

Decision PROPOSED DECISION OF COMMISSIONER PICKER  
(Mailed 6/11/2015)

**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)

**DECISION GRANTING, IN PART, THE PETITION FOR MODIFICATION OF  
DECISION 15-01-027 BY SHOREBREAK ENERGY DEVELOPERS, LLC TO  
REMOVE THE 180 DAY REQUIREMENT**

**Summary**

This decision modifies Decision (D.) 15-01-027<sup>1</sup> to remove the finding that documentation required by Pub. Util. Code § 2852 be recorded at least 180 days prior to the date of a Multifamily Affordable Solar Housing application.<sup>2</sup> This decision declines Petitioner's request that the Commission adopt specific language for a deed restriction referred to in Section 2852. This decision also affirms that the opinions and advice provided to the public by individual members of the Commission's staff do not represent the opinions of the Commission. This proceeding remains open.

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<sup>1</sup> D.15-01-027, *Decision Extending the Multifamily Affordable Solar Housing and Single Family Affordable Solar Homes Programs with the California Solar Initiative* (January 29, 2015).

<sup>2</sup> All Section references are to the Pub. Util. Code unless otherwise indicated.

## 1. Background

On February 27, 2015, Shorebreak Energy Developers, LLC (Petitioner or Shorebreak) filed a petition for modification of Decision (D.) 15-01-027.<sup>3</sup> The petition requests that the Commission remove the requirement adopted in D.15-01-027 that documentation used to demonstrate compliance with Section 2852 be recorded at least 180 days before an applicant files an application for incentives under the Multifamily Affordable Solar Housing (MASH) program. Shorebreak also requests the Commission to adopt specific language for deed restrictions for MASH applicants to use to demonstrate compliance with the low-income residential housing requirements referenced in Section 2852. In support of its petition for modification, Shorebreak suggests that members of the Commission, through informal conversations with staff, approved of specific language for a deed restriction that complies with Section 2852.

D.15-01-027 adopted modifications to the MASH program and the Single Family Affordable Solar Homes (SASH) program. The MASH and SASH programs are both part of the California Solar Initiative.<sup>4</sup> Generally, the MASH and SASH programs provide solar incentives to qualifying affordable housing, as defined by state law.

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<sup>3</sup> On March 6, 2015, Shorebreak amended its February 27, 2015 filing, *Amended Petition of Shorebreak Energy Developers, LLC for Modification of Decision 15-01-027* (Rulemaking 12-11-005), because its February 27, 2015 petition for modification omitted its Attachment A and its Affidavit in support of Attachment A. The amended petition filed on March 6, 2015 included these two previously-omitted documents.

<sup>4</sup> The history of the California Solar Initiative is set forth in more detail in D.15-01-027. *See also*, D.06-01-024, *Interim Order Adopting Policies and Funding for the California Solar Initiative* (January 12, 2006) and Senate Bill 1 (Murray, Stats. 2006, ch.132).

D.15-01-027 implemented certain changes to these existing MASH and SASH programs pursuant to Assembly Bill (AB) 217 (Bradford, Stats. 2013, ch. 609) by adopting, among other things, program budgets, incentives, and evaluation requirements.

On March 30, 2015, Everyday Energy and the Multifamily Affordable Solar Homes Coalition (MASH Coalition)<sup>5</sup> filed responses to Shorebreak's petition for modification. Shorebreak also filed an application for rehearing of D.15-01-027 on February 4, 2015. On February 6, 2015, Renewable Energy Partners, LLC (Renewable Energy Partners) also filed an application for rehearing of D.15-01-027. These two applications for rehearing are pending before the Commission. While the arguments set forth in these two applications for rehearing differ from those made in Shorebreak's petition for modification, the points raised by Shorebreak and Renewable Energy Partners in all of these pleadings share commonalities.

Today's decision only addresses Shorebreak's petition for modification. We address the following topics below: (1) whether to remove the 180 day restriction adopted in D.15-01-027; (2) whether to adopt a specific form for a deed restriction under Section 2852; and (3) whether the advice and opinions of individual members of the Commission's staff carry any legal weight.

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<sup>5</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.

**2. Decision 15-01-027 is Modified to Remove the Requirement to Record Documentation per Section 2852(a)(3)(B) at Least 180 Days Before Filing a MASH Application**

Today's decision modifies D.15-01-027 to remove the requirement, adopted therein, that any documentation demonstrating a commitment to provide affordable housing per Section 2852(a)(3)(B) be recorded at least 180 days before filing an application under the MASH program.

In D.15-01-027, the Commission adopted the requirement that documentation of a commitment to provide affordable housing presented in compliance with Section 2852(a)(3)(B) be recorded at least 180 days before the date an application for participation in the MASH program is filed.

The requirement for a particular type of documentation is found in the part of Section 2852 that defines the term "low-income residential housing." For purposes of the MASH program, which applies to multifamily residences, and the deed restriction referenced in Shorebreak's petition for modification, only subsections (A) and (B) are relevant and provide as follows:<sup>6</sup>

- (A) A multifamily residential complex financed with low-income housing tax credits, tax-exempt mortgage revenue bonds, general obligation bonds, or local, state, or federal loans or grants, and for which either of the following applies:

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<sup>6</sup> Subsection (C) of Section 2852 provides as follows: (C) An individual residence sold at an affordable housing cost to a lower income household that is subject to a resale restriction or equity sharing agreement, for which the homeowner does not receive a greater share of equity than described in paragraph (2) of subdivision (c) of Section 65915 of the Government Code, with a public entity or nonprofit housing provider organized under Section 501(c)(3) of the Internal Revenue Code that has as its stated purpose in its articles of incorporation on file with the office of the Secretary of State to provide affordable housing to lower income households.

- (i) The rents of the occupants who are lower income households do not exceed those prescribed by deed restrictions or regulatory agreements pursuant to the terms of the financing or financial assistance.
  - (ii) The affordable units have been or will be initially sold at an affordable housing cost to a lower income household and those units are subject to a resale restriction or equity sharing agreement pursuant to the terms of the financing or financial assistance.
- (B) A multifamily residential complex in which at least 20 percent of the total housing units are sold or rented to lower income households and either of the following applies:
  - (i) The rental housing units targeted for lower income households are subject to a deed restriction or affordability covenant with a public entity or nonprofit housing provider organized under Section 501(c)(3) of the Internal Revenue Code that has as its stated purpose in its articles of incorporation on file with the office of the Secretary of State to provide affordable housing to lower income households that ensures that the units will be available at an affordable rent for a period of at least 30 years.
  - (ii) The housing units have been or will be initially sold at an affordable cost to a lower income household and those units are subject to a resale restriction or equity sharing agreement, for which the homeowner does not receive a greater share of equity than described in paragraph (2) of subdivision (c) of Section 65915 of the Government Code, with a public entity or nonprofit housing provider organized under Section 501(c)(3) of the Internal Revenue Code that has as its stated purpose in its articles of incorporation on file with the office of the Secretary of State to provide affordable housing to lower income households.

As part of implementing the modifications to Section 2852 enacted by AB 217, the Commission in D.15-01-027 adopted the requirement that documentation presented in compliance with Section 2852(a)(3)(B) be recorded at least 180 days before the date of an application for participation in the MASH program.

Building upon the documentation language in Section 2852(a)(3)(B), D.15-01-027 found as follows:

In addition, the documentation presented under Section 2852(a)(3)(B) may not reference the MASH program, and must have been recorded at least 180 days prior to the date of the MASH application, or if recorded within 180 days of MASH application, replace a similarly complying pre-existing restriction or covenant.<sup>7</sup>

This requirement first appeared in the proposed decision of the assigned Commissioner after parties to this proceeding filed comments on the assigned Commissioner's proposed decision. The Commissioner's proposed decision was first published to the service list on December 15, 2014 pursuant to Section 311. Parties filed comments and reply comments on January 5, 2015 and January 12, 2015, respectively. In response to reply comments, the assigned Commissioner modified his December 15, 2014 proposed decision to include the 180 day requirement. On January 29, 2015, this proposed decision - as modified to include the 180 day requirement - was adopted by the Commission.

We find that additional opportunities to review and comment upon the 180 day requirement would be preferable. Since the 180 day requirement was incorporated into the proposed decision after reply comments were filed, parties

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<sup>7</sup> D.15-01-027 at 56 (and also found at Conclusion of Law 42 at 73-74).

had no opportunities to provide their opinion on this change. Moreover, this type of requirement – a time frame for recording the documentation required under Section 2852(a)(3)(B) – was not previously raised in the proceeding. Therefore, it is preferable to remove this language from D.15-01-027 and further consider the merits of the recording requirement or another similar requirement in a future and more comprehensive review of the MASH program.

Accordingly, in response to Shorebreak’s petition for modification, the requirement to record documentation of a commitment to provide affordable housing referenced in Section 2852 at least 180 days before filing an application under the MASH program is removed from D.15-01-027.

Furthermore, within two days of the effective date of this decision, the MASH Program Administrators are directed to jointly file a supplement to Advice Letter (CSE AL-59, filed on March 20, 2015, *Proposed Standalone Multifamily Affordable Solar Housing (MASH) Program Handbook to Incorporate Changes to the MASH Program Necessary to Align with Decision 15-01-027*). The supplemental filing should amend CSE AL-59. Specifically, the supplemental filing shall remove all references to the requirement in the proposed standalone MASH Handbook to record documentation of a commitment to provide affordable housing referenced in Section 2852 at least 180 days before filing an application under the MASH program.

### **3. The Commission Declines to Adopt Section 2852 Deed Restriction Language**

Today’s decision does not adopt any specific language for MASH applicants to use for any deed restriction presented as proof of compliance with Section 2852. As set forth in the above excerpt of Section 2852, the deed restriction functions, in certain instances, to meet one of the various requirements

needed to qualify for incentives under Section 2852. Shorebreak's petition for modification requests that the Commission adopt a form "Deed Restriction to eliminate any uncertainty or confusion on the part of applicants as to whether their deed restriction meets Commission requirements."<sup>8</sup> Shorebreak argues that, in the absence of the Commission's approval of a deed restriction that meets the requirements of Section 2852, those seeking incentives are placed at a disadvantage. Shorebreak further argues that it is the Commission's responsibility to adopt a deed restriction that complies with this code section.<sup>9</sup>

We take this opportunity to clarify that the Commission is not required by Section 2852 to adopt a deed restriction. We further clarify that the specific nature of the deed restrictions referenced in Section 2852 generally falls within the expertise of other state and local agencies. As such, the Commission, the utilities, and the MASH program administrators<sup>10</sup> are not positioned to provide advice to applicants on drafting language for a deed restriction under Section 2852. For these reasons, the Commission declines to adopt specific language for the deed restrictions required by Section 2852. Accordingly, Shorebreak's request for the Commission to adopt specific language for a deed restriction required by Section 2852 is denied.

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<sup>8</sup> February 27, 2015 Shorebreak Petition for Modification at 1.

<sup>9</sup> February 27, 2015 Shorebreak Petition for Modification at 4-5.

<sup>10</sup> The MASH program administrators are Pacific Gas and Electric Company, Southern California Edison Company, and the Center for Sustainable Energy in San Diego Gas & Electric Company's service territory.

#### **4. Reliance on the Advice or Opinions of Commission Staff as Speaking for the Commission is Not Reasonable**

The petition for modification filed by Shorebreak includes a series of e-mails between Jim Stevens, President of Renewable Energy Partners, and various members of the Commission's staff.<sup>11</sup> Shorebreak apparently seeks to justify its reliance on the content of the email exchanges and, specifically, the advice and opinions expressed therein by staff in response to questions by Jim Stevens, to claim that the Commission affirmed its business plan related to Shorebreak's compliance with the documentation language required by Section 2852.

Shorebreak justifies its actions in seeking and subsequently relying on staff advice, stating that:

"...Section 2852 is fairly open ended on what constitutes an acceptable deed restriction. That led Renewable Energy Partners, on behalf of those Shorebreak customers who had no recorded deed restriction in place, to look for guidance from the CSI Program Administrators and the Commission's Energy Division."<sup>12</sup>

Shorebreak further states that:

"Shorebreak recognizes that none of this advice [the advice of staff in the attached email exchanges] was carved in stone, but it [Shorebreak] has reasonably relied on these interpretations in its attempt to meet the Section 2852 documentation requirements."<sup>13</sup>

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<sup>11</sup> These e-mail exchanges are included with Shorebreak's March 6, 2015 petition for modification at Attachment A.

<sup>12</sup> February 27, 2015 Shorebreak Petition for Modification at 2.

<sup>13</sup> February 27, 2015 Shorebreak Petition for Modification at 3.

We disagree. Shorebreak's reliance on the advice of staff was not reasonable. Shorebreak even admits to the unreasonable nature of such reliance stating that the advice "was not carved in stone."<sup>14</sup> Moreover, Shorebreak's reliance on staff advice to justify or legitimize any aspects of its business plan, including compliance with the documentation requirement found in Section 2852, is not supported by law.

As a general matter, the Commission speaks only through its decisions, and not through the statements of any individual Commissioner or staff person. As stated in D.00-09-042 (Cal Water) 2000 Cal. PUC LEXIS 700: "it is well settled that the Commission speaks only through its written decisions. Applicants have cited no authority and we are aware of none for the proposition that oral comments made by individual commissioners affect the validity of the decision."<sup>15</sup>

Accordingly, today we reaffirm well-settled law that individual members of the Commission's staff do not speak for the Commission. Shorebreak's reliance on the advice and opinions of members of the staff as confirmation of its compliance with Section 2852 was not reasonable.

## **5. Comments on Proposed Decision**

The proposed decision of Commissioner Picker in this matter was mailed to the parties in accordance with Section 311, and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on July 1, 2015 and reply comments were filed on July 6, 2015. Revisions have been made in response to comments to the extent needed.

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<sup>14</sup> February 27, 2015 Shorebreak Petition for Modification at 3.

<sup>15</sup> D.00-09-042, Cal Water 2000 Cal. PUC LEXIS 700 at \*6.

## **6. Assignment of Proceeding**

President Michael Picker is the assigned Commissioner and Regina M. DeAngelis is the assigned Administrative Law Judge for this proceeding.

### **Findings of Fact**

1. Additional review of the requirement adopted in D.15-01-027 that any documentation required by Section 2852 be recorded at least 180 days before filing an application under the MASH program is preferable.

2. Other state and local agencies, among others, are more knowledgeable than the Commission on the documentation required by Section 2852. As such, the Commission, the utilities, and the MASH program administrators are not positioned to provide advice to MASH applicants on drafting language for a deed restriction under Section 2852.

3. It is not reasonable to find that the individual members of the Commission's staff speak for the Commission.

### **Conclusions of Law**

1. Because further review is preferable, the following requirement is removed from D.15-01-027: The documentation presented under Section 2852(a)(3)(B) must have been recorded at least 180 days prior to the date of the MASH application, or if recorded within 180 days of MASH application, replace a similarly complying pre-existing restriction or covenant.

2. The Commission will not adopt specific language for a deed restriction under Section 2852 because other agencies have expertise in this area.

3. It is well-settled law that individual members of the Commission staff do not speak for the Commission. To seek to legitimize a business plan based on the advice of Commission staff is not reasonable.

**O R D E R**

**IT IS ORDERED** that:

1. Decision 15-01-027 is modified to remove the following phrase from Conclusions of Law 42: "...and must have been recorded at least 180 days prior to the date of the MASH application, or if recorded within 180 days of MASH application, replace a similarly complying pre-existing restriction or covenant."

2. Within two days of the effective date of this decision, the Multifamily Affordable Solar Housing (MASH) Program Administrators shall jointly file a supplement to the Advice Letter (CSE AL-59, filed on March 20, 2015) *Proposed Standalone Multifamily Affordable Solar Housing (MASH) Program Handbook to Incorporate Changes to the MASH Program Necessary to Align with Decision 15-01-027* . The supplemental filing shall include amendments to the proposed standalone MASH Handbook to incorporate changes to the program needed to align with this decision.

3. Rulemaking 12-11-005 remains opens.

This order is effective today.

Dated \_\_\_\_\_, 2015, at San Francisco, California.