

STATE OF CALIFORNIA  
Energy Resources Conservation and Development Commission

In the Matter of:

APPLICATION FOR CERTIFICATION FOR THE  
HIDDEN HILLS SOLAR ELECTRIC  
GENERATING SYSTEM

Docket No. 11-AFC-02

**INTERVENOR CINDY R. MACDONALD'S RESPONSE  
TO APPLICANT'S MOTION TO SUPPLEMENT EVIDENTIARY RECORD  
AND  
MOTION FOR SUBPOENA DUCES TECUM  
OR, IN THE ALTERNATIVE,  
MOTION TO STRIKE TESTIMONY**

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**RESPONSE TO APPLICANT'S MOTION  
TO SUPPLEMENT THE EVIDENTIARY RECORD**

**I. STATEMENT OF FACTS**

On March 22, 2013, Applicant submitted a Motion To Supplement The Evidentiary Record of the Hidden Hills Solar Electric Generating System, herein called the "Motion", that seeks to introduce additional evidence into the Hidden Hills AFC proceedings through submission of an affidavit from Dr. Sonke Johnsen for purposes claimed by Applicant to "correct the procedural unfairness and prejudice to the Applicant and all parties that resulted from Staff's surprise introduction of fundamentally new evidence on the issue of flux at the March 14, 2012 evidentiary hearing".

On February 1, 2013, Energy Commission Staff issued a Motion For Subpoena Duces Tecum and Motion For Extension of Time For Rebuttal Testimony, or, In the Alternative, Motion To Strike Testimony. Its purpose was to attempt to compel Applicant to provide information and data that had been withheld from the parties for several months -- despite repeated requests by Staff to make this information available for review prior to the Evidentiary Hearings. (*See* HHSEGS Evidentiary Hearing, Exhibit 749, for full disclosure and scope of Energy Commission Staff's Scope and Necessity For Subpoena).

On February 6, 2013, Energy Commission Staff issued a Motion To (1) Withdraw Motions for Subpoena Duces Tecum, Extension of Time For Rebuttal Testimony or To Strike Testimony due to Applicant's agreement to finally produce evidence relative to Staff's Motion For Subpoena Duces Tecum filed on February 1, 2013. (*See* Attached -Exhibit I, Motion To (1) Withdraw Motions for Subpoena Duces Tecum, Extension of Time For Rebuttal Testimony or To Strike Testimony Exhibit A: Notice of Agreement Between Staff and Applicant Regarding February 11, 2013 Workshop, February 6, 2013, TN#69409.)

The aforementioned agreement contained terms and conditions that were not included in the Committee's Hearing Order issued on December 21, 2012, but result in:

- a) An agreement that was negotiated privately between Staff and Applicant that did not involve participation by all parties in either drafting and agreeing to its terms and/or conditions.
- b) Provided a stipulation to allow only Applicant to file Sur-Rebuttal testimony by February 20, 2013, but did not contain provisions to offer an equal opportunity for other parties to file a Sur-Rebuttal Testimony.
- c) Was never formally granted or denied by the Committee, thus failing to provide a clear understanding to all parties as to the official status of these agreements made between Staff and Applicant, whether such a Sur-Rebuttal Testimony would be allowed by the Committee and if so, whether granting Applicant the right to submit Sur-Rebuttal Testimony would be offered equally to other parties.

## **II. DISCUSSION**

### **A. REBUTTAL AND SUR-REBUTTAL TESTIMONY**

Throughout the Motion, Applicant opines how Staff did not comply with provisions set forth in the Committee's Hearing Order with respect to their inclusion of "new" evidence at the March 14, 2013 Evidentiary Hearing, which includes describing how the Hearing Order did not allow Staff to file any Sur-Rebuttal Testimony.

However, Applicant fails to apply an equal standard to their own actions as the Hearing Order never allowed Applicant to file a Sur-Rebuttal Testimony nor did the Committee ever grant or agree to the terms set forth solely by Applicant and Staff regarding Applicant's exclusive and

singular “right” to file Sur-Rebuttal Testimony as outlined in Exhibit A of Staff’s Motion To (1) Withdraw Motions for Subpoena Duces Tecum.

In fact, Applicant’s claim that “the Committee Hearing Order did not allow Staff to file any sur-rebuttal to Applicant’s rebuttal testimony” omits the material fact that no such provisions for any party to file “sur-rebuttal testimony” exist in the Hearing Order nor did the Committee grant or agree to provisions of the agreement set forth in Exhibit A of Staff’s Motion To Withdraw Subpoena Duces Tecum that the Motion now asserts was Applicant’s right to file.

Additionally, while the Motion outlines pre-filing procedures, testimony and rebuttal testimony dates as authorized by the Committee, the Motion exclude facts related to their Sur-Rebuttal Testimony filed on February 20, 2013, such as that no party was granted the right or opportunity to rebut Applicant’s Sur-Rebuttal Testimony, including Staff, save for the Evidentiary Hearing.

The Motion equally complains that, “Lastly, and most importantly, Applicant’s rebuttal testimony was filed on February 11, 2013. Staff had one month in which it could have sought permission to file a response and provide the information to all Parties in advance of the hearing”.

Again, the Motion omits relevant facts surrounding evidence, testimony and rebuttal testimony concerning issues connected to solar flux that occurred prior to the Evidentiary Hearings, which continually placed Staff and all parties at a significant disadvantage throughout the proceedings through Applicant’s own unfair tactics and failure to exercise due diligence by reasonably providing relevant information in a timely manner and in compliance with the Committee’s Order dated December 21, 2012.

A summary of the Motion’s omissions include, but are not limited to;

- a) The failure of Applicant to provide Gary Santolo and various requested data and/or evidence regarding the “SEDC Flux Study” scheduled for December 5, 2012. This

- workshops sole purpose was to provide a forum to discuss the SEDC Flux Study with Mr. Santolo as well as issues associated with the proposed project's potential adverse impacts to the environment, biological resources and/or avian species resulting from solar flux.
- b) Applicant not only failed to produce Mr. Santolo at the December 5, 2012 workshop, Applicant continued to perpetuate a lack of access to Mr. Santolo by not scheduling another workshop to satisfy their previous obligations to produce outstanding information related to the "SEDC Flux Study" for another 67 days.
  - c) Through Applicant's continual failure to produce such reasonably available information for over two months, Staff filed a Motion For Subpoena Duce Tecum in efforts to compel Applicant to finally provide outstanding information to the parties regarding this hotly contested, disputed and debated subject.
  - d) The negotiated agreement between Staff and Applicant contained in Staff's Motion To Withdraw Motions ultimately resulted in the Applicant scheduling an untimely workshop on February 11, 2013, which was clearly in violation of the December 21, 2012 Hearing Order that stipulated if any workshop was deemed necessary, it was to be conducted *before* January 31, 2013. This allowed Applicant a significant advantage over all other parties even though the terms of said agreement were never ruled on or authorized by the Committee.
  - e) Throughout this process, Applicant continued to present "new" evidence and "new" experts such as Dr. Johnsen, who was introduced to the parties for the first time at the December 5, 2012 workshop in place of Mr. Santolo, Dr. Schwab and Dan Franck, who were introduced to the parties for the first time in Applicant's Opening Testimony filed on January 23, 2013, and Dr. Carretto, who was introduced to the parties in Applicant's

Rebuttal Testimony filed on February 11, 2013 – the same day as the February 11, 2013 solar flux workshop.

- f) While the other parties continued to comply with the Committee’s Hearing Order, Applicant continued the trend of making exceptions for themselves without prior authorization such as filing their Sur-Rebuttal Testimony on February 20, 2013, which was comprised solely of testimony from Mr. Santolo through an avenue that had not been allowed for in either the Committee’s December Hearing Order or through a Committee response that neither granted or denied the terms set forth in Exhibit A of Staff’s Motion To Withdraw Subpoena Duces Tecum.
- g) Additionally, the Motion fails to include the fact that Applicant’s Sur-Rebuttal Testimony was filed nine days later than any other date included in the Motion’s timeline references and was filed less than three weeks before the start of the Evidentiary Hearings.

**B. MISREPRESENTATION OF “UNFAIR TACTICS”**

The Motion laments how, “Applicant’s witnesses on solar flux were physically in the hearing room with Staff’s witnesses and counsel for several hours prior to this issue coming before the Committee. Staff could have, at the very least, shared the graphs and new information earlier in the day. Instead, Staff quite deliberately chose to wait until Applicant’s witnesses were literally on the stand such that they would be forced to respond to the new evidence-assuming any response was even permitted-in real time”

The Motions continues its complaints by stating, “Applicant’s counsel opined Staff’s new evidence comprised the most unfair hearing tactic he had experienced in over three decades of practice at and before the Commission”

The irony of the Motion's complaints against Staff's "unfair tactics" is that Applicant had employed the exact same unfair tactics just two days before during the Traffic and Transportation portion of the Hearings on March 12, 2013.<sup>(1)</sup>

Here, Applicant introduced "new" evidence, data, analysis and expert opinions regarding the potential noise impacts from construction vehicle traffic at the eleventh hour of the Evidentiary Hearing, had failed to provide this "new" data and information to any of the parties throughout course of the entire day -- including Staff and/or Staff's counsel -- and merely waited for the expert panel to be assembled before introducing this new evidence.

To add insult to injury, at the March 5<sup>th</sup> and March 6<sup>th</sup>, 2013 workshop scheduled to allow the parties one last opportunity to attempt to resolve dispute issues and specifically included the topic area of Traffic and Transportation Noise, Applicant continued to maintain its previous stance that no further data or analysis was necessary regarding adverse noise impacts to the community of Charleston View.

However, Applicant apparently had a change of mind regarding the merit of their previous testimony and so, developed a new set of data, analysis, and conclusions regarding noise associated with the construction traffic<sup>(2)</sup> that was a "surprise" to all parties when it was suddenly introduced "on the stand".

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(1) Evidentiary Hearing Transcript for the HHSEGS, Volume I, March 12, 2013, TN#2929, Testimony of Mr. Ratliff, p. 310, 11-13, "We're—we're very interested in what Mr. Bastasch has to say. And we heard --- we're hearing for the first time right now."

(2) Evidentiary Hearing Transcript for the HHSEGS, Volume I, March 12, 2013, TN#2929, Statements of Hearing Officer Celli, p. 309, 25, p. 310, 1-10, "I'm fairly impressed, at least with the testimony of Mr. Bastasch who seems to have some pretty ready figures at his fingertips in terms of what impacts are, what the thresholds are, what the measurement is at this site. And so, that's ---that was where I got the idea that this was—this was something that everybody had already looked at and that there were some – I also got the sense that there may have been some mitigation on the table and some conditions that could be crafted that would address the question of traffic noise. "

Not only had no one had ever seen this “new” information before, it was a complete reversal of Applicant’s previous testimony<sup>(3)</sup> regarding prior analysis being sufficient to stand on its own merit.<sup>(4)</sup> Additionally, portions of this “new” evidence<sup>(5)</sup> even contradicted Applicant’s prior testimony regarding noise levels resulting from a single heavy truck.<sup>(6)</sup>

The relevance of the Applicant’s own “equally” unfair tactics is made for the purpose of establishing the fact that the Motion’s assertion by Applicant’s counsel that Staff’s new evidence was the “most unfair hearing tactic he had experienced in over three decades of practice at and before the Commission” is *at best*, a gross misrepresentation.

Obviously, Applicant’s counsel *had* experienced such an unfair tactic before as Applicant’s counsel were responsible for employing this identical tactic and strategy on March 12, 2013, during the Traffic and Transportation/Noise portion of the Hearing held merely two days before Applicant found themselves on the receiving end of their own strategies to which they “vigorously objected too” and is now being complained about in the Motion.

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(3) Exhibit 72, Applicant’s Rebuttal Testimony, Noise, Testimony of Mr. Bastasch, p. 58-60; Traffic and Transportation, Testimony of Mr. Bloomberg, p. 72-73.

(4) Evidentiary Hearing Transcript for the HHSEGS, Volume I, March 12, 2013, TN#2929, Statements of Mr. Wheatland, p. 307, 3-4, “And the applicant again, in good faith, has done additional analysis to further clarify this issue.”

(5) Evidentiary Hearing Transcript for the HHSEGS, Volume I, March 12, 2013, TN#2929, Testimony of Mr. Bastasch, p. 300, 17-21, “Many at the same – many at the same time. So if we have -- if we’re looking at – at 500 feet from the roadway and 55 miles per hour, 49 decibels, we’d be looking at something less if those vehicles were idling.”

(6) Exhibit 72, Applicant’s Rebuttal Testimony, Traffic and Transportation, Testimony of Mr. Bloomberg, p. 72, Response A-6, “No, AFC Table 5.7-7 states that the noise level from a heavy truck at 50 feet is 86 dBA and at 1,500 feet it is 56 dBA. At 750 feet, the sound level would be 62 dBA.”

The only measurable distinction between Applicant's introduction of new analysis during the Evidentiary Hearing and Staff's is, Staff provided documentation that allows the parties to verify the information presented during the Evidentiary Hearing where Applicant relied solely on "expert opinion" without any supporting documentation to substantiate or verify the accuracy, adequacy or validity of such testimony.

Furthermore, Applicant directs all their complaints towards Staff but never acknowledges that under the authority set forth in Section 1203(c) and Section 1212(c), the Presiding Member has both the authority and discretion to allow such evidence into the hearing record at any time throughout the proceedings and that, "each party shall have the right to call and examine witnesses, to introduce exhibits, to cross-examine opposing witnesses on any matters relevant to the issues in the proceeding, and to rebut evidence against such party."

In short, the Motion ignores the Commission's established regulations that allow the parties the right to introduce evidence, including for purposes of rebutting testimony, and is allowable at the Committee's discretion.

Therefore, the Motion inappropriately directs its complaints against Staff when in fact, this "new" evidence was allowed into the hearing record as a direct result of the Presiding Members sole discretion for the exact purposes outline under Section 1203(c) and 1212(c) so that evidence of the sort on which a responsible person is accustomed to rely on in the conduct of serious affairs could be considered.

### **C. DR. JOHNSEN'S TESTIMONY AND AFFIDAVIT**

The Motion's complains that the acceptance of Dr. Johnsen's affidavit into the evidentiary hearing record "does not cure the unfairness of Staff's tactics" but would allow certain technical evidence to be presented to remedy alleged procedural unfairness.

Dr. Johnsen's affidavit then goes on to reiterate points made during the Evidentiary Hearing, such as continuing to repeatedly denigrate Staff's analysis, modeling and conclusions with such statements as "failing grades", "junior engineering" and implying that Staff's testimony could be completed as an overnight homework assignment.

In contrast, in the Motion's affidavit, Dr. Johnsen's extols the virtues of Mr. Santolo's SEDC Flux Study by testifying, "In my expert opinion, that question is best answered by studying real birds at real operating projects or by field tests such as those conducted by Mr. Santolo."

Yet when Dr. Johnsen was on the stand at the Evidentiary Hearing, he would not testify to the quality of Mr. Santolo's study or work and refused to "grade" or issue his expert opinion regarding Mr. Santolo's methods under the same standards he applied to Staff or those long-recognized as a standard in the scientific community<sup>(7)</sup>, even though Dr. Johnsen had ample opportunity to review Mr. Santolo's work for months prior to the Evidentiary Hearing and is now lobbying for the Committee to consider the results of Mr. Santolo's SEDC Flux experiment as more "realistic" than either Staff's theoretical analysis and modeling conclusions or even his own.

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(7) Evidentiary Hearing Transcript for the HHSEGS, Volume III, March 14, 2013, TN#2934

Testimony of Mr. Rubenstein, p. 408, 16-19, "The three studies were the SEDC study in Israel done by Mr. Santolo...";

Testimony of Ms. MacDonald, p. 409, 2-8, "I would like to question you all with the same question – in your opinion, do those three studies that you cited meet the standardized, scientifically-defensible criteria that you had ranked staff's analysis on? Because there was the failing grade, et cetera. Do you think those three studies would pass the same bar?";

Testimony of Ms. MacDonald, p. 409, 13-15, "Same question to Mr. Johnsen; would the three studies that he referenced – would those pass your class or your test or – do those have scientifically –defensible criteria?";

Testimony of Dr. Johnsen, p. 409, 16-18, "I'm not really the best person to ask that, either. It's out of my expertise, those particular things."

Dr. Johnsen's affidavit also provides contradictory testimony that both support his own calculations of "much higher flux levels" than Staff's calculations but simultaneously makes several assertions regarding the fact that even attempting to calculate solar flux impacts on living birds is a "fools errand" and that, "The difficulty is in applying them to flying birds and getting a meaningful result. At the moment, this cannot be done; merely presenting the equation does not make them accurate". He then further testifies that, "Above that threshold (including mine), however, the calculation tells you nothing about whether living, flying birds will, in fact, be harmed and, if so, at what flux levels."

Ironically, while Dr. Johnsen testifies that complex calculations used to predict flux impacts to living, flying birds cannot be done and recommends the use of studying real birds at real operating projects such as those conducted by Mr. Santolo, the Applicant has long held that Mr. Santolo's conclusions outlined in the SEDC Flux experiment are also not wholly applicable or accurate as they failed to represent "living, flying birds" as well.

Despite such contradictory positions, since Dr. Johnsen's introduction to these proceedings in December 2012, his testimony has consistently supported similar standards of significant thresholds of flux impacts to avian species<sup>(8)</sup> as first introduced by Applicant through a power point presentation at a Joint Workshop titled, "Avian Flux Study At SEDC" by Gary Santolo.

This study is the source of Applicant's alleged 50 kW/m<sup>2</sup> significance threshold to avian species.<sup>(9)</sup>

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(8) Exhibit 85: Avian Solar Flux Calculations from Staff, Dr. Johnsen and Dr. Carretto.

(9) Power Point Presentation for 082812 Joint Workshop, Avian Flux Study At SEDC, Gary Santolo, August 29, 2012, p. 35, Results, "No observable effects on feathers or tissue were found in test birds where solar flux was below 50 kW/m<sup>2</sup> with exposure times of up to 30 seconds".  
[http://www.energy.ca.gov/sitingcases/hiddenhills/documents/2012-08-28\\_joint\\_workshop/Applicant\\_Submitted\\_Power\\_Point\\_Presentation\\_for\\_082812\\_Joint\\_Workshop.pdf](http://www.energy.ca.gov/sitingcases/hiddenhills/documents/2012-08-28_joint_workshop/Applicant_Submitted_Power_Point_Presentation_for_082812_Joint_Workshop.pdf)

### III. MOTION FOR SUBPOENA DUCES TECUM

The Motion argues that Dr. Johnsen's affidavit should be admitted and allowed by the Committee to supplement the evidentiary record for two primary reasons, these being;

- a) To provide expert opinion necessary to counteract the "unfair" tactics of Staff by remedying the deficiencies alleged in Staff's "new" evidence and/or testimony and,
- b) To admit "[a]ny relevant noncumulative evidence....if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Applicant believes that "Such evidence should be taken into account by the Committee prior to rendering a decision on the Application for Certification of the HHSEGS project."

While Applicant seeks to supplement the Evidentiary Hearing record with Dr. Johnsen's "expert opinion" because it is the sort of evidence a responsible person should rely on in serious affairs, an expert opinion that supports Mr. Santolo's "real world" SEDC Flux Study, the facts of the matter are, Applicant went through great pains to withhold detailed relevant information from Staff, the parties and particularly the Committee regarding this same experiment for many months throughout these proceedings.

Specifically, the Applicant would not allow Staff or any other party to view the photos of the "singed birds" resulting from Mr. Santolo's work on the SEDC Flux experiment unless Staff agreed to the following stipulations as set forth by Applicant in Staff's Motion To Withdraw Motions, Exhibit A. These stipulations,

- a) Prohibited the photos of the "singed birds" from being recorded in any manner by any party.
- b) Prohibited the photos of the "singed birds" from being introduced into the public record in

any manner, including under confidentiality clauses.

- c) Prohibited these photos from being introduced by any party as evidence into the Evidentiary Hearing record or for Committee review.

While Applicant and Dr. Johnsen continue to support Mr. Santolo's work through theoretical principles regarding significant flux thresholds, it is obvious there is no similar support with respect to allowing the Committee or the public to review the "real world" results of what the birds in Mr. Santolo's study actually looked like after exposure to the solar flux levels at the miniscule SEDC facility in Israel.

Instead, Applicant has gone through a great deal of trouble to hide this evidence from Staff and the other parties for many months, to keep it out of the public record in any manner and most importantly, to attempt to prevent the Committee from being able to equally consider reasonably available evidence during the decision making process such as those in Mr. Santolo's experiment conducted at the SEDC facility in Israel last summer and the photos of recorded impacts to birds exposed to various levels of solar flux levels and exposure times.

As such, if it is the Applicant's true intent that the Committee should be able to review all relevant information regarding impacts and potential impacts of solar flux on avian species, then no decision should be rendered without the Committee being able to equally view the photos and notes of Mr. Santolo's SEDC Flux experiment as was made available to Staff and attending parties at the February 11, 2013 workshop.

Energy Commission Staff believed the information requested in the Motion For Subpoena Duces Tecum filed on February 1, 2013, was critical to their analysis and conclusions regarding impacts of solar flux to avian species and biological resources.

As such, it should be self-evident that such information should be considered by the Committee as equally critical for incorporation as evidence in the decision making process, especially so since Dr. Johnsen's affidavit states Mr. Santolo's work is what the Committee should consider above Staff's analysis and conclusions.

For the all the reasons outlined in the above response, if the Committee is to allow the admittance of Dr. Johnsen's testimony and affidavit as provided in the Motion and outside the normal procedures for evidence submission into the evidentiary record, then the admission of this evidence should be equally balanced with all evidence reasonably available to the Applicant, including evidence Applicant has previously sought to prevent from being introduced into the record and to withhold from the Committee's consideration.

Therefore, I hereby move to file a Motion For Subpoena Duces for the information and data outlined in Exhibit 749 of the HHSEGS Evidentiary Hearing, as presented by Staff in the February 1, 2013, Motion For Subpoena Duces Tecum and Motion For Extension of Time For Rebuttal Testimony, or, In the Alternative, Motion To Strike Testimony, which includes:

1. All written instructions, directions, or requests from Brightsource regarding the purpose of the SEDC Flux study and any other study conducted at the SEDC facility and the research questions that such studies were intended to address;
2. All notes taken by Mr. Santolo or others who assisted him regarding such studies;
3. All pictures taken of the dead birds that were the subject of such studies;
4. All data regarding temperatures recorded on the dead birds used in such studies at the start of, during, and at the end of flux exposure;

5. All data regarding thermal levels on or in the dead birds used in such studies as they varied over the full time measured by the thermal couples, and;
6. All documents responsive to Energy Commission Staff Data Request Set 3, issued October 26, 2012 (including but not limited to Request Numbers 200, 201, 202(a) – (e) and (s)) that have not been previously produced.

#### **IV. CONCLUSION**

This additional evidence is necessary to supplement the Evidentiary Hearing record and should be provided by the Applicant to the Committee, the parties and to be incorporated in the public record for purposes of consideration by the Committee as it is reasonably available to the Applicant, supports Applicant's and Dr. Johnsen's testimony and is of extreme relevance as said photos and information contain direct, measurable results from exposure of avian species to solar flux.

As such, the evidence outlined in this Motion For Subpoena Duces Tecum regarding Mr. Santolo's results at the SEDC Flux experiment is the kind of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs.

If the Committee is to allow the Applicant to supplement the Evidentiary Hearing record as provided in the Applicant's Motion, then such an admission would only allow a one-sided, partial and incomplete record of Mr. Santolo's work and thus, fails to provide the Committee with a complete record of all the relevant facts reasonably available for the Committee's consideration.

In the event the Applicant is unwilling to provide such relevant information to the Committee as outlined in this response and its accompanying Motion for Subpoena Duces Tecum to insure a

complete and adequate record of all reasonably available information, then in the Alternative, it is respectfully requested that the Committee DENY Applicant's Motion and thus, disallow any further supplemental testimony in the Evidentiary Hearing Record, including Dr. Johnsen's attached testimonial affidavit filed with Applicant's Motion To Supplement The Evidentiary Hearing Record.

Dated: March 27, 2013

Respectfully submitted by,

A handwritten signature in cursive script, appearing to read "Cindy R. MacDonald", is written on a light-colored rectangular background.

Cindy R. MacDonald/Intervenor  
3605 Silver Sand Court  
North Las Vegas, NV 89032

## EXHIBIT I

### **Energy Commission Motion To**

- (1) Withdraw Motions for Subpoena Duces Tecum, Extension of Time For Rebuttal  
Testimony or To Strike Testimony And**
- (2) Modify Order Re Evidentiary Hearings, TN#69409.**

CALIFORNIA ENERGY COMMISSION

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California Energy Commission <b>DOCKETED</b> <b>11-AFC-2</b>
TN # 69409 FEB 06 2013

**ENERGY COMMISSION STAFF  
MOTION TO  
(1) WITHDRAW MOTIONS  
for  
SUBPOENA DUCES TECUM,  
EXTENSION OF TIME FOR REBUTTAL TESTIMONY  
or  
TO STRIKE TESTIMONY**

**And**

**(2) MODIFY ORDER RE EVIDENTIARY HEARINGS**

**I. INTRODUCTION**

On February 1, 2013, Energy Commission staff (Staff) filed a *Motion for Subpoena Duces Tecum and Motion for Extension of Time for Rebuttal Testimony, or, in the Alternative, Motion to Strike Testimony (Motion for Subpoena)* in this proceeding. This *Motion for Subpoena* was filed primarily to obtain information from the Applicant about potential impacts on avian life from concentrated solar flux at the proposed facility. Since filing the *Motion for Subpoena*, the Applicant has agreed to provide the information sought by Staff. The information would be presented and discussed at Staff’s previously-noticed workshop on the issue of impacts of solar flux, which is to be held on February 11, 2013. This commitment by the Applicant is subject to certain limitations and with the expectation of additional time to prepare and respond to rebuttal testimony on the avian solar flux issue in light of the information presented at the upcoming Staff workshop.

Accordingly, Staff respectfully requests the Presiding Member exercise her authority under title 20, California Code of Regulations, section 1203(c), to:

- (1) allow Staff to withdraw its *Motion for Subpoena* without prejudice, and
- (2) Issue an order allowing additional time as agreed to by Staff and the Applicant for all parties to this proceeding to file rebuttal testimony, and the Applicant to file sur-rebuttal testimony, on the solar flux issue.

**II. BASIS FOR THIS MOTION**

The Applicant has now agreed to produce its expert Mr. Gary Santolo and his documents at Staff’s workshop on February 11, 2013. This commitment is reflected in a letter of agreement from counsel for the Applicant submitted to the Presiding Member, dated

February 6, 2013, a true and correct copy of which is attached hereto as Exhibit A. This commitment from the Applicant, accepted in good faith, obviates the need at this time for Staff's *Motion for Subpoena*.

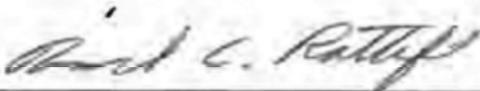
Staff and the Applicant believe additional time is warranted for parties to the proceeding to prepare rebuttal testimony, and the Applicant to prepare sur-rebuttal testimony, on the solar flux issues as they pertain to the flux study conducted by Mr. Santolo.

A proposed order is attached for the convenience of the Presiding Member.

### III. DECLARATION

I declare, under penalty of perjury of the laws of the State of California, that the foregoing is true and correct.

Executed on February 6, 2013, in Sacramento, California.



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Richard C. Ratliff, Staff Counsel IV  
Pippin C. Brehler, Senior Staff Counsel  
Kerry Willis, Senior Staff Counsel  
California Energy Commission

## Exhibit A

## ELLISON, SCHNEIDER & HARRIS L.L.P.

ANNE J. SCHNEIDER  
1947-2010

CHRISTOPHER T. ELLISON  
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February 6, 2013

Commissioner Karen Douglas  
Hearing Officer Ken Celli  
Hidden Hills Solar Electric Generating System (11-AFC-2)  
California Energy Commission  
1516 Ninth Street  
Sacramento, CA 95814

Re: Notice of Agreement Between Staff and the Applicant Regarding the February 11, 2013 Workshop.

Dear Commissioner Douglas and Hearing Officer Celli:

We are writing to notify the Committee that Staff and the Applicant have come to an agreement regarding the February 11, 2013 workshop. Staff and the Applicant have agreed as follows:

- Applicant agrees to have Gary Santolo at the workshop and that he will answer reasonable, relevant questions regarding the tests described in his testimony;
- Applicant agrees that Gary Santolo will produce photographs taken as part of the tests for inspection by Staff, government agency representatives and a representative of each formal intervenor at the workshop; provided, however, that Staff and Applicant agree that, due to the nature of the photographs and the potential for abuse of them, the photographs will not be available for inspection by persons other than those specified above and neither Staff nor Parties or other person or entity will obtain custody of or otherwise record or copy the photographs, nor will the photographs be submitted to the Docket or admissible in this proceeding;
- Applicant agrees that Gary Santolo will also produce the following documents at the workshop which will be submitted to the Docket:
  - Notes regarding the tests (with the understanding that there are no notes specifically addressing the placement of the thermocouples); and
  - Notes/records of the thermocouple data, including records beyond 5 seconds;

- Staff agrees to withdraw its *Motion for a Subpoena Duces Tecum and Motion for Extension of Time for Rebuttal Testimony or in the Alternative Motion to Strike Testimony*;
- Optional Rebuttal Testimony addressing the Santolo Report will be due by all parties on February 15, 2013;
- Optional Sur-rebuttal testimony by the Applicant to the Rebuttal Testimony filed by other parties will be due on or before February 20, 2013;
- Both Staff and Applicant agree that no changes to any other dates in the December 21, 2012 Scheduling Order are necessary; and
- Both Staff and Applicant will advocate for the schedule set forth in the December 21, 2012 Scheduling Order without any further modification.

Please contact me at 916-447-2166 if you have any questions regarding this agreement.

Sincerely,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By   
Jeffery D. Harris  
Christopher T. Ellison  
Samantha G. Pottenger  
Attorneys for Applicants

**[PROPOSED] ORDER  
GRANTING MOTION TO**

**(1) WITHDRAW MOTIONS  
for  
SUBPOENA DUCES TECUM,  
EXTENSION OF TIME FOR REBUTTAL TESTIMONY  
or  
TO STRIKE TESTIMONY**

**And**

**(2) MODIFY ORDER RE EVIDENTIARY HEARINGS**

For the reasons stated in the Energy Commission Staff's *Motion to (1) Withdraw Motions for Subpoena Duces Tecum, Extension of Time for Rebuttal Testimony, or to Strike Testimony, and (2) Modify Order re Evidentiary Hearings*, filed herein February 5, 2013, the Hidden Hills Presiding Member hereby adopts this Order.

*Staff Motions for Subpoena Duces Tecum, Extension of Time for Rebuttal Testimony, or to Strike Testimony*, filed herein on February 1, 2013, are withdrawn without prejudice.

Further, the Committee's Notice of Prehearing Conference and Evidentiary Hearing and Order, December 21, 2012, is hereby modified to allow:

- Optional Rebuttal Testimony addressing the avian impacts from solar flux issues will be due by all parties on February 15, 2013;
- Optional Sur-rebuttal testimony by the Applicant to the Rebuttal Testimony filed by other parties will be due on or before February 20, 2013;

Dated: \_\_\_\_\_

\_\_\_\_\_  
KAREN DOUGLAS  
Commissioner and Presiding Member  
HHSEGS AFC Committee



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
COMMISSION OF THE STATE OF CALIFORNIA  
1516 NINTH STREET, SACRAMENTO, CA 95814  
1-800-822-6228 – WWW.ENERGY.CA.GOV

**APPLICATION FOR CERTIFICATION FOR THE  
HIDDEN HILLS SOLAR ELECTRIC  
GENERATING SYSTEM**

**Docket No. 11-AFC-02**

**PROOF OF SERVICE  
(Revised 3/25/13)**

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1516 Ninth Street, MS-4  
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PARTICIPANTS (LISTED FOR  
CONVENIENCE ONLY):**

***After docketing, the Docket  
Unit will provide a copy to the  
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KAREN DOUGLAS  
Commissioner and Presiding  
Member

DAVID HOCHSCHILD  
Commissioner and Associate  
Member

Ken Celli  
Hearing Adviser

Galen Lemei  
Adviser to Presiding Member

Jennifer Nelson  
Adviser to Presiding Member

Jim Bartridge  
Adviser to Associate Member

\*Kelly Foley  
Adviser to Associate Member

Eileen Allen  
Commissioners' Technical  
Adviser for Facility Siting

**DECLARATION OF SERVICE**

I, Cindy R. MacDonald, declare that on March 27, 2013, I served and filed copies of the attached Response To Applicant's Motion To Supplement Evidentiary Record And Motion For Subpoena Duces Tecum Or, In the Alternative, Motion To Strike Testimony, dated March 27, 2013. This document is accompanied by the most recent Proof of Service, which I copied from the web page for this project at:  
<http://www.energy.ca.gov/sitingcases/hiddenhills/>.

The document has been sent to the other persons on the Service List above in the following manner:

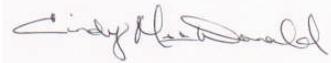
**(Check one)**

**For service to all other parties and filing with the Docket Unit at the Energy Commission:**

- I e-mailed the document to all e-mail addresses on the Service List above and personally delivered it or deposited it in the US mail with first class postage to those parties noted above as "hard copy required"; **OR**
- Instead of e-mailing the document, I personally delivered it or deposited it in the US mail with first class postage to all of the persons on the Service List for whom a mailing address is given.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: March 27<sup>th</sup>, 2013



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Cindy R. MacDonald