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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking Regarding  
Policies, Procedures and Rules for the  
California Solar Initiative, the Self-  
Generation Incentive Program and Other  
Distributed Generation Issues

Rulemaking 12-11-005  
(Filed November 8, 2012)

**Response of the Multifamily Affordable Solar Homes Coalition<sup>1</sup>  
on the Petition For Modification Of Decision 15-01-027 of  
Shorebreak Energy Developers, LLC**

G. Andrew Blauvelt  
Randall Simmrin  
The MASH Coalition  
5835 Avenida Encinas, suite 116  
Carlsbad, CA 92008  
Email: andy@mash-coalition.org  
randy@mash-coalition.org  
Tel: 760.201.3738

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<sup>1</sup> The MASH Coalition consists of the following companies: Affirmed Housing Group, Bayview Community Development Corporation, Chelsea Investment Corporation, Community Housing Works, Community Advancement Corporation, Core Builders, EAH Housing, Housing Authority of the County of Santa Barbara, Irvine Housing Opportunities Levy Affiliated, LINC Housing, Many Mansions, San Diego Youth Services, Standard Property Company, The Reliant Group, Urban Housing Communities, and VITUS Group.

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The Multifamily Affordable Solar Homes Coalition (“MASH Coalition”) hereby submits this response to the Petition for Modification of Decision 15-01-027 filed by Shorebreak Energy Developers, LLC on February 27, 2015 (the “Petition”) in the above captioned proceeding.

**1. INTRODUCTION:**

Shorebreak’s Petition is an untimely effort to resurrect settled issues in another attempt to improperly ask the Commission to circumvent the established affordable housing policies of the State of California. Furthermore, these procedural failings are all in service to an effort to substantively change the fundamental definition of the “MASH program [as] targeted at existing multifamily affordable housing that meets the [specified] definition of low-income residential housing”<sup>2</sup>, contrary to the explicit parameters of the legislative intent and existing regulations of the successful MASH program. For each and all of these reasons, it must be rejected:

- The Petition is out of order, in that it untimely raises matters already settled by the Commission, thus wasting valuable public resources and everyone’s time.
- The Petition amounts to an attempted new work-around for an improper practice already examined and rejected by the Commission.
- The Petition asks the Commission to make housing policy, a task outside its expertise and authority; housing agencies should be making these determinations.

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<sup>2</sup> D.08-10-036, p. 6

- The Petition attempts to recharacterize the fundamental nature of this component of the Commission's energy program, which clearly holds that MASH is for existing multifamily rental housing affordable to low-income households.

Any one of the procedural points summarized above is sufficient to disqualify the Petition. But as a group of affordable housing organizations with collectively hundreds of years of experience in the industry, who toil every day in the financially meager soil of our chosen field of service, the last, substantive point is perhaps the most troubling aspect of the Petition. The MASH and SASH low-income programs, alone among CSI, were re-funded by new legislation, in recognition of the fact that they are a valuable use of scarce public resources. Now more than ever, with the added direct tenant benefit provisions, the MASH program is a crucial tool to bridge the Green Divide and provide the benefits of solar to many thousands of low-income Californians. Throughout these proceedings, it has been the position of the Coalition that time is of the essence: the Wait List is loaded with projects ready to go, and we need to get this new round of MASH-supported solar installations moving now, especially in light of the potential loss of the 30% federal tax credit on Dec. 31, 2016.

Yet here we are, with Shorebreak trying once again to get the Commission to approve a shortcut around the many, well-established requirements for properly regulated affordable housing under current public policy of the state of California, so that their customers can obtain MASH funding ahead of the legitimate existing affordable housing properties the MASH program was created to serve.

The question is not whether mobile homes can qualify for MASH; they can, just like any other housing, provided they meet the other eligibility requirements. The question is whether the Commission should, or even has the authority to, approve a special path to being deemed eligible affordable housing for MASH purposes for housing that does not meet the established requirements of the MASH program. The MASH Coalition respectfully submits that Commission should not and may not.

## **2. The Petition Fails on Multiple Procedural Grounds**

**A. Shorebreak is using the Petition to raise matters it should have addressed in comments on the Final Decision.** The Petition belatedly raises matters already discussed and settled by the Commission, thus wasting everyone's time and valuable public resources. Shorebreak was a party to and participated actively in the proceedings, but then failed to raise

these objections or make any comment at all on the final decision, when all parties were actively considering the matter. Instead, they filed this Petition after the fact.

**B. Shorebreak is attempting to resurrect settled issues already examined and rejected by the Commission.** The Petition is asking the Commission to approve a work-around to the low-income eligibility requirements of PUC § 2852. This is not a new effort. These exact issues have already been examined – and rejected – by the Commission. Evidence was introduced into the record by Everyday Energy that showed Shorebreak and others were creating inadequate deed restrictions (in the form of self declarations, with no regulating counterparty, that were conditional upon receiving a MASH reservation) in order to convince PAs to approve MASH incentives for certain projects. A number of MASH Coalition members and other affordable housing experts wrote to the Commission to express their strong objections in early 2014.<sup>3</sup> Several months thereafter, the PUC instructed the PAs to submit Advice Letters to update the CSI Handbook with “more detailed and comprehensive low-income eligibility documentation standards” particularly as to low-income eligibility. The Advice Letters were produced and the Handbook was amended effective August 2014.<sup>4</sup> The Commission also clearly addressed and rejected this practice in Decision, stating that “Section 2852 established clear standards on low-income property eligibility... [W]e will require that the documentation presented under Section 2852(a)(3)(B) be independently enforceable and verifiable (etc).”<sup>5</sup>

**C. The Petition asks the Commission to make housing policy, a task outside its expertise and authority.** With all due respect, the proper form of deed restriction to establish affordable rents for low-income multifamily properties lies outside the Commission’s purview. Housing agencies, not the Public Utilities Commission, should be making these determinations as to whether a particular form of deed restriction, and the mechanisms to verify compliance with such restrictions, is consistent the requirements of the California Health & Safety Code (“CHSC”) Division 31 and the established body of regulation and prevailing practices pursuant to affordable housing law.

The Commission recognized as much in adopting the final language of § 2852, which explicitly references CHSC Division 31, Part 1 as the source of the relevant definitions of

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<sup>3</sup> See for example letters to the Commission from EAH Housing, XXXX WHO ELSE SUBMITTED? “RE: R.12-11-005 Implementation of AB217 MASH/SASH Funds” dated on or about January 14, 2014, and the letter of Joel Rubenzahl, Executive Director of Community Economics, Inc. of approximately the same date.

<sup>4</sup> CSI August 2014 Handbook, “What’s New” section, inside front cover

<sup>5</sup> D.15-01-027, p. 56. Identical language appeared in the Proposed Decision of Commissioner Peevey, mailed 12/15/2014, p. 51.

“affordable rent,” “affordable housing cost” and “lower income households”. If one delves into CHSC Sections 50050 and following, one realizes that there is welter of cross-woven statutory requirements and arrangements, such as the need “to be consistent with pertinent federal statutes and regulations governing federally assisted housing” (50025.5(c)) and a certain latitude for state and local housing agencies (50052.5(b)(4)). Clearly, appropriate expertise is required, and an appropriate housing agency needs to be in a position to govern compliance with the affordability covenants of any given multifamily property. For this reason, the PUC requested and approved the aforementioned Advice Letters amending the CSI Handbook in August 2014, reading in relevant part:

For both [accepted methods of documentation], it is the responsibility of the Applicant to demonstrate that the rents being charged (or initial sale costs of the units) in the multifamily residential complex are or were affordable under the definitions of “affordable housing cost,” “affordable rent” and “lower income households”, as defined in Public Utilities Code Section 2852, all of which terms have the same meanings as in Health and Safety Code Sections 50050 through 50106. If an applicant’s documentation submitted pursuant to either 1 or 2 above does not come from one of the public entities listed below— all of whom have established authority to regulate affordable housing costs and/or rents—the applicant must present evidence to the MASH Program Administrator that the relevant affordability requirements of the Public Utilities Code and Health and Safety Code have been met for all units presented by the applicant as affordable under these code sections.

For reference, below is a non-comprehensive list of public entities that provide financing for low- income multifamily housing:

[list omitted]

The MASH Program Administrator may consult the public entity or non-profit housing provider listed on any applicant’s submitted low income documentation to confirm that the property is in good standing and not in violation of the terms of the low income documentation required for MASH.<sup>6</sup>

In other words the PUC, through the approved Handbook, puts the obligation squarely on the MASH applicant to provide evidence that they are meeting the low-income requirements of 2852, which can most effectively be done by reference to an affordability covenant in good standing with an established California affordable housing agency. Neither the Commission nor the PAs, as the Commission’s agents in implementing the program, are making the determination themselves.

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<sup>6</sup> CSI August 2014 Handbook, Section 4.11.1.7, pp. 83-84

### **3. The Petition Attempts to Redefine Affordable Housing to Suit Their Desires, and Thus Destroy the Heart of the MASH Program**

Any one of the procedural flaws discussed above is sufficient to invalidate the Petition. But after you get past all the procedural disqualifications, affordable housing is the heart of the matter, and at the heart of the MASH program. As mentioned above, Shorebreak repeatedly has tried to redefine affordable housing to suit their desires and skirt the well-established body of public policy on the matter. Therefore we urge the Commission, in rejecting the Petition, to make a clear statement in support of the fundamental purpose of the program.

**A. The MASH program is clearly, by statute and regulation, reserved for existing multifamily housing meeting current state standards for affordability to low-income households.** The fundamental MASH program goals are quite clear, as stated in the Commission's 2008 decision establishing the program in light of the straightforward requirements of AB2723:

“The MASH program is targeted at existing multifamily affordable housing that meets the definition of low-income residential housing set forth in Pub. Util. Code § 2852.8 Specifically, this means multifamily housing financed with low-income housing tax credits, tax-exempt mortgage revenue bonds, general obligation bonds, or local, state or federal loans or grants. The housing must also meet the definition of low-income households in Health and Safety Code § 50079.5.”<sup>7</sup>

The original decision was equally clear that not all developments in which otherwise qualifying low-income households reside meet the stricter affordable housing requirements of PUC § 2852:

“According to a study for the Commission on the characteristics of the low income population in California, approximately 50% of low-income households in the state, or approximately two million households, live in multifamily dwellings... It is unclear what percentage of these multifamily dwellings meets the definition of low-income residential housing in § 2852.” (emphasis added)<sup>8</sup>

**B. All MASH recipients must meet all threshold requirements.** MASH recipients must be multifamily rental housing. Just as any one of the aforementioned procedural hurdles alone is sufficient to invalidate Shorebreak's Petition, there are a series of threshold requirements with respect to the content of the MASH program and the meaning of affordable housing as established

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<sup>7</sup> D.08-10-036, p. 6

<sup>8</sup> *ibid.*

in the body of California law clearly referenced by 2852. Simply put, first a MASH project must be deemed housing, then it must be multifamily, then it must be rental, and finally it must be affordable to low-income households, as defined in state law. (These first and last of these requirements together are typically referred to in shorthand simply as “affordable housing”; the rental and multifamily requirements are particular to the MASH program.)

Mobile homes *per se* are not at issue; indeed, some mobile-home developments may meet all of the requirements including proper deed restrictions and thus qualify for MASH incentives. However, mobilehome parks as typically structured often will have trouble meeting some of the required threshold requirements. First, they must be housing – that is, the applicant entity and its property, the mobilehome park, must consist of and be in the business providing housing – fundamentally, the MASH applicant must own the dwelling unit. If the mobilehome park owner owns only the land and infrastructure and rents out a space on which a mobile home owned by the resident (or anyone other than the park owner) – which may be the predominant pattern of mobilehome park development in the state – then the MASH applicant is not providing housing, and so is disqualified in the first instance. Similarly, such an arrangement wouldn’t pass the rental test, and probably not the multifamily requirement either. It doesn’t matter what the income of the resident is if the park operator is not renting them the dwelling unit.

If the mobile home is owned by the resident rather than the park operator, they may qualify for the SASH program (as mentioned in our previous comments in the record; we are sorry to have to rehearse these already settled arguments). Indeed, the SASH handbook clearly states in Section 2.4.1 (D) that “An owner-occupied residence that is part of a multi-family complex” and meets the income, affordability covenant and other program requirements is eligible for that program.<sup>9</sup>

Next, MASH recipients must be *existing* affordable housing, not merely subject to a newly minted affordability covenant drafted to obtain MASH funds. As the Commission has rightly judged, it is unacceptable to have non-affordable housing agree to adopt an affordability requirement contingent upon receiving MASH incentives. The “existing” requirement has been a much-debated and clearly defined feature of the program from the beginning, when rules were put in place to direct newly constructed housing to the CSI New Solar Homes Partnership program rather than MASH. As much as the MASH Coalition, as affordable housing advocates, would like to see the state enable more affordable housing, this program is not the vehicle for such housing policy. In short, the PUC is not in the business of creating affordable housing, but rather in the

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<sup>9</sup> CSI August 2014 Handbook, Appendix D, p. 195

business of making sure documentation is correct to determine eligibility in its energy program restricted to existing multifamily rental housing affordable to low-income households.

**C. It takes time to create affordable housing that meets the regulatory requirements specified in PUC § 2852.** The process to actually provide affordable housing takes some time to put in place, with a deed restriction only one of many steps, one coming fairly early in the process. The housing sponsor still has to set “affordable rents” and receive a determination from the responsible agency that the rents comply with “low-income” levels for the subject geographical jurisdiction. The sponsor must provide notice to all the tenants, execute valid leases with each tenant in the property, and go through the detailed process of determining the income of each member of the household, including successfully soliciting third-party income verifications from employers and other sources of personal income. Given all this, the Decision’s requirement that the affordability covenant be recorded at least 180 days prior to the MASH application<sup>10</sup> is entirely reasonable, and in fact represents a quite optimistic timeline for moving from intention to realization of an affordable housing program.

**D. “Affordable Housing” has a specific meaning in California public policy, and in the MASH program through § 2852’s reference to CHSC Division 31, which must not be compromised.** The final threshold requirement for MASH eligibility, the one at the crux of the matter, is that MASH is a program for existing affordable housing, meaning specifically housing affordable to low-income residents, through the provision of low-income rents governed by an appropriate affordability covenant, as firmly established by the competent authorities under existing California law.

Housing policy a rich, active and ongoing history in California law and regulation, with numerous bills introduced each session. With such a fundamental human need at stake, housing policy has many resident protections in place, with carefully considered and highly elaborated rules for such essential matters as what constitutes “affordable rent.” This is not an area in which decisions can be taken arbitrarily to suit any one petitioner’s commercial interests.

To ensure that tenants’ rights are respected, and taxpayers’ investments are protected, extensive regulatory regimes have been established. Moreover, an enormous amount of time and effort has been invested by state officials and the whole range of housing stakeholders in trying to harmonize the governance of these compliance mechanisms. In order for sponsors like ourselves

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<sup>10</sup> D.15-01-027, p. 56 and Conclusion of Law 42

to develop and operate affordable housing, for agencies to effectively verify compliance, for lenders to be able to lend private capital to leverage the public subsidies, for low-income residents and their advocates to be able to understand and defend their rights, it is essential that the principal housing agencies in the state including those listed in the previously cited section of the CSI Handbook are all working from the same framework. It would be a grave error for another state entity to ignore this extensive body of practice and willy-nilly adopt its own rules of the game.

#### **4. The Commission Should Promote Interagency Cooperation to Resolve Any Outstanding Cases**

There will be certain MASH applications, either already in the pipeline and/or that will arise in the course of the upcoming funding round, that are outside of the normal standards for affordable housing. These would be properties that do not have a deed restriction or similar affordability covenant in place with one of the public housing agencies listed in the CSI Handbook as cited and discussed above (in Section 2.C of these comments). In these cases, as discussed, the obligation rests clearly on the applicant to present documentation that clearly evidences compliance with the appropriate requirements. The best way to do this would be to solicit the aid of the appropriate state or local housing agency, a practice the Commission could encourage, perhaps simply by directing the PAs to submit Advice Letters adding one or two sentences to the Handbook on the subject.

For example, the alternative of an affordability covenant where a housing nonprofit is the counterparty is fairly common for affordable for-sale housing created within a larger subdivision in order to satisfy local low-income inclusionary zoning requirements. The PA would not be expected to be familiar with the housing nonprofit, and have no good way of verifying that the arrangement is legitimate and the affordable housing has been appropriately verified. In such a case, the MASH applicant could ask the housing nonprofit to obtain a letter from the responsible local housing or planning agency to confirm adequate compliance oversight is in place. In our experience, such requests from local agencies (which Coalition members often obtain for various purposes) are relatively routine and should be readily obtainable by the applicant.

For more unusual cases, the PAs could refer MASH applicants to HCD for specialized review. This is a service HCD would be well equipped for: they are, by statute, the lead agency for state housing policy, and their duties include reviewing local affordable housing programs for compliance with state mandates. With respect to resources, the relevant analogy here is the 50% direct tenant benefit requirement adopted in the MASH Decision. Applicants seeking the higher

Track 1D incentives first have to procure an expert meeting qualifications promulgated by the California Tax Credit Allocation Committee (TCAC) to run a CUAC analysis, and then must submit the CUAC along with a fee sufficient to pay TCAC's delegated consultants to review and approve it. Whatever the exact mechanism, this same principle of interagency cooperation should be applied to any alternative form of deed restriction or affordability covenant, to ensure the protection of tenants' rights and the public's resources. The key is that the review be done by qualified experts under the purview of a competent public housing agency.

## 5. CONCLUSION:

The MASH program has been wonderfully productive to date, the Wait Lists are stacked with more legitimate affordable housing developments ready to go, and we are aware of numerous other affordable housing sponsors who missed out on the first round and are now eager to participate. The newly adopted incentive scheme encouraging 50% direct tenant benefits promises to go even further in bridging the Green Divide, bringing the benefits of solar to many thousands more low-income Californians, exactly as the enabling legislation intended. We urge the Commission to act swiftly now to reject the Petition, affirm the essential program goal of serving legitimate existing housing that is truly affordable to low-income households, and move forward with the next round of this successful program.

Respectfully Submitted this 30th day of March 2015, Carlsbad California

By: \_\_\_\_\_ /s/ *G. Andrew Blauvelt*

G. Andrew Blauvelt  
MASH Coalition

Randall Simmrin  
Community Advancement &  
MASH Coalition Member