



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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California Energy Commission
DOCKETED
11-AFC-4
TN # 66306
JUL 24 2012

APPLICATION FOR CERTIFICATION
*FOR THE RIO MESA SOLAR
ELECTRIC GENERATING FACILITY*

Docket No. 11-AFC-04

ORDER RE: ENERGY COMMISSION STAFF'S REQUEST FOR EXTENSION OF THE PRELIMINARY STAFF ASSESSMENT FILING DEADLINE, EXTENSION OF DISCOVERY PERIOD FOR 60 DAYS AND MOTION TO COMPEL PRODUCTION OF BRIGHTSOURCE ENERGY, INC.'S POWER PURCHASE AGREEMENTS INVOLVING THE RIO MESA SOLAR ELECTRIC GENERATING FACILITY

On June 4, 2012, Energy Commission staff (Staff) asked for an extension of the June 11, 2012 deadline to submit information requests to the Applicant in this Application for Certification (AFC) proceeding. As discussed below, Staff's request is **GRANTED**.

Further, on June 29, 2012, Staff filed a motion seeking an extension of time to file its Preliminary Staff Assessment (PSA) and a motion to compel the production of the Applicant's power purchase agreements (PPA). As discussed below, the motion to extend the filing of the PSA to September 28, 2012 is **GRANTED**. The motion to compel production of the PPA was withdrawn by staff counsel in an email dated July 17, 2012.

Background

On October 14, 2011, Rio Mesa Solar I, LLC, Rio Mesa Solar II, LLC, and Rio Mesa Solar III, LLC (collectively referred to as "Applicant") jointly filed an AFC with the Energy Commission for three separate certifications to construct and operate three plants known as Rio Mesa I, Rio Mesa II, and Rio Mesa III as a single facility referred to as Rio Mesa Solar Electric Generating Facility. The Commission deemed the AFC complete ("data adequate") on December 14, 2011.

On February 2, 2012, the Committee designated to conduct proceedings and oversee the AFC process for the Rio Mesa Solar Energy Generating Facility, held an Informational Hearing and Scoping Meeting in Blythe, California.

On March 19, 2012, the Committee held a Status Conference and on April 13, 2012, the Committee issued a Scheduling Order. The Order required Staff to publish the PSA in "August 2012."

By a letter dated May 30, 2012, the Applicant announced an intention to revise the project and pursue project Alternative 3 as described in the AFC, which would eliminate Rio Mesa Solar III. The letter states in pertinent part:

. . . BrightSource has elected to pursue an Environmentally Enhanced 2 Unit project configuration with all solar plant equipment located on private land. One of the permanent project access roads, gen-tie line, and construction/emergency backup power would access the site via public (BLM) land. No new land impacts are contemplated for this alternative. The primary differences between the Environmental Enhancement and the originally proposed "Preferred" alternative include:

1. Removal of the northern generating Unit
2. All solar generating plant equipment is located on private land
3. Common Area Facilities including the project switchyard are relocated west of the WAPA and Transcanada transmission lines
4. Natural Gas tap/meter station is relocated to the south at the terminous of the Unit 1 eastern spoke road. (5/30/12 Applicant Letter, p. 1.)

The letter indicates Applicant's intention to file project change documents with the Commission by early July 2012.

Anticipating the Applicant's proposed project changes and the June 11, 2012 information request deadline, Staff submitted a written request on June 4, 2012 asking the Committee to extend the deadline to allow data requests on the project change documents.

Staff explained:

The changes proposed by the Applicant, while described as environmental enhancements, involve a substantial change to the project design. As such, Staff anticipates that these changes may necessitate additional requests for information. As the Applicant has acknowledged, the changes cannot be simplified by stating that all impacts are reduced by a third across the board. Major project components are being relocated and because resources are not evenly distributed on site, the evaluation of how the potential impacts have changed from the original proposal will require careful review and analysis to obtain a thorough understanding of which impacts are reduced and by how much and which remain unchanged. Additionally, these changes will affect the majority, if not all, of the technical areas reviewed by Staff. (June 4, 2012 Staff Letter, pp. 1-2.)

Staff asked for a 60-day period within which to submit information requests to the Applicant on the project change documents. Neither the Applicant nor Intervenor, Center for Biological Diversity, opposed this request.

During the June 20, 2012 Mandatory Status Conference, the Applicant stated it will serially submit project change documents ending with a final a submission on or about July 23, 2012.

On June 29, 2012, Staff filed the instant request to extend the filing of the PSA to September 28, 2012 and motion to compel production of the PPA (hereinafter "Motion") and Applicant filed their response on July 16, 2012 (hereinafter "Response.")

On July 17, 2012, Staff withdrew its motion to compel production of the PPA.

Discussion

60-Day Extension for Submission of Information Requests

Parties in AFC proceedings may request information from Applicants when the information is (1) relevant to the AFC proceedings or reasonably necessary for a decision on the AFC and (2) reasonably available to Applicants. (Cal. Code Regs., § 1716, subd. (b).) Parties must generally make these information requests within 180 days from the date the Energy Commission deems the AFC data adequate. (Cal. Code Regs., § 1716, subd. (e).) A committee may extend this deadline for good cause. (*Id.*)

Staff's unopposed June 4, 2012 letter states good cause for allowing an extension for data requests in response to Applicant's recently submitted project change documents. Accordingly, Staff and the Center for Biological Diversity may submit information requests to the Applicant up to and including 60 calendar days after the Applicant serves the last installment of project revision documents on the persons listed in the project proof of service list. The information requests shall be limited to questions arising from the project description changes submitted by the Applicant since June 21, 2012 regarding the effects of the elimination of Rio Mesa Solar III.

Extension of the PSA Publication Date to September 28, 2012

The Scheduling Order of April 13, 2012 was confined to the facts that were presented to the Committee prior to the issuance of the Order. The Order requires a PSA in August 2012. According to Staff, on May 24, 2012, Applicant informed Staff and other parties during a workshop that it would be revising the project to remove the northern third of the project, Rio Mesa III, from the AFC and to relocate the permanent common facilities. On May 30, 2012, Applicant notified the parties in a formal writing of their intent to pursue this revision and indicated that they expected to submit the full package of information in early July. (Staff's Motion, p. 1.)

On June 15, 2012, Applicant informed Staff that it would be providing a detailed description of the project changes according to the following schedule:

- five sections submitted on June 21, 2012;
- nine sections on July 10, 2012; and
- the remaining sections provided by July 23, 2012 in electronic format, with hard copies delivered by July 25, 2012. (Staff's Motion, p. 2.)

Staff argues that these submittal dates are several weeks later than originally proposed by the Applicant. (Staff's Motion, p. 2.) "From a purely logistical standpoint, [S]taff's ability to complete the writing, review, formatting, publication, and final delivery of a PSA that, due to the complexity of the proposed project, will likely be on the order of over 1,000 pages in length, while also maintaining a level of quality control, will be virtually impossible with submittal of revised project information the last week of July. This is the case even if all review occurred simultaneously." (Staff's Motion, p. 3.)

Applicant argues that Applicant's proposed changes are relatively minor and Applicant has already provided a substantial portion of the changed information by "early" July. (Applicant's Response, p. 3.)

At the Mandatory Status Conference held at the Energy Commission headquarters on June 20, 2012, counsel for Applicant characterized the project changes as "significant" (6/20/12 RT 6:23-25). The project manager for Staff described the logistical hurdles which must be surmounted before the PSA could be published (6/20/12 RT 19:23-21:9) and counsel for Applicant stated that they were constrained by the same logistical problems as Staff in terms of the necessary layers of review (6/20/12 RT 30:22-25).

The central issue in scheduling this AFC proceeding has been Applicant's desire to get a Presiding Member's Proposed Decision (PMPD) published in May of 2013 versus Staff's call for more time to provide a complete assessment of significant environmental issues. As stated in the Scheduling Order of April 13, 2012 which ruled in favor of Applicant's right to an 18-month AFC process, "[t]he parties' status conference arguments reveal a tension between the requirements of Section 25540.6 (as framed by the Applicant's demand) and Staff's concern that Applicant has yet to produce essential data important to Staff's preparation of preliminary and final project impact assessments. Staff raises a legitimate concern." (4/13/12 Committee Scheduling Order, p. 2.) The Order observed that "Applicant assumes the risk that Staff and others will present persuasive evidence and analyses that prevent the Applicant from satisfying its burden." (4/13/12 Committee Scheduling Order, p. 5.)

The Scheduling Order directed that if "the Applicant does not produce environmental information Staff deems necessary for its, the Committee's, and the Commission's analyses, then Staff's assessment must explain how the absence of this data affects an

assessment of the project's impacts and proposed mitigation measures. The assessment must also provide Staff's position on the environmental issues *even if Staff's position is a recommendation against certification.*" (4/13/12 Committee Scheduling Order, pp.5-6, emphasis in the original.)

Finally, the Scheduling Order opined that "despite Staff's reasonable intention to publish its assessments only after receiving all of the information requested of the Applicant, Staff's ability to comply with its regulatory duties is not contingent on the Applicant's production of additional data." (4/13/12 Committee Scheduling Order, p.6.)

The difference between the issue underlying the 4/13/12 Committee Scheduling Order and the instant motion is that originally, Applicant was alleged to have inadequately responded to data requests based upon the project description that had been deemed data adequate many months before. Now Applicant is changing the project description and submitting it piecemeal until the last week before August 2012. The project description is the fundamental basis of Staff's review, without which, Staff's analysis would be worthless. Indeed, while Staff conceded at the status conference prior to the Committee Scheduling Order that it can issue the assessments in the absence of information it requested from the Applicant (3/19/12 RT 46:18 - 49:8), it is quite another thing to issue assessments based upon an obsolete project description.

One problem in need of clarification concerns the deadline to file the PSA. According to the Scheduling Order, the PSA must be filed in "August 2012." Staff read this to mean "late August" (6/20/12 RT 14:20-22). Applicant appears to understand it to mean "August 1" (Applicant's Response, p. 3 ¶ 2). When a deadline is set for a month and a year without specifying a day, fairness requires that we construe the ambiguity in favor of the party obligated to meet the deadline. We read August 2012 to mean "up to and including the last day of August." Therefore, Staff's request to file the PSA by September 28, 2012 amounts to a 28-day extension.

The impediment to Staff's adherence to the schedule was not caused by some failing on the part of Staff but is due to the Applicant's own recently filed project changes. While the Committee acknowledges that the AFC process is an "iterative process" and encourages ongoing changes for the sake of perfecting the project, it would seem fundamentally unfair to force Staff to issue a perfunctory PSA when the 28-day extension they seek is predicated upon a delay caused by Applicant. In balancing the equities, we find that basic fairness requires that Staff be given at least as much time to respond to project changes as it took for Applicant to make them in the first place. Therefore, we find that Staff has shown good cause to extend the filing of the PSA to September 28, 2012. In making this finding, we are quick to advise that, absent unforeseen extraordinary circumstances, the parties are expected to strictly adhere to the remainder of the schedule, including the publication of the Final Staff Assessment, in as complete a form as possible, before the last day of January, 2013.

Conclusion

The record contains a showing of good cause to allow an extension of information requests due to the Applicant's recent project changes. Accordingly, Staff and the Center for Biological Diversity may submit information requests to the Applicant up to and including 60 calendar days after the Applicant serves the last installment of project revision documents on the persons listed in the project proof of service list. The information requests shall be limited to questions arising from the project description changes submitted by the Applicant since June 21, 2012 regarding the effects of the elimination of Rio Mesa Solar III.

Good cause exists to extend the filing of the PSA to September 28, 2012 to enable Staff to include Applicant's new changes to the project description in the PSA.

IT IS SO ORDERED.

Dated: July 24, 2012, at Sacramento, California.

Original Signed By: _____

CARLA PETERMAN
Commissioner and Presiding Member
Rio Mesa SEGF AFC Committee

Original Signed By: _____

KAREN DOUGLAS
Commissioner and Associate Member
Rio Mesa SEGF AFC Committee



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**DOCKET NO. 11-AFC-04
PROOF OF SERVICE
(Revised 7/11/12)**

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DECLARATION OF SERVICE

I, Jacqueline Clay, declare that on July 24 2012, I served and filed a copy of the attached document ORDER RE: ENERGY COMMISSION STAFF'S REQUEST FOR EXTENSION OF THE PRELIMINARY STAFF ASSESSMENT FILING DEADLINE, EXTENSION OF DISCOVERY PERIOD FOR 60 DAYS AND MOTION TO COMPEL PRODUCTION OF BRIGHTSOURCE ENERGY, INC.'S POWER PURCHASE AGREEMENTS INVOLVING THE RIO MESA SOLAR ELECTRIC GENERATING FACILITY dated July 24, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: <http://www.energy.ca.gov/sitingcases/riomesa/index.html>.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(Check all that Apply)

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- Served electronically to all e-mail addresses on the Proof of Service list;
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

- Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.

Original Signed By: _____

Jacqueline Clay
Hearing Advisers Office