judicial intervention.

SB110 Issues

One of the areas of utmost concern revealed by our brief analysis which will undoubtedly become part of any ensuing litigation, is the effect SB110 has on CEQA compliance. This includes the very real possibility that, in addition to being unconstititutional in various respects (e.g., impermissibly infringing on the constitutional right to effectively petition government), SB110 may have such a great impact on environmental review as to compel decertification of your regulatory program under Public Resources Code §21080.5, thus requiring a full-blown EIR under CEQA.

Even if the regulatory program is not decertified, SB110 may make it impossible to comply with fundamental CEQA requirements that must still be satisfied, including:

1. The strong substantive policy of identifying, analyzing and adopting feasible alternatives and feasible mitigation.
2. The strong substantive and procedural policy of informed and meaningful public participation and adequate input in the democratic decisionmaking process, including the ability to utilize the political process by holding ecologically insensitive decisionmakers accountable come election day.
3. Making adequate findings, including a statement of overriding considerations, duly supported by substantial evidence in the record, for unavoidable potentially significant impacts.

Public Participation Issues Including Constitutional Issues

In addition to SB110, there appear to be very real and very serious problems in the manner in which public participation is handled under the Warren-Alquist statutory scheme and your regulations. One such problem is this. The statutory and regulatory scheme includes provisions purportedly aimed at encouraging and facilitating public participation, but having the directly opposite effect.

As occurred in the present case, and as further discussed below, these provisions serve to lull the public into a false sense of security, thus depriving members of the public of their statutory right to fully and fairly participate in the environmental review as well as the accompanying democratic decisionmaking process. And also depriving them of constitutional rights that include the right to effectively petition government.

Moreover, significant infringement into these statutory and constitutional rights stems from the efforts to draw members of the public as "parties," with duties as well as rights, into extremely complex, time consuming and expensive administrative proceedings, without providing effective technical expert assistance or warning that without such assistance they are highly unlikely to prevail in opposing or significantly improving the

project. Indeed, members of the public are enticed to become "intervenors" by the promise that they will have access to information directly from project applicants. However, that promise, as well as other public participation devices such as the appointment of a Public Advisor, are illusory and even fraudulent in nature. For example, the public need not accept the imposition of affirmative duties, the violation of which could conceivably result in the loss of their right to petition government, merely to gain access to information they should already be entitled to.

Indeed, constitutional issues may go beyond those involving SB110 and the CEQA public participation requirement. They may go to the very foundation of the CEC's power and authority to regulate in the present manner under the present statutory and regulatory interpretation.

Specific CEQA Violations Vis a Vis This Particular Project

In addition to or in conjunction with those raised by **CARE**, other intervenors and other members of the public including public agencies and staff, the project-specific CEQA violations include, without limitation:

1. The failure to identify or adequately address potentially significant environmental impacts.
2. The failure to identify or adequately address potentially feasible alternatives to the project as well as to its location.
3. The failure to identify or adequately address potentially feasible mitigation measures.
4. The failure to conduct an adequate initial study.
5. The failure to provide an adequate project description.
6. The failure to make adequate findings supported by substantial evidence.
7. The failure to prepare an adequate statement of overriding considerations that is based on substantial evidence in the record.
8. The failure to adequately respond to public comments.
9. All issues raised by others as previously incorporated by reference.

Environmental Justice Issues

Our office simply has not had a chance to independently review these complex new issues. Therefore, at the present time we will defer to the comments and objections previously made by **CARE**. Additional information on these important issues will undoubtedly be presented at or before the 02/09/00 hearing.

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Request for a Continuance

Being fully aware of the extensive work that has already been done and the many opportunities **CARE**, other so called intervenors, and other members of the public have had to retain legal counsel, we are still compelled to request a continuance simply because it will take several months to achieve even a basic understanding of the complex materials, events and circumstances, and the legal and technical issues, involved.

Our threshold investigation clearly reveals overwhelming "probable cause" to institute legal proceedings to enforce CEQA, the Warren-Alquist Act and constitutional rights that appear to have been unduly infringed upon. Therefore, we cannot allow your refusal to continue the matter to terminate the process. It will only result in the institution of legal proceedings aimed primarily at keeping the process open until we have had an opportunity to fully present the legal issues.

In terms of there being good cause for a continuance, it must again be mentioned that the seemingly extensive public participation provisions of the Act have proved to be illusory and deceptive, and have served to lull my clients and other members of the public into a false sense of security that convinced them it was appropriate to wait until the last minute to retain legal counsel.

A key factor in this clear violation of the spirit as well as the letter of the law regarding public participation is the appointment of an attorney Advisor specifically to assist members of the public in participating in these extremely complex, time consuming and very expensive administrative proceedings. To perform her functions in a proper manner in terms of the best interests of those members of the public who became at least "quasi-clients," the advisor, whose qualifications, abilities and character are in no manner being challenged or demeaned by these remarks, should have strongly impressed upon **CARE** and others the very basic and absolute truth that without assistance from experts, including legal counsel, throughout and at the earliest possible time in the process, they stood little if --and jeopardized virtually any--realistic chance to successfully oppose or improve the proposed project.

Although it was made clear that the advisor was not acting as counsel for any members of the public and was only providing assistance in regard to procedural matters, such advice was not given. To now refuse to grant a continuance because **CARE** and others may not have had the foresight to arrive at this conclusion on their own, and may have unduly relied on the purported benefits of already having a free legal advisor, appears to be inherently fraudulent in nature. Indeed, it appears to be nothing more than a somewhat sophisticated (and expensive to the taxpayers footing the bill) way of confusing and opting out opposition to powerplant projects and reducing interference from the public.

Submission of Additional Material Prior to 02/09/00 Hearing

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Under the circumstances, even if you deny our request for a continuance, we trust you will allow us to submit additional materials for the record at the 02/09/00 hearing. To facilitate your determination in this regard, please be reminded that under CEQA there are no restrictions on the materials that members of the public may submit into the record, and even if evidence and other information is submitted at the very last minute before the termination of administrative proceedings, and even if the agency receiving the information need not officially respond to it in a final EIR, the agency ignores the information at its own peril.

Respectfully submitted,

GABRIELLI LAW OFFICE

By _____
John C. Gabrielli

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