



July 19, 2018

Chair Weisenmiller and Commissioners  
California Energy Commission  
Docket No. 17-OIR-02  
1516 9th Street, MS-4 Sacramento, CA 95814

**RE: Comments of the Independent Energy Producers Association: Proposed Amendments to Title 20 of the Commission’s Siting and Procedure Regulations (Docket 17-OIR-02)**

Dear Chair Weisenmiller and Commissioners:

On behalf of the Independent Energy Producers Association (“IEP”), we submit these comments on the proposed amendments to the California Energy Commission’s (“Commission”) Siting and Procedure Regulations.<sup>1</sup> IEP has participated extensively in this rulemaking process by submitting written comments in 2015, 2017, and 2018, as well as attending workshops held by Commission Staff. Overall, IEP supports the proposed amendments and is pleased that several of its recommendations have been reflected in the language proposed for adoption.<sup>2</sup>

IEP has consistently raised three concerns over the course of several years that are not addressed by the proposed amendments. First, IEP is concerned that the public comment process relating to Staff approval of a petition for modification may be misused to prolong the approval process for minor modifications, which may lead to costly delays and unnecessary expenditure of resources. Second, IEP remains concerned regarding the lack of connection to applicable statutory language and lack of specificity related to the collection of costs and fees for the processing of petitions for modification, including the lack of cost containment provisions. Third, IEP remains concerned regarding the potential reliance on public comments as a basis to support a finding by the Commission, elevating one form of hearsay evidence at the expense of due process protections. As set forth in further detail below, to address these concerns, IEP recommends specific language changes that set forth in Attachment A to these comments.

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<sup>1</sup> The Commission’s regulations are set forth in Title 20 of the California Code of Regulations.

<sup>2</sup> As set forth in the Express Terms published on May 25, 2018 (TN#: 223583).

## **DISCUSSION**

### **I. Section 1769(a)(3)(C) Should Provide The Procedures To Ensure That Speculation, Argument, Conjecture, And Unsupported Conclusions Or Opinions Do Not Result In Unnecessary Costs And Time Delays**

The proposed amendments to Section 1769 contain significant improvements to the Commission's current petition for modification process, and IEP supports the increased ability of Commission Staff to approve project modifications. IEP has two recommendations regarding the proposed amendments to Section 1769.

First, IEP recommends clarifications to Section 1769(a)(3)(C). As proposed, Section 1769(a)(3)(C) would provide a process whereby a person could object to Staff approval of an objection. IEP appreciates the requirement that an objection must be adequately supported, and the proposal that "Speculation, argument, conjecture, and unsupported conclusions or opinions are not sufficient to support an objection to staff approval." (See, Express Terms, p. 28). However, two items require clarification. Section 1769 should be clarified to outline the process by which Staff will make a determination that as to whether an objection is sufficiently supported, and how that determination will be conveyed to the objector and a project owner.

Specifically, Section 1769 should be revised to state that upon receipt of an objection to a staff recommended approval, Staff should either (i) publish a notice stating that the project owner may proceed because the objection is based on speculation, argument, conjecture, or unsupported conclusions or opinions or (ii) publish a notice stating that the Staff has elected to submit the matter to the Commission. Otherwise, these procedural ambiguities have the potential to cause significant delays in the processing, approval, and implementation of needed project modifications. Of greater importance, the Commission's regulations should clearly provide that objections based on speculation, argument, conjecture, or unsupported conclusions or opinions cannot, and will not, be used as a basis to delay minor amendments not affecting the public, the environment, LORS compliance or implementation of project Conditions of Certification.

Second, and consistent with the directive that speculation, argument, conjecture, and unsupported conclusions or opinions should not result in unnecessary costs and delays, IEP again recommends that the Commission adopt a list of ministerial activities that a project owner can implement without the need for submission of a petition for modification.<sup>3</sup> The Commission

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<sup>3</sup> *Independent Energy Producers Association's Post-Workshop Comments*, December 9, 2015, TN #: 206911, pp. 1-3; Attachment A, pp. A-1 to A-3; *Siting Compliance Process Review and Improvement Proceeding*, February 3, 2017, TN #: 215761, pp. 3-5.; February 21, 2018, TN #: 222654, pp. 4-5, Attachment A, pp. 16-17.

should clearly define categories of activities/changes that do not require a petition for modification, including, but not limited to changes prior to construction in the general site arrangement or equipment list in the original AFC.

IEP's proposed list of activities is set forth in Attachment A as new section 1769(a)(6). The language recognizes that there are some "changes" that are so minor that no further agency review is required by the California Environmental Quality Act ("CEQA"). In addition to the proposed language, the Commission should process a requested change without delay or expense if the proposed change is statutorily or categorically exempt from CEQA, and other agencies, such as CalTrans, regularly use such CEQA exemptions in their approvals.<sup>4</sup> The State Water Resources Control Board, which also has a Certified Regulatory Program like the Commission, uses the exemptions as well. The Warren-Alquist Act does not limit in any way the Commission's ability to rely on Statutory and Categorical Exemptions. If a change is exempt from CEQA, either because the approval is a ministerial action or because the proposed change is categorically or statutorily exempt, the change should not be subject to environmental review by the Commission. IEP's proposed language accomplishes these important improvements to the Commission's processes.

The Commission's Regulations should expressly list these activities as not requiring a petition to amend to provide a form of "safe harbor" for ministerial acts that do not implicate the design, operation, or performance of a project with the new section 1769(a)(6).

## **II. Section 1708: Costs and Fees**

Public Resources Code section 25806(e) provides that following "a full accounting of the actual cost of processing the petition to amend", a project owner will reimburse the Commission for any costs exceeding five thousand dollars. As set forth in IEP's comments on February 3, 2017,<sup>5</sup> and again on February 21, 2018,<sup>6</sup> the Commission's regulations should be revised to provide for Commission adoption of a rate schedule on a yearly basis that clearly outlines the scope of services provided and the specific costs for activities related to the processing of petitions to amend. A yearly rate schedule will help provide transparency regarding the

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<sup>4</sup> See the discussion on CalTrans' use of CEQA exemptions at: <http://www.dot.ca.gov/ser/vol1/sec5/ch34ce/chap34.htm>; See also application to the SWRCB at: [http://www.swrcb.ca.gov/waterrights/water\\_issues/programs/water\\_quality\\_cert/docs/bishop\\_intake\\_no\\_4/bi\\_noe.pdf](http://www.swrcb.ca.gov/waterrights/water_issues/programs/water_quality_cert/docs/bishop_intake_no_4/bi_noe.pdf).

<sup>5</sup> *Siting Compliance Process Review and Improvement Proceeding*, February 3, 2017, TN #: 215761, pp. 1-3.

<sup>6</sup> *Independent Energy Producers Association Comments on Proposed Changes*, February 21, 2018, TN #: 222654, pp. 1-3, Attachment A, pp. 8-9.

calculation of costs that are currently absent from the proposed amendments. In particular, there are a number of ambiguities arising from the proposed cost recovery language:

- Can Staff use contractors and consultants to advocate for changes not requested in the Amendment at the project owner's expense? How will such costs be tracked separately from the costs to process the petition to amend submitted by a project owner?
- How are the "hourly loaded rates" determined for Staff and Staff Counsel?
- How are the "hourly loaded rates" determined for subcontractors and consultants?
- If the activities of commissioners and their advisors are excluded from the definition of "processing the petition to amend", why are project owners responsible for the "labor and administrative expenses" associated with producing and distributing committee and commission documents?

IEP has proposed revisions in Attachment A to address these open issues. IEP is also concerned that there is no mechanism for a project owner to challenge or appeal assessed costs. Such a mechanism will serve an important cost containment function, ensure efficient processing of a petition to amend, and provide a measure of protection to project owners against improperly assessed costs. Project owners should have the right to appeal items in the full accounting to the Executive Director, or his or her designee, and thereafter to the commission by motion appealing the decision of the executive director. IEP's proposed changes to revise Section 1708 to address these concerns are set forth in Attachment A.

### **III. Section 1212: Public Comment as Basis for a Finding**

IEP continues to be concerned that public comments not made under penalty of perjury can be relied upon by the Commission to support a finding and incorporates by reference all prior comments submitted on this matter. IEP has consistently and vigorously made these observations and requested changes in the language since the inception of this proceeding in 2015<sup>7</sup>. Further, without dropping its opposition, IEP also provided language in 2018 aimed at softening proposed language allowing the Commission to rely on public comment to support a finding.<sup>8</sup>

IEP knows of no other agency at the federal, state or local level that allows for a finding to be made solely on the basis of public comment. The lack of any other authority is telling: governmental entities use public comment like the hearsay evidence that it is. Section 1212(c)(3) of the Commission's regulations provide the appropriate mechanism by which public

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<sup>7</sup> *Independent Energy Producers Association's Post-Workshop Comments*, December 9, 2015, TN #: 206911, pp. 2-5.

<sup>8</sup> *Independent Energy Producers Association Comments on Proposed Changes*, February 21, 2018, TN #: 222654, pp. 1-3, Attachment A, p. 7.

comment should be treated by the Commission: “Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.” (20 C.C.R. § 1212(c)(3). As a matter of sound public policy, IEP continues to recommend that Section 1212 be amended to remove public comment as a permissible basis upon which the Commission can support a finding as set forth in Attachment A.

### **CONCLUSIONS**

IEP appreciates the opportunity to provide comments on the proposed changes to the Commission’s regulations. In large part the proposed changes are an improvement to the existing regulations. However, as described above, IEP is still concerned with potential abuses of the petition for modification process; the lack of transparency and adequate cost containment provisions related to the full accounting of actual costs related to processing a petition to amend; and the use of unsworn public comment to support a finding by the Commission.

Incorporation of the revisions proposed by IEP in Attachment A will address these remaining concerns. Thank you for your hard work on these important issues.

  
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## ATTACHMENT A

IEP's proposed changes to the Express Terms published on May 25, 2018 are shown below.

### I. Section 1769: Post Certification Petition For Changes In Project Design, Operation, Or Performance And Amendments To The Commission Decision

#### **Revise Section (a)(3)(C) as follows:**

(C) Staff shall file a statement summarizing its actions pursuant to subdivisions (a)(3)(A) or (B). Any person may file an objection to a staff action taken pursuant to subdivisions (a)(3)(A) or (B) within 14 days of the filing of staff's statement. Any such objection must make a showing supported by facts that the change does not meet the criteria in this subdivision. Speculation, argument, conjecture, and unsupported conclusions or opinions are not sufficient to support an objection to staff approval. **Upon receipt of a timely objection, Staff shall take one of the following actions: (i) publish a notice stating that the project owner may proceed because the objection is based on speculation, argument, conjecture, or unsupported conclusions or opinions; or (ii) publish a notice stating that the Staff has elected to submit the matter to the Commission pursuant to subdivision (a)(3)(D).**

#### **Add a new section 1769(a)(6) as follows:**

(6) A petition is not required for the ministerial activities, including, but not limited to, the following:

(A) Maintenance activities routinely performed in the electric generation industry;

(B) Like-kind replacement or repair of component parts of the thermal powerplant any related facilities;

(C) The use of portable and prefabricated structures that would not require a building permit from the local land use authority but for the Commission's jurisdiction;

(D) Platforms, stairs, walkways, and non-structural concrete slabs and paving;

(E) Temporary tents, shade structures, awnings or similar facilities;

(F) Tanks of less than 5,000 gallons capacity;

(G) Emergency repairs;

(H) Trenching or excavations related to any of the above; and

(I) Any facilities, structure, or improvements that could have been approved by the CBO during the detailed design phase of construction of the thermal powerplant or related facilities;

(J) Activities that are subject to one or more CEQA Statutory Exemptions (14 CCR §15260 et seq.) or one or more CEQA Categorical Exemptions (14 CCR §15300 et seq.).

## II. Section 1708: Costs and Fees

### Revise Section 1708 as follows:

1708. Costs and Application, Compliance, and Reimbursement Fees.

(a) A project owner shall pay all fees specified in Public Resources Code sections 25802 and 25806, and reimburse the commission for its actual costs of processing a petition to amend as specified in 25806(e). In calculating the fee required by Public Resources Code section 25806(a), generating capacity shall be determined in the manner specified in section 2003(a).

(b) “Processing the petition to amend,” as used in Public Resources Code section 25806(e), includes the activities of staff, staff subcontractors, and legal counsel representing staff in the preparation of the staff assessment and in any proceeding on a petition through the adoption of the commission decision, as well as the labor and administrative expenses associated with the production ~~and distribution~~ of staff, ~~committee, and commission~~ documents. The activities of commissioners and their advisors, commission hearing officers, and other attorneys and commission staff advising commissioners or the commission, are not considered part of processing the petition to amend.

(c) **“Actual Costs” for the activities described in subdivision (b) shall be calculated based on a rate schedule approved annually by the commission for the next fiscal year. The commission approved rate schedule shall set forth (1) the hourly loaded rates for staff, including subcontractors, consultants and legal counsel representing the staff, and the hours worked to process a petition to amend commission administrative staff and (2) the types of administrative activities that may be required for a petition to amend and associated costs for each listed activity.** If requested by a project owner the commission shall provide a full accounting, including the following: the hours billed by staff, subcontractors, consultants and legal staff; the hourly rate associated with each; a **detailed** description of the work performed; and supporting documentation.

**(1) Staff Analyses: “Actual Costs” include time and resources expended in analyzing the relief requested in the petition to amend.**

**(2) Staff Advocacy: “Actual Costs” do not include time and resources expended in opposing the relief requested in the petition to amend.**

(d) Upon the demand of the executive director, the applicant project owner shall pay additional fees to the commission in the amount of any reimbursement made to local agencies by the commission pursuant to Section 1715 of this article.

(e) Project owners may request an investigation of the fees they have been assessed using the procedures set forth in section 1231.

### III. Public Comment as Basis for a Finding

#### Revise Subsection 1212(c) as follows:

#### § 1212. Rights of Parties, Record and Basis for Decision.

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#### (c) Basis for and Contents of Decisions.

(1) Decisions in adjudicative proceedings shall be based on the evidence in the hearing record, explain the basis for the decision, and shall include but need not be limited to all legally-required findings of fact and conclusions of law.

(2) A finding may be based on any evidence in the hearing record, if the evidence is the sort of information on which responsible persons are accustomed to relying on in the conduct of serious affairs. Such evidence does not include, among other things, speculation, argument, conjecture, and unsupported conclusions or opinions. The committee or commission shall give appropriate weight to information in the record as allowed by law.

(3) Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions.

(4) Public comments and briefs filed by parties in an adjudicative proceeding, as prescribed in section 1208, may be considered by the committee or commission, but shall not be sufficient in themselves to support a finding. ~~The committee or commission may rely on public comment, standing alone, to support a finding if the committee or commission provides notice of its intent to rely upon such comment at the time the comment is presented, other parties are provided an opportunity to question the commenter, and parties are given a reasonable opportunity, as ordered by the presiding member, to provide rebuttal evidence.~~