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STATE OF CALIFORNIA

**Energy Resources Conservation
and Development Commission**

In the Matter of:

NEXTERRA BLYTHE SOLAR ENERGY
CENTER, LLC'S REVISED PETITION TO
AMEND - CONVERSION TO PV BLYTHE
SOLAR POWER PROJECT

DOCKET NO. 09-AFC-6C

**INTERVENOR LABORERS' INTERNATIONAL UNION
OF NORTH AMERICA, LOCAL UNION NO. 1184's
COMMENTS ON PRESIDING MEMBER'S PROPOSED DECISION**

January 10, 2014

Michael R. Lozeau
Richard T. Drury
Lozeau|Drury LLP
410 12th Street, Suite 250
Oakland, CA 94607
Ph: (510) 836-4200
Fax: (510) 836-4205
Email: michael@lozeaudrury.com;
richard@lozeaudrury.com

On behalf of Laborers' International Union of
North America, Local Union No. 1184

Pursuant to the December 13, 2013 Notice of Availability of Presiding Member's Proposed Decision, Supplemental Environmental Review Documentation, Committee Recommendations and Notice of Full Commission Hearing and 20 California Code of Regulations ("CCR") § 1749(b), Intervenor Laborers' International Union of North America, Local Union No. 1184 ("LIUNA") submits the following comment on the Proposed Decision. LIUNA continues to stand by its earlier comments and testimony regarding the inadequacies of the Energy Commission's analysis of air pollution and biological resource impacts of the revised Blythe Solar Project. In addition, however, LIUNA brings to the attention of the Energy Commission the following important issue regarding the constitutionality of Public Resources Code § 25531, the Warren-Alquist State Energy Resources Conservation and Development Act's ("Warren-Alquist Act") judicial review provision. Although LIUNA understands that the Energy Commission is not in a position to alter its enabling legislation, LIUNA submits these comments in order to exhaust this important issue in the context of a certification decision by the Energy Commission.

As the Commission is well aware, Public Resources Code § 25531(a) provides for exclusive judicial review of the Energy Commission's site certification decisions by way of petition to the Supreme Court of California. Pub. Res. Code § 25531(a). See *also* Pub. Res. Code §§ 25901; 25500.1; Proposed Decision, p. 3. Section 25531(a) is unconstitutional because it infringes upon the constitutionally-prescribed jurisdiction of the California Superior Courts and Court of Appeal and, thus, improperly restricts LIUNA's and other interested parties' access to the constitutionally prescribed judicial review venues. By restricting judicial review to petitioning the Supreme Court, Section 25531 in effect largely precludes the vast majority of challenges to the Energy Commission's certification decisions from obtaining any judicial review on the merits.

Article VI, section 10 of the California Constitution provides that:

The Supreme Court, courts of appeal, superior courts, and their judges ... have original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition. The appellate division of the superior court has original jurisdiction in proceedings for extraordinary relief in the nature of mandamus, certiorari, and prohibition directed to the superior court in causes subject to its appellate jurisdiction. Superior courts have original jurisdiction in all other causes.

Cal. Const., Art. VI § 10. The Legislature may only alter this Constitutional directive where the Constitution itself empowers the Legislature with authority to establish a different judicial review scheme for a particular agency or department. Where an agency has not been established pursuant to a Constitutional provision that also grants the Legislature plenary authority to prescribe the available judicial review of that agency's decisions notwithstanding other Constitutional provisions, the Legislature may not alter Article VI, Section 10's judicial review provision.

The Energy Commission was not established by way of the Constitution. The Commission was instead created solely by the Legislature with the enactment of the Warren-Alquist Act. Because there is no provision in the California Constitution authorizing the Legislature to alter Article VI, Section 10's judicial review jurisdiction as they apply to the Energy Commission's decisions, the Legislature's enactment of Pub. Res. Code § 25531(a) is unconstitutional.

In the past, the constitutionality of Public Resources Code § 25531(a)'s judicial review scheme under Article VI, Section 10 has been upheld where it was inextricably linked to the decisionmaking and judicial review process of the Public Utilities Commission ("PUC"). See *County of Sonoma v. State Energy Resources Conservation etc. Com.* (1985) 40 Cal.3d 361, 368. Unlike the Energy Commission, the PUC has been established under a constitutional enabling act with full power conferred on the Legislature to enact legislation defining the PUC's powers and procedures even contrary to any other provisions of the Constitution provided such provisions are consistent with the enabling provision. Cal. Const., Art. XII. This includes plenary authority for the Legislature to establish the judicial review process for PUC decisions:

The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, ... to establish the manner and scope of review of commission action in a court of record....

Cal. Const., Art. XII § 5. In 1985, the only reason the Supreme Court upheld the constitutionality of Section 25531(a) in regard to the Energy Commission's certification decisions occurring at the time was because, under the then existing statute, the certification decisions were "a statutory prerequisite to approval by the PUC of thermoelectric power projects to be constructed by public utilities." *County of Sonoma*, 40 Cal.3d at 368. As a result, the Court reasoned that, because the Legislature had the power to designate the Supreme Court as the sole court to review the PUC's decision, that power extended to the prerequisite certification decision in order to preserve the expedited PUC review process. *Id.*

The Supreme Court's 1985 rationale has been rendered moot by the Legislature's subsequent legislation deregulating the energy industry, including in 2001 the decoupling of the PUC's approvals and the Energy Commission's certification decisions. Senate Bill No. 28 (May 22, 2001). The Energy Commission's certification decisions are no longer a prerequisite to any decisions by the PUC. Hence, the linkage and timing concerns described by the Supreme Court in the *County of Sonoma* ruling, as well as the extent of the Legislature's authority over the PUC under Article XII, Section 5 of the California Constitution, no longer have any bearing on a Constitutional analysis of Section 25531(a). The Energy Commission was not created via the California Constitution. As a result, there is no Constitutional provision granting the Legislature any authority to alter the judicial review provisions of Article VI, Section 10 of the California Constitution as they apply to Energy Commission decisions. At the time of the 1985 *County of Sonoma* decision, the integrated approval processes of the Energy Commission and PUC may have justified the constitutionality of Section 25531(a). As a

stand-alone review provision of the Energy Commission's certification decisions, however, Justice Mosk's dissenting views now hold full sway:

It cannot be denied that in section 25531 the Legislature has with deliberation purported to restrict and curtail the jurisdiction vested in the superior courts of this state by the Constitution. But what the Legislature has thus attempted to do is beyond its power. "And upon this but one thing can be said. If there be not in the constitution itself warrant and power to the legislature to do this thing, its effort must be declared illegal." [citation omitted.] There is no such power in the Constitution. [citation omitted.]

County of Sonoma, 40 Cal.3d at 375 (J. Mosk, dissenting).

LIUNA requests that the Energy Commission hold off on approving the Presiding Officer's Proposed Decision in order to provide the Commission, its staff, and the parties additional opportunity to respond to LIUNA's challenge to the constitutionality of Section 25531(a). Thank you for this opportunity to comment on the Proposed Decision.

Dated: January 10, 2014

Respectfully Submitted,

LOZEAU|DRURY LLP

Original signed by _____
Michael R. Lozeau
Attorneys for Laborers International Union of
North America Local Union 1184

DECLARATION OF SERVICE

I, Michael R. Lozeau, declare that on January 10, 2014, I served and filed copies of **INTERVENOR LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, LOCAL UNION NO. 1184's COMMENTS ON PRESIDING MEMBER'S PROPOSED DECISION** dated January 10, 2014. The most recent Proof of Service List, which was copied from the web page for this project at <http://www.energy.ca.gov>, is attached to this Declaration.

For service to all other parties and filing with the Docket Unit at the Energy Commission, I successfully uploaded the document to the Energy Commission's filing system and I personally delivered the document or deposited it in the US mail with first class postage to those persons for whom a physical mailing address but no mail address is shown on the attached Proof of Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that I am over the age of 18 years.

Dated: January 10, 2014


Michael R. Lozeau



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Applicant

Dan Neville, Project Director, Development
NextEra Energy Resources
505 14th Street, Suite 310
Oakland, CA 94616
daniel.neville@nexteraenergy.com

Applicant Representative

Marie Fleming
Galati/Blek, LLP
455 Capitol Mall, Suite 350
Sacramento, CA 95814
mfleming@gb-llp.com

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

Applicant Consultant

Sara Head
AECOM
1220 Avenida Acaso
Camarillo, CA 93012
sara.head@aecom.com

Tricia Bernhardt
Tetra Tech, Inc.
143 Union Boulevard, Suite 1010
Lakewood, CO 80228
tricia.bernhardt@tetrattech.com

Intervenor

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

Marc D. Joseph, Counsel for California Unions
for Reliable Energy (CURE)
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
mdjoseph@adamsbroadwell.com

Rebecca Loudbear, Office of the Attorney
General
Colorado River Indian Tribes
26600 Mohave Road
Parker, AZ 85344
rloudbear@critdoj.com

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

Intervenor Representative

Michael R. Lozeau, Counsel for LIUNA Local
1184
Lozeau Drury LLP
410 12th Street, Suite 250
Oakland, CA 94607
michael@lozeaudrury.com

Richard T. Drury, Counsel for LIUNA Local
1184
Lozeau Drury LLP
410 12th Street, Suite 250
Oakland, CA 94607
richard@lozeaudrury.com

Sara A. Clark, Counsel for Colorado River
Indian Tribes
Shute, Mihaly & Weinberger, LLP
396 Hayes Street
San Francisco, CA 94102
clark@smwlaw.com

Winter King, Counsel for Colorado River Indian
Tribes
Shute, Mihaly & Weinberger, LLP
396 Hayes Street
San Francisco, CA 94102
king@smwlaw.com

Commission Staff

eFiling archive
California Energy Commission

Jared Babula, Staff Counsel
California Energy Commission

Mary Dyas, Project Manager
California Energy Commission

Sacramento, CA
efilingPOSarchive@energy.ca.gov

Office of the Chief Counsel, 1516 Ninth Street,
MS-14
Sacramento, CA 95814
jared.babula@energy.ca.gov

Siting, Transmission & Environmental Protection
Division, 1516 Ninth Street, MS-2000
Sacramento, CA 95814
mary.dyas@energy.ca.gov

Committee

DAVID HOCHSCHILD, Associate Member,
Commissioner
California Energy Commission
Sacramento, CA

Eileen Allen, Commissioners' Technical Adviser
for Facility Siting
California Energy Commission
Sacramento, CA

Eli Harland, Adviser to Commissioner Douglas
California Energy Commission
Sacramento, CA

Jennifer Nelson, Adviser to Commissioner
Douglas
California Energy Commission
Sacramento, CA

KAREN DOUGLAS, Presiding Member,
Commissioner
California Energy Commission
Sacramento, CA

Kelly Foley, Adviser to Commissioner
Hochschild
California Energy Commission
Sacramento, CA

Raoul Renaud, Hearing Adviser
California Energy Commission
Sacramento, CA

Public Adviser

Alana Mathews, Public Adviser
California Energy Commission
Public Advisers Office, 1516 Ninth Street, MS-12
Sacramento, CA 95814
publicadviser@energy.ca.gov

Public Agency

California ISO
Folsom, CA
e-recipient@caiso.com

Jeff Childers
Bureau of Land Management, Desert District
Office
22835 Calle San Juan De Los Lagos
Moreno Valley, CA 92553
jchilders@blm.gov

John Guerin
Riverside County Airport Land Use Commission
Riverside County Administrative Center, 4080
Lemon Street, 14th Floor
Riverside, CA 92501
jguerin@rctlma.org

Magdalena Rodriguez
California Department of Fish and Game, Inland
Desert Region
3602 Inland Empire Boulevard, Suite C-220
Ontario, CA 91764
magdalena.rodriguez@wildlife.ca.gov

Tera Baird
United States Fish and Wildlife Service
777 East Tahquitz Canyon Way, Suite 208
Palm Springs, CA 92262
Tera_baird@fws.gov

Tiffany North, Supervising Deputy County
Counsel
Riverside County
3960 Orange Street, Suite 500
Riverside, CA 92501
tnorth@co.riverside.ca.us