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October 9, 2018

VIA EMAIL TO:

Ms. Bara Jacobsma
Development Manager
RES Distributed, Americas
11101 W. 120th Ave., Suite #400
Broomfield, CO 80021
Bara.jacobsma@res-group.com

Re: Application for Location and Extent Review and Review for Activities of State Interest Pitkin County Solar, LLC dated May 2, 2018 & Supplemental Information to the Application for Location and Extent Review and Review for Activities of State Interest dated September 7, 2018

Dear Ms. Jacobsma:

Thank you for discussing the above-referenced land use application (the "Application") with me and the Director of the Pitkin County Community Development Department, Cindy Houben, on Friday, September 28, 2018. I am writing you to clarify the position of the Board of County Commissioners of Pitkin County, Colorado (the "BOCC") with respect to the Application and the applicable Pitkin County Land Use Code (the "LUC") review that the BOCC believes is required to process the Application. I am doing so because Ms. Houben forwarded me your email to her dated October 1, 2018 wherein you communicated that it was your understanding the Application could continue under Location and Extent Review. For the following reasons, it is my opinion that is not the case and that the Application, in its current form, must proceed under special use review.

I. Background:

On May 2, 2018, RES Distributed, LLC ("RES"), through its subsidiary Pitkin Solar, LLC, submitted the Application on behalf of the Aspen Consolidated Sanitation District ("ACSD"). The Application seeks approval under Location and Extent Review and Review for Activities of State Interest. On September 7, 2018, Pitkin Solar submitted Supplemental Information to the Application for Location and Extent Review and Review for Activities of State Interest (the "Supplemental Information").

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Based on the information supplied in the Application, Pitkin Solar is applying to develop a 5-MW electric power generating facility on property it intends to lease from the ACSD (the "Project"). The Project is a power plant and falls under the LUC definition of a Major Public Utility. The Application states that Pitkin Solar intends to sell the electricity to Holy Cross Energy ("HCE"). Pitkin Solar represents in the Application that HCE may have an option to purchase the Project in the future, but the specifics of the purchase option as well as the referenced Power Purchase Agreement have not been provided to the County with the Application. The Application represents that Pitkin Solar intends to locate the Project on approximately 33 acres of property (the "Pitkin Solar Leased Property") of an approximately 55 acre parcel owned by the ACSD. There is a reference to a Solar Energy Ground Lease (the "Ground Lease") in the Application, but Pitkin Solar does not appear to include the Ground Lease with the Application materials.

II. The Application, in its current form, is not entitled to Location and Extent Review.

Generally, LUC, Section 2-30-30(h)(10) provides:

The purpose of the location and extent review is to determine whether any proposed road, park, or other public way, ground, or space, or public building or structure or public utility, whether publicly or privately owned is in conformance with the applicable County Comprehensive Plan or Master Plan.

The Project on its face is a privately owned, public utility and, thus, potentially entitled to review under LUC, Section 2-30-30(h)(10). However, C.R.S. § 30-28-110(1)(c) provides:

In the case of a utility owned by an entity other than a political subdivision, the submission to the commission shall be by the utility and shall not be by the public utilities commission; however, the commission's disapproval may be overruled by the public utilities commission by a vote of not less than a majority of its entire membership

Thus, State law makes it clear that, in the case of privately owned, public utilities, submission to the Planning and Zoning Commission must come from the utility provider. Here, the Application describes the Project as one that will be owned by RES/Pitkin Solar and Application lists ACSD as the applicant, but not the owner of the Project. Accordingly, in order for the Project to benefit from Location and Extent Review, State law requires the utility provider, in this case HCE, submit the Application to the Planning and Zoning Commission as the applicant in order to benefit from Location and Extent Review.¹

¹ Counsel for RES indicated during our phone call on September 28, 2018 that he too believed that if HCE were the applicant Location and Extent Review would be applicable.

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Notwithstanding the foregoing, which I believe is dispositive of the question, it is further unclear whether ACSD would be entitled to Location and Extent Review in connection with the Project. I acknowledge that ACSD is a political subdivision of the State that would generally be entitled to benefit from LUC Section 2-30-30(h)(10) as well as C.R.S. § 30-28-110(1). However, C.R.S. § 30-28-110(1) and the case law interpreting the statute specifically contemplate balancing the authority of the BOCC with that of other political subdivisions of the State, having special statutory purposes. *See Bd. of Cty. Comm'rs of Cty. of Boulder v. Hygiene Fire Prot. Dist.*, 221 P.3d 1063, 1064–65 (Colo. 2009) (“Section 30–28–110(1) of the Planning Act codifies the longstanding rule that political subdivisions with special statutory purposes, including special districts, have a different relationship to county zoning authority than is otherwise applicable to private developments.”) emphasis supplied.

In this instance, I believe it is unlikely, though I acknowledge not impossible in some circumstances, that constructing a solar power plant would fall under the purview of the statutory authority customarily associated with sanitation districts. *See* C.R.S. § 32-1-1006 (enumerated list of statutory powers granted to sanitation districts). Further, it seems logical that the General Assembly’s clear effort to balance the authority of boards of county commissioners with the ability of other political subdivisions to override that authority would only extend to those types of activities that the political subdivision has a unique relationship with – such as those activities related to providing sanitation services in the case of the ACSD.² In my opinion, the Project is primarily the development of a public utility, despite ACSD receiving a secondary benefit as lessor of the Pitkin Solar Leased Property, not a sanitation facility or infrastructure.

Finally, I believe that the idea that the Project is entitled to Location and Extent Review because the ACSD has been listed as the Project applicant and/or is the owner of the underlying property is an oversimplification of the matter. While the ACSD is the fee owner of the Project Area, the long term ground lease arrangement substantially divests the ACSD of its ownership interest in the 33 acre Pitkin Solar Leased Property and begins to look a lot like a de facto subdivision of the ACSD property. Therefore, I think the correct analysis in this case involves both an evaluation of property interests at issue as well as a close examination of the proposed uses of the ACSD property.

Accordingly, for the foregoing reasons, the BOCC asks that you consider amending the Application to address the concerns raised in this letter regarding the Location and Extent Review process.

III. Pitkin Solar/ACSD Request for an Access Easement over and across Pitkin County Property.

The Supplemental Information provided on September 7, 2018 includes a request for an easement across property owned by Pitkin County. In this regard, Pitkin Solar appears to

² The requirement set out in C.R.S. § 30-28-110(1)(c) that utility providers submit applications for the construction of utilities supports this conclusion.

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acknowledge it does not currently have an easement sufficient to demonstrate legal access to the Pitkin Solar Leased Property for the Project. Pitkin Solar and the ACSD do claim to have a prescriptive right to utilize property owned by Pitkin County to access the ACSD. However, reliance on a prescriptive right generally does not satisfy the requirement that an applicant demonstrate legal access in connection with a land use application. Further, it is debatable whether any use of Pitkin County property by the ACSD would create a rights in third parties such as Pitkin Solar.

Assuming that we can agree on the correct review process moving forward, the BOCC would be willing to allow the Application to proceed to the Planning and Zoning Commission for recommendation as well as to the BOCC without the need to finalize any potential grant of easement to Pitkin Solar and the ACSD, until the end of the review process.

III. Conclusion:

As I stated previously, it is my opinion that it would be most correct for the Application to be processed through the Pitkin County Community Development Department, the Planning and Zoning Commission, and the BOCC in accord with the Pitkin County Land Use provisions regarding Special Review Uses, in addition to the LUC provision regarding Areas of State Interest. Generally, this would require an amendment to the current Application to include Special Review associated with the use of a Major Public Utility on the ACSD property. The Pitkin County Community Development Department can provide more information as to the specific requirements for Special Review associated with that use as well as more information on amending the Application.

I want to reiterate the same sentiment that I conveyed during our phone call on September 28, 2018, which is that the BOCC is very interested in this Project and is not attempting to preemptively block the Project or prejudge it in anyway. The goal of this letter is to ensure that the Application and the Project are reviewed correctly in accord with the LUC and the mandates of State law. By doing so, the BOCC is hopeful that any outcome is reached in a manner that complies with the law and maximizes community involvement in the review process. The BOCC is looking forward to continuing to work with RES/Pitkin Solar, the ACSD, and HCE to process the Application.

Please feel free to contact me if you have any questions or if you believe that there is any other pertinent information that would be useful to this matter that I am not aware of.

Very truly,



Richard Neiley

Cc: John Ely, Esq.; Jon Peacock; Cindy Houben; Suzanne Wolff.