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California Energy Resources Conservation
and Development Commission
Attn: Docket Unit - Docket No. 09-AFC-9
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Re: *Application of Solar Trust of America for Certification of the Ridgecrest Solar Power Project,* ***Docket No. 09-AFC-09***

Opposition to Hearing Adviser's [Proposed] Commission Decision Affirming that Warren-Alquist Act Section 25502.3 Applies to Photovoltaic Electrical Generating Facilities (Business Meeting, February 13, 2012)

Dear Commissioners:

The California State Association of Counties and the County of Riverside submit the following comments in opposition to the Hearing Adviser's [proposed] decision affirming that the Public Resources Code[1] section 25502.3 applies to photovoltaic ("PV") electrical generating facilities. CSAC and the County join the arguments and conclusions of the Commission's own Staff Counsel in opposing the proposed decision.

The California State Association of Counties is a nonprofit association of the state's 58 counties, many of which will be adversely affected by the proposed decision. The County of Riverside is particularly interested in the proposed decision since it will likely be host to a significant percentage of the state's commercial solar projects. Currently, the County has 118,000 acres or 185 square miles in some state of planned solar development. The Hearing Adviser's proposed decision jeopardizes the County's local land use, zoning, and environmental control over these significant projects.

Applicant's contention that section 25502.3 permits it to voluntarily elect to file an Application for Certification for PV facilities with the Commission is erroneous. The Commission must reject the proposed decision for at least the following five reasons. They are:

[1] All statutory references are to the Public Resources Code, unless otherwise indicated.

- The Commission may not issue an advisory opinion. Yet, the Committee characterized the proposed decision as an advisory opinion and Applicant admitted it seeks an advisory opinion.

- Legislative preemption of local jurisdiction requires a clear expression that the Legislature has completely occupied a particular field. Here, section 25502.3 contains *no* expression that the Commission has any authority over PV facilities, let alone *exclusive* authority over PV facilities. The Hearing Adviser's proposed decision would inappropriately usurp the constitutionally conferred police power of counties over PV facilities.

- The Commission's jurisdiction is definite and specified. The Commission's jurisdiction cannot randomly be conferred at the option of private, commercial applicants. The Hearing Adviser's proposed decision, however, inappropriately permits an applicant to confer jurisdiction on the Commission at the applicant's election.

- Legislative history consistently limits the Commission's authority to thermal facilities with a generating capacity of 50 or more megawatts. The Hearing Adviser's proposed decision contradicts the Warren-Alquist Act's legislative history.

- As a statutory entity created by the Legislature, the Commission may only act within the authority that the Legislature has granted it. The Hearing Adviser's proposed decision would exceed that authority.

1. The Commission May Not Issue Advisory Opinions. The Committee Itself Characterized The Proposed Decision As An Advisory Opinion. The Commission Must Reject Applicant's Motion As Premature.

A. California Law Does Not Empower The Commission To Issue Advisory Opinions. The Authority To Designate Opinions As Precedent Decisions Does Not Dispense With An Applicant's Ripeness Requirement.

Just as a court of law may not issue an advisory opinion, the Commission must not either. (See *Younger v. Superior Ct.* (1978) 21 Cal.3d 102, 119 [145 Cal.Rptr. 674] ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court."]; *Pacific Legal Found. v. Cal. Coastal Comm'n* (1982) 33 Cal.3d 158, 170 [188 Cal.Rptr. 104] ["The ripeness requirement, a branch of the doctrine of justiciability, prevents courts from issuing purely advisory opinions."].)

The Commission acts in a quasi-judicial capacity during adjudicative proceedings siting facilities. (Pub. Resources Code, §§ 25513, 25521; see *Sommerfield v. Helmick* (1997) 57 Cal.App.4th 315, 320 [67 Cal.Rptr.2d 51] ["The exercise of discretion to grant or deny a license, permit or other type of application is a quasi-judicial function."]; 2 Cal.Jur.3d, Administrative Law (3d ed. 2011) Administrative Adjudication, § 367 [administrative agency's adjudicatory powers are "quasi-judicial"].) Quasi-judicial bodies have no more authority to act than a judicial body. (See *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 372 [261 Cal.Rptr. 318] [scope of administrative agency's adjudicatory powers are more narrow than that of a judicial body since the "judicial power . . . remains ultimately in the courts, through review of agency determinations"]; *Bradshaw v. Park* (1994) 29 Cal.App.4th 1267, 1275 [34 Cal.Rptr.2d 872] [administrative agencies may exercise quasi-judicial power, but essential judicial power remains with courts through review of agency determinations].) The Commission, as a quasi-judicial body, therefore has no more authority than a court of law to issue advisory opinions. (See *Pacific Legal Found.*, *supra*, 33 Cal.3d at p. 170 [the rule against advisory opinions "is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion."].)

The authority to designate an opinion as a precedent decision does not confer any greater power on an administrative agency. "An agency may not by precedent decision revise or amend an existing regulation or adopt a rule that has no adequate legislative basis." (Cal. Law Revision Com. com., West's Ann. Gov. Code (1995) foll. § 11425.60.) Rather, Government Code "Section 11425.60 is intended to encourage agencies to articulate what they are doing when they make new law or policy in an adjudicative decision." (*Ibid.*) While the Commission may designate a decision as a precedent decision, this authority does not dispense with an applicant's ripeness requirement. (See Gov. Code, § 11425.60, subd. (b).)

Moreover, a precedent decision may have a powerful impact, just as an agency's regulations do. A precedent decision, therefore, must not be based on a hypothetical controversy.

The proposed decision cites *Yamaha Corp. of America v. State Board of Equalization* as authority for issuing the decision. ((1998) 19 Cal.4th 1 [78 Cal.Rptr.2d 1].) In *Yamaha*, the Board of Equalization determined that Yamaha had to pay taxes on musical instruments it bought and had shipped into California. (*Id.* at p. 5.) Yamaha did not approach the Board of Equalization before buying the instruments and ask the Board whether it would owe taxes if it proceeded with its purchase. Instead, *Yamaha* dealt with an actual, genuine controversy. (*Ibid.*) *Yamaha* did not deal with a hypothetical situation like the Commission does. *Yamaha* does not authorize advisory opinions or the proposed decision.

B. Applicant Seeks An Advisory Opinion. The Commission Must Reject The Proposed Decision As An Advisory Opinion.

Applicant has presented the Commission with no actual, genuine controversy. The Committee recognized that any opinion on Applicant's application would be an advisory opinion. The Committee characterized the proposed decision as "an advisory opinion." The Committee's July 28, 2011 Order stated: "Applicant . . . essentially *seeks an advisory opinion.*" (7/28/11 Order, p. 1 [emphasis added].)

By Applicant's own admission, its project is purely hypothetical. Applicant has not filed a notice of intention to file an Application for Certification with the Commission. Applicant admitted at oral argument:

> [W]e are asking for a legal interpretation *ahead of time*. But our plan, our plan is a 100 percent PV project . . . .

(7/25/11 Transcript, p. 29:16-18 [emphasis added].)

Applicant is merely exploring the possibility of redesigning its facility to use PV technology. At the July 25, 2011 Committee Hearing, Hearing Officer K. Vaccaro commented: "I think the motion papers state that Solar Trust wishes to inform the Committee that it is *exploring redesign* . . . ." (7/25/11 Transcript, p. 28:5-6 [emphasis added].) At the July 25th hearing, those opposing Applicant's motion commented: "And to boot in this case, we don't have a public notice from Solar Trust of America as to the new project. They're *exploring it*, they *are thinking about a redesign.* It's *a hypothetical project. There is no real project here as yet.*" (7/25/11 Transcript, p. 40:11-15 [S. Silliman's comments] [emphasis added].) At the August 24, 2011 Business Meeting before the Commission, Hearing Officer K. Vaccaro again stated: "The applicant for the project has recently informed the assigned siting committee that it is *interested and intending to redesign the project.*" (8/24/11 Transcript, p. 23:15-18 [emphasis added].)

Applicant's motion is not yet ripe for a Commission decision. California law precludes the Commission from offering an advisory opinion. The Commission must reject Applicant's motion as premature and the proposed decision as an advisory opinion.

2. The California Legislature Has Not Limited The Police Power Of Counties Over PV Facilities Through Legislative Preemption. Counties Retain The Ability To Exercise Their Police Power Over PV Facilities.

A. The California Legislature May Limit The Police Power Of Counties Through Legislative Preemption, But Preemption Requires That The Legislature Completely Occupy The Field, Either Expressly Or By Necessary Implication.

The California Constitution recognizes the police power of counties. (Cal. Const., art. XI, § 7.) Article XI, section 7 of the California Constitution provides:

> A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

(*Ibid.*; see also *Candid Enterprises, Inc. v. Grossmont Union High Sch. Dist.* (1985) 39 Cal.3d 878, 885 [218 Cal.Rptr. 303] [cities and counties have plenary power]; *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129 [130 Cal.Rptr. 465] [police power of cities and counties "is as broad as the police power exercisable by the Legislature itself"].)

Land use regulations, including the regulation of PV facilities, are a function of a county's constitutionally conferred police power. (*Big Creek Lumber Co. v. City of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 [45 Cal.Rptr.3d 21] ["We have recognized that a . . . county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state."] [quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782 [38 Cal.Rptr.2d 699]]; *Scrutton v. County of Sacramento* (1969) 275 Cal.App.2d 412, 417 [79 Cal.Rptr. 872] [referring to article XI, section 11 (now article XI, section 7)].)

The California Supreme Court has recognized the plenary power of cities and counties. In *Candid Enterprises, Inc. v. Grossmont Union High School District*, it stated:

> Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the "police power [of a county or city] under this provision . . . is as broad as the police power exercisable by the Legislature itself."

(39 Cal.3d at p. 885 [held: School Facilities Act, Government Code section 65970 *et seq.* did not preempt local governments from imposing school-impact fees because no conflict existed].)

The California Legislature may limit the constitutionally conferred police powers of counties through legislative preemption, *but only* where the Legislature enacts laws completely occupying a field, either expressly or by necessary implication. (*People* ex rel. *Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 483-485 [204 Cal.Rptr. 897] ["preemption [of local regulation under the police power] may not be lightly found"]; see, e.g., *Candid Enterprises*, *supra*, 39 Cal.3d at pp. 885-886 [no legislative preemption of local school board's imposition of school-impact fees]; *City of Claremont v. Kruse* (2009) 177 Cal.App.4th 1153, 1172-1173, 1175, 1176 [100 Cal.Rptr.3d 1] [held: no preemption of city from denying a business license and permit to operate a medical marijuana dispensary]; *Valley Vista Services, Inc. v. City of Monterey Park* (2004) 118 Cal.App.4th 881 [13 Cal.Rptr.3d 433] [held: no preemption of city ordinance].)

For example, in *City of Claremont v. Kruse*, the appellate court held that state law did not preempt a city, either expressly or by necessary implication, from enforcing zoning and business licensing requirements for a property's proposed use. (177 Cal.App.4th at pp. 1172-1173, 1175, 1176.) The court explained:

> "'[A]bsent a clear indication of preemptive intent from the Legislature,' we presume that local regulation 'in an area over which [the local government] traditionally has exercised control' is not preempted by state law. [Citation.]" . . . *A local government's land use regulation is one such area.* "[W]hen local government regulates in an area over which it traditionally exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute."

(*Id.* at p. 1169 [emphasis added].)

Citizens for Planning Responsibly v. San Luis Obispo provides another example. ((2009) 176 Cal.App.4th 357 [97 Cal.Rptr.3d 636].) There, the appellate court held that a state law did not preempt local land use regulation. (*Id.* at p. 372 ["The [State Aeronautics Act] does not expressly or impliedly preempt local land use regulation."].) The court reasoned:

> Local agencies have traditionally exercised control over land use regulation. Absent a clear indication of preemptive intent, we must presume that local regulation and the initiative power do not conflict with the SAA.

> . . . [A]s we have explained, land use regulation has long been held to be a quintessential municipal affair . . . .

(*Id.* at pp. 373, 375.)

The court confirmed that a "party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption." (*Id.* at p. 371.) The court also confirmed that preemption is found reluctantly, since a presumption against preemption exists, especially where significant local interests prevail. The court stated:

> [The California Supreme Court] ha[s] been particularly "reluctant to infer legislative intent to preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another."
>
> . . . Thus, when local government regulates in an area over which it traditionally has exercised control, . . . California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is not preempted by state statute. [Citation.] The presumption against preemption accords with our more general understanding that "it is not to be presumed that the [L]egislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."

(*Ibid.*)

B. Preemption Did Not Occur. The California Legislature Neither Expressly, Nor By Necessary Implication Completely Occupied The Field Of PV Facilities Through Section 25502.3. In Fact, Through Section 25502.3, The Legislature Has Not Occupied This Field At All. The Hearing Adviser's Proposed Decision Would Inappropriately Deprive Counties Of Their Constitutionally Conferred Police Powers.

Section 25502.3 does not satisfy the requirements for preemption. (See Pub. Resources Code, § 25502.3.) Through section 25502.3, the Legislature neither expressly, nor by necessary implication completely occupies the field of PV facilities. In fact, the Legislature does not occupy that field at all through section 25502.3. In particular:

- Nowhere does section 25502.3 state that the Commission has any authority over PV facilities. If it did, there would be no need to review the Act's legislative history as the Applicant, the Commission, and those opposing the Applicant's motion have done.

- Section 25502.3 does not state that the Commission occupies the entire field (i.e., it does not state that counties may not apply land use regulations to PV facilities).

- The proposed decision would inappropriately confer jurisdiction on the Commission over all energy facilities in the state, not just PV facilities. (7/25/11 Transcript, p. 32:17-18 [Staff Counsel Jared Babula's comments].) If the Legislature had intended the Commission to have jurisdiction over all energy facilities in the state, including PV facilities, it would have been easy for the Legislature to say so. It did not.

- The proposed decision would inappropriately confer jurisdiction on the Commission over all types of energy projects, as long as the applicant elected the Commission's jurisdiction. This would include those projects with a generating capacity of less than 50 megawatts. Yet, the Legislature has consistently limited the Commission's jurisdiction to thermal power plants with a generating capacity of 50 or more megawatts. (Sen. Com. on Energy and Public Utilities, Analysis of Sen. Bill No. 928 (1986-1987) May 5, 1987; see *Dept. of Water & Power v. Energy Resources Conserv. & Dev. Comm'n* (1991) 2 Cal.App.4th 206, 214-215, 220-221, 223-227 [3 Cal.Rptr.2d 289] [preserving local jurisdiction when addressing the 50-megawatt-capacity threshold]; see also 7/5/11 Staff Reply Brief, pp. 3-7; 9/16/11 Staff Response to Commission Questions, pp. 3, 7-14; 9/16/11 CSAC Brief Opposing Motion, pp. 5-8.)

- In *Department of Water & Power v. Energy Resources Conservation & Development Commission*, this Commission sought to expand its jurisdiction. The appellate court rejected this attempt. The court affirmed judgment issuing a peremptory writ of mandate commanding the Commission to cease its exercise of certification jurisdiction over the Harbor Generating Station Repowering Project. (2 Cal.App.4th at pp. 210-211, 227.) The station existed before the Commission's creation, and had not previously been subject to the Commission's jurisdiction. (*Id.* at p. 211.) DWP sought to repower the station. (*Id.* at pp. 211-213.) The court held that the Commission neither had modification jurisdiction, nor construction jurisdiction over the station. (*Id.* at pp. 223, 227.) The court determined that the repowering project did not result in a 50-megawatt or more net increase of the station's generating capacity to confer modification jurisdiction

on the Commission. (*Id.* at p. 221.) The court further determined that the repowering project did not constitute "construction" of a facility to confer construction jurisdiction on the Commission. (*Id.* at p. 224.)

The California Legislature has not preempted the police power of counties over PV facilities through section 25502.3. The Legislature, therefore, has not authorized the Commission to limit the police power of counties over PV facilities as the proposed decision claims.

Moreover, the Commission must consider the consequence of its proposed decision: usurping the police power of counties over PV facilities. Through section 25502.3, the Legislature neither intended, nor authorized preemption of the police power of counties to apply land use regulations to PV facilities. The Commission must act within the authority specifically provided by the Legislature. That authority does not include limiting the police power of counties over PV facilities through section 25502.3. The Commission must not issue a decision that usurps a county's police power.

3. The Commission Has A Definite Jurisdiction Specified By The Legislature. Its Jurisdiction Cannot Randomly Be Conferred At The Option Of Private, Commercial Applicants.

A. Where The Legislature Has Not Conferred Jurisdiction On A Statutory Administrative Agency, The Agency Lacks Jurisdiction.

An administrative agency, such as the Commission, has a definite, specified jurisdiction established by the Legislature. (See *Security National Guaranty, Inc. v. Cal. Coastal Comm'n* (2008) 159 Cal.App.4th 402, 419 [71 Cal.Rptr.3d 522] ["The Commission, like all administrative agencies, has no inherent powers; it possesses only those powers that have been granted to it by the Constitution or by statute."]; *Larson v. State Personnel Bd.* (1994) 28 Cal.App.4th 265, 273-274 [33 Cal.Rptr.2d 412] ["An administrative agency has only such powers as have been conferred upon it by the Constitution or statute. An administrative agency may not validly act in excess of, or in violation of, the powers conferred upon it. If it does so, the action taken is void and subject to being set aside through a proceeding in administrative mandate."].)

Where the Legislature has not conferred jurisdiction on an administrative agency, the agency lacks jurisdiction. (See *Public Utilities Comm'n v. Energy Resources Conserv. & Dev. Comm'n* (1984) 150 Cal.App.3d 437, 450-453 [197 Cal.Rptr. 866] [court affirmed a ruling interpreting the extent of the Commission's jurisdiction over transmission lines under section 25107; in interpreting the Commission's jurisdiction, the court limited the Commission's interpretation of its jurisdiction]; *Security National Guaranty, supra*, 159 Cal.App.4th at p. 419

["[A]n agency literally has no power to act . . . unless and until [the Legislature] confers power upon it."].)

A project applicant cannot confer jurisdiction on an administrative agency by requesting such jurisdiction or electing to "opt in," just as a litigant cannot confer subject matter jurisdiction on a court of law. (See *Cowan v. Superior Ct.* (1996) 14 Cal.4th 367, 373 [58 Cal.Rptr.2d 458] ["[I]t is settled that the act of a litigant cannot confer subject matter jurisdiction on the court."]; *People v. National Auto. & Casualty Insurance Co.* (2000) 82 Cal.App.4th 120, 125 [97 Cal.Rptr.2d 858] ["[S]ubject matter jurisdiction cannot be conferred by consent, waiver, or estoppel."].) The California Constitution and the Legislature set the jurisdiction of both courts and administrative agencies. Such jurisdiction is not set by a litigant or by an agency applicant. (See *Security National Guaranty*, *supra*, 159 Cal.App.4th at p. 419 [administrative agency possesses only those powers that have been granted to it by the Constitution or by statute]; *National Auto. & Casualty Insurance*, *supra*, 82 Cal.App.4th at p. 125 ["[A]ny acts which exceed the defined power of a court . . ., whether that power be defined by constitutional provision, express statutory declaration, or rules developed by the courts and followed under the doctrine of *stare decisis*, are in excess of jurisdiction."].)

In *Public Utilities Commission v. Energy Resources Conservation & Development Commission*, a California court already rejected allowing the Commission to have flexible jurisdiction that is determined on a case-by-case basis. (150 Cal.App.3d at pp. 450-453.) The court reasoned:

> Of greater concern is the uncertainty and confusion that would likely result from the Energy Commission's utilization of the [flexible] 'functional' test in defining its own jurisdiction. Such test anticipates a case-by-case determination by the Energy Commission of the extent of its jurisdiction. Until such time as the commission makes that determination in a particular case, which may be long after the administrative process has commenced, neither utilities, state, regional or local agencies, nor the general public will know whether the Energy Commission possesses or is exercising regulatory authority. The attendant delay, expense, and uncertainty might well create regulatory havoc.

(*Id.* at p. 453 [interpreting section 25107's grant of jurisdiction to the Commission over transmission lines; jurisdiction up to a designated point lies with the Commission and beyond the point lies with the Public Utilities Commission; affirming trial court ruling limiting Commission's jurisdiction].)

Allowing the Commission or an applicant to determine the Commission's own jurisdiction is inconsistent with California law.

B. The Commission Must Not Usurp The Police Power Of Counties To Regulate PV Facilities. The Constitution Confers On Counties The Jurisdiction To Regulate Such Facilities.

The jurisdictions of the Commission and counties over PV facilities are reciprocal. As the Commission takes authority over PV facilities, the counties lose authority over PV facilities. (See Pub. Resources Code, § 25500 ["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, . . . 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 . . . ."]; *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 517 [128 Cal.Rptr.3d 658] ["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."].)

The Commission would not only be determining its jurisdiction through the proposed decision, but also the jurisdiction of counties. Yet, the California Constitution controls the jurisdiction of counties. (See Cal. Const., art. XI, § 7.) It would be truly precedential to allow a statutory entity, such as the Commission, to alter the jurisdiction of counties.

C. The Proposed Decision's Interpretation Of The Commission's Jurisdiction Would Produce An Absurd Result.

The proposed decision's interpretation of broad Commission jurisdiction would lead to an absurd result by conferring on the Commission jurisdiction over *any* facility, *regardless of type or size*. The result would conflict with the Warren-Alquist Act.

The Act's language is what unambiguously establishes Commission jurisdiction over facilities of 50 or more megawatts. (See Pub. Resources Code, §§ 25110, 25120.) The proposed decision attempts to reassure that the Commission could never take jurisdiction over facilities of less than 50 megawatts. Yet, the proposed decision itself disregards the Act's language, which serves as the basis for the reassurance that the proposed decision asserts. (See Proposed Decision, p. 7, fn. 7.)

Therefore, the fact that the Act unambiguously establishes Commission jurisdiction over facilities of 50 or more megawatts will be of little avail if the Commission adopts the proposed decision and decides it need not look to the Act.

D. Policy Considerations Require The Commission To Respect The Limits Of Its Jurisdiction Conferred By The Legislature.

Several policy reasons weigh against the Commission having jurisdiction that is randomly conferred at the applicant's election. Those reasons include:

- Allowing an applicant to confer jurisdiction on the Commission at the applicant's own election may constitute an unconstitutional delegation of legislative power to a private party, since it is the Legislature that confers the Commission's jurisdiction. (See, e.g., *Kugler v. Yocum* (1968) 69 Cal.2d 371 [71 Cal.Rptr. 687]; *Bock v. City Council* (1980) 109 Cal.App.3d 52, 57 [167 Cal.Rptr. 43] [finding an unconstitutional delegation of power].)

- Definite, specified jurisdiction provides applicants, cities, counties and the public with certainty regarding the Commission's jurisdiction. Lack of certainty may create inefficiencies, confusion, and increased costs for all involved. (See *Energy Resources Conserv. & Dev. Comm'n*, *supra*, 150 Cal.App.3d at pp. 451-453.)

- Allowing an applicant to confer jurisdiction on the Commission merely at the applicant's own election would create an opportunity for forum shopping. California courts have repeatedly discouraged and condemned the practice of "forum shopping." (See, e.g., *Bravo v. Superior Ct.* (2007) 149 Cal.App.4th 1489, 1494 [57 Cal.Rptr.3d 910] [rule prohibiting a peremptory challenge to a judge in a proceeding that is a continuation of an earlier proceeding is designed to prevent forum shopping]; *Giest v. Sequoia Ventures, Inc.* (2000) 83 Cal.App.4th 300, 303 [99 Cal.Rptr.2d 476] ["Many states have adopted 'borrowing statutes' in order to prevent forum shopping by plaintiffs."]; In re *Anthony H.* (1983) 148 Cal.App.3d 1123, 1126 [196 Cal.Rptr. 448] ["forum shopping tend[s] to undermine the integrity of the judicial system"].) As one California court stated: "If a newly-arrived claimant in California could initiate an action against a nonresident . . . for compensation and claims based on prior nonmarital cohabitation outside California, then California's courts would be thrown wide open to the grossest form of forum shopping, for which the only equipment needed would be a tenuous claim to some California connection, a serviceable carpetbag, and a one-way ticket from New York, London, Paris, or Cannes." (*Henderson v. Superior Ct.* (1978) 77 Cal.App.3d 583, 593-594 [142 Cal.Rptr. 478].)

The Warren-Alquist Act specifies a definite jurisdiction for the Commission. The Commission has jurisdiction over (a) electric transmission lines, and (b) thermal power plants with a generating capacity of 50 or more megawatts. Since the Commission has only those

powers expressly conferred by the Act, its jurisdiction is limited to that specified in the Act. The Commission's jurisdiction does not vary case-by-case depending on whether an applicant elects the Commission's jurisdiction. The Commission's jurisdiction depends on the Legislature, not on the unilateral act of a private applicant.

4. The Proposed Decision Contradicts The Legislative History Of The Warren-Alquist Act.

The Commission's own Staff presented thorough and persuasive arguments describing the legislative history of the Warren-Alquist Act. (See generally 7/5/11 Staff Reply Brief; 9/16/11 Staff Response to Commission Questions.) The Hearing Adviser's proposed decision contradicts the Act's legislative history. In particular:

- Section 25502.3 has meaning in the Act's historical context. The waiver provisions of sections 25502.3 and 25501.7 are vestiges of the original statute. These provisions were adopted to address problems with grandfathering provisions that excluded projects from the Commission's jurisdiction. Both waiver provisions only apply to grandfathered projects. (See Pub. Resources Code, §§ 25501.7, 25502.3; 58 Ops.Cal.Atty.Gen. 729, 736-737 (1975); see also 7/5/11 Staff Reply Brief, pp. 3-4; 9/16/11 Staff Response to Commission Questions, pp. 7, 10-13.) The Attorney General recognized the two waiver provisions in a formal opinion on the grandfathering provision. The opinion stated: "[T]he 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 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 . . . ." (58 Ops.Cal.Atty.Gen., *supra*, at p. 736 [emphasis added].)

- Section 25502.3's waiver worked in connection with former section 25501.5's list of exempt facilities and former section 25501, subdivision (b)'s criteria for exclusion. Section 25502.3 is not an open-ended waiver for projects outside the scope of the Act. With the repeal of former sections 25501 and 25501.5, section 25502.3 became obsolete. (See Pub. Resources Code, § 25502.3; Pub. Resources, Code, §§ 25501, 25501.5 (1978) [repealed]; 58 Ops.Cal.Atty.Gen., *supra*, at pp. 736-738; see also 7/5/11 Staff Reply Brief, pp. 5-7; 9/16/11 Staff Response to Commission Questions, pp. 9, 10.)

- Nothing in the Act's legislative history suggests that applicants on projects outside the scope of the Act could elect to be subject to the Commission's

jurisdiction. Rather, the Act's legislative history evidences the Commission's lack of jurisdiction over non-thermal projects, such as PV facilities. (See Sen. Com. on Energy and Public Utilities, Analysis of Sen. Bill No. 928 (1986-1987) May 5, 1987 ["The purpose of SB 928 is to clarify existing law relating to the California Energy Commission's jurisdiction over renewable energy resources. Currently, the Commission has authority to regulate development of thermal powerplants over 50 MW but not wind, solar or hydroelectric plants which are not thermal."]; Consent Calendar, Sen. 3d reading, Analysis of Sen. Bill No. 928 (1986-1987) as amended Aug. 1, 1988; Rosenthal Floor Statement on SB 928; 8/1/88 Letter from Charles R. Imbrecht, Chairman, California Energy Commission, to John Vasconcellos, Chairman, Assembly Ways and Means Committee; see also 9/16/11 Staff Response to Commission Questions, p. 13.)

- The proposed decision directly contradicts the outcome the Legislature intended to preserve when adopting Senate Bill 928. In 1987, SB 928 added an express exclusion to section 25120's definition of thermal powerplant. SB 928 expressly excluded a solar PV facility. (See Sen. Com. on Energy and Public Utilities, Analysis of Sen. Bill No. 928 (1986-1987) May 5, 1987; see also 9/16/11 Staff Response to Commission Questions, pp. 3, 13-14; 9/16/11 CSAC Brief Opposing Motion, pp. 7-8.) SB 928's Bill Analysis explains: "CEC is responsible for siting thermal powerplants of a size equal to or greater than 50 megawatts (MW). *Electrical generating facilities which are not thermally powered are exempt from the CEC's siting authority.* . . . SB 928 was introduced . . . to clarify existing law and to give assurances to businesses engaged in renewable energy development, such as wind, hydro and solar energy developers, that they will not be subject to regulatory burdens associated with CEC siting jurisdiction." (Sen. Com. on Energy and Public Utilities, Analysis of Sen. Bill No. 928 (1986-1987) May 5, 1987 [emphasis added].) SB 928 was a confirmation of existing law that the Commission specifically did *not* have jurisdiction over non-thermal projects, such as PV facilities.

- The proposed decision renders Senate Bill 226 superfluous. SB 226 added section 25500.1 to the Warren-Alquist Act. The section provides a specific jurisdictional waiver for certain applicants seeking to convert to PV facilities. If section 25502.3 already provides a general jurisdictional waiver to *any* project, there was no need for the Legislature to add section 25500.1 to provide a specific jurisdictional waiver. (See Pub. Resources Code, § 25500.1; Sen. Bill No. 226 (2011-2012 Reg. Sess.) as adopted, Oct. 4, 2011; Pub. Resources Code, § 25502.3; see also 9/16/11 CSAC Brief Opposing Motion, pp. 5-7.) The fact that the Legislature felt required to enact SB 226 to provide a specific jurisdictional

waiver to applicants seeking to convert to PV facilities conclusively establishes that the Act did not already provide such applicants a jurisdictional waiver. That is, the Legislature did not believe that section 25502.3 already provides a jurisdictional waiver to applicants seeking to convert to PV facilities. The proposed decision directly conflicts with the Legislature's intent as to section 25502.3. The proposed decision must be rejected.

- The proposed decision misconstrues the adoption of SB 226 and codification of section 25500.1. The proposed decision accurately states that SB 226/section 25500.1 create a specific jurisdictional waiver for certain PV facility applicants. The proposed decision, however, misinterprets the legislative intent of that section. The proposed decision incorrectly claims that the creation of a specific jurisdictional waiver for certain PV facilities somehow means that the Legislature now intends section 25502.3 to provide a general jurisdictional waiver to *any* project. (Proposed Decision, pp. 6-7.) If the Legislature intended such a result, it would have provided for it, rather than just creating a specific jurisdictional waiver. The very fact that the Legislature added a specific jurisdiction waiver in section 25500.1 confirms that the Legislature believed that the Commission would have no jurisdiction over PV facilities but for the new section. Otherwise, the Legislature's adoption of section 25500.1 would be an idle act, creating a superfluous statute. (See *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390 [97 Cal.Rptr.3d 464] [reasoning that if the Legislature intended all remedies to be available, Legislature would not have included a provision singling out remedies; "We do not presume that the Legislature performs idle acts, nor do we construe statutory provisions so as to render them superfluous."].)

- Both Commission Staff and the proposed decision cite the May 13, 1974 letter from the Office of Legislative Counsel. (See 9/16/11 Staff Response to Commission Questions, p. 11; Proposed Decision, pp. 7-8, fn. 9.) The proposed decision takes language from the May 13th letter out of context. The proposed decision ignores critical, explanatory language preceding the language it quotes. Commission Staff quotes the preceding language, which provides the necessary context for the language quoted in the proposed decision. The preceding language: (a) identifies the original grandfathering provisions (sections 25501, 25501.3 and 25501.5); (b) identifies the two waiver provisions (sections 25501.7 and 25502.3); and (c) observes that any project excluded or exempted as just discussed (under 25501, 25501.3 or 25501.5) may waive the exclusion or exemption (under 25501.7 or 25502.3). (Ops. Cal. Legis. Counsel, No. 9867 (May 13, 1974) Energy Resources: Powerplants (A.B. 1575) pp. 6-7.)

- The proposed decision also omits important language from within the quote from the May 13, 1974 Legislative Counsel letter. (See Proposed Decision, p. 8, fn. 9.) The Legislative Counsel letter states, without omission: "Therefore, any person proposing to construct a facility on an excluded or exempted site, *including the site referred to in subdivision (e) of Section 25501.5*, could waive the exclusion of such site and related facility from the power facility and site certification provisions, and, in that case, the commission, as discussed generally in Analysis No. 1, would have the exclusive power to certify such site and facility." (Ops. Cal. Legis. Counsel, No. 9867 (May 13, 1974) Energy Resources: Powerplants (A.B. 1575) pp. 6-7.) The language the proposed decision omits (italicized) provides a telling reference back to the specifically excluded or exempted sites under sections 25501, 25501.3 and 25501.5. (See *ibid.*)

5. The Commission Is A Creation Of The California Legislature And May Only Act Within The Authority The Legislature Has Granted It. The Hearing Adviser's Proposed Decision Would Exceed That Authority, And Must Be Rejected.

As an unelected administrative agency and creation of the California Legislature, the Commission has no inherent powers. The Commission possesses only those specific, limited powers that the Legislature has granted it. (See *Security National Guaranty*, *supra*, 159 Cal.App.4th at p. 419 ["The Commission, like all administrative agencies, has no inherent powers; it possesses only those powers that have been granted to it by the Constitution or by statute."].)

Unlike the plenary police power of counties, the Commission may only exercise the limited power that the Legislature has authorized. (*Ferdig v. State Personnel Bd.* (1969) 71 Cal.2d 96, 103 [77 Cal.Rptr. 224] ["It is settled principle that administrative agencies have only such powers as have been conferred on them, expressly or by implication, by constitution or statute."].) Absent specific authority, the Commission may not act. (See *Larson*, *supra*, 28 Cal.App.4th at pp. 273-274 ["An administrative agency has only such powers as have been conferred upon it by the Constitution or statute. An administrative agency may not validly act in excess of, or in violation of, the powers conferred upon it."].)

Here, the Legislature defined and limited the Commission's power through the enabling act creating the Commission - - the Warren-Alquist Act. (See Pub. Resources Code, § 25000 *et seq.*) Section 25502.3 does not give the Commission the power to regulate PV facilities. Nowhere in section 25502.3 does it provide the Commission with authority over PV facilities.

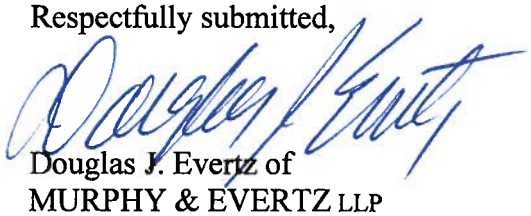
Because the Legislature did not grant the Commission jurisdiction over PV facilities pursuant to section 25502.3, the Commission lacks the power to regulate such facilities. The proposed decision exceeds the Commission's jurisdiction. The Commission must decline

Applicant's request to take jurisdiction over the siting of Applicant's proposed PV facility. It must leave such regulation to the counties.

6. Conclusion.

For all of the foregoing arguments and authorities, and the arguments and authorities presented in the comments and briefs opposing the proposed Commission decision, the California State Association of Counties and the County of Riverside respectfully request that the Commission reject the proposed decision.

Respectfully submitted,



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APPLICATION FOR CERTIFICATION
For the *RIDGECREST SOLAR POWER PROJECT*

Docket No. 09-AFC-9
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(Revised 12/13/2011)

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DECLARATION OF SERVICE

Opposition of the California State Association of Counties and the County of Riverside to the Hearing Adviser's

I, Stephanie Pattis, declare that on February 2, 2012, I served and filed copies of the attached [Proposed] Commission Decision, dated February 2, 2012. The original documents, filed with the Docket Unit or the Chief Counsel, as required by the applicable regulation, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:
[www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest/index.html].

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CALIFORNIA ENERGY COMMISSION – DOCKET UNIT
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1516 Ninth Street, MS-4
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

__x__ Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California 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.

Stephanie Pattis

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