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March 11, 2010

DOCKET
08-AFC-13
DATE <u>MAR 11 2010</u>
RECD. <u>MAR 11 2010</u>

California Energy Commission
Attn: Docket No. 08-AFC-13
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: 08-AFC-13 Calico Solar Project Letter

Dear Docket Clerk:

Enclosed are an original and one copy of California Unions for Reliable Energy's Letter re Project Description for the Calico Solar Project. Please process the letter and provide us with a conformed copy in the envelope enclosed.

Thank you.

Yours truly,

/s/

Carol N. Horton
Administrative Assistant

:cnh
Enclosures

2309-051d

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VIA EMAIL AND US MAIL

Christopher Meyer
Project Manager
Siting, Transmission and Environmental Protection Division
California Energy Commission
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cmeyer@energy.state.ca.us

Re: Calico Solar Project (08-AFC-13)

Dear Mr. Meyer:

We are writing on behalf of California Unions for Reliable Energy (“CURE”) regarding the Commission’s responsibilities under the California Environmental Quality Act (“CEQA”) pertaining to the Calico Solar Project (“Project”), formerly known as SES Solar One. Although the Staff Assessment/Draft Environmental Impact Statement (“SA/DEIS”) is scheduled to be released this month, Tessera Solar, LLC (“Applicant”) continues to change the Project and has still not provided the Commission or the public with key facts and analyses regarding its changed Project. Thus, the Project is not defined with enough specificity to enable an adequate analysis and identification of mitigation for significant impacts. Without a stable, finite and accurate project description, the Commission cannot comply with CEQA or the Warren Alquist Act.

I. The Applicant Has Failed to Adequately Describe the Project’s Transmission Upgrades and a Reliable Water Supply for the Project

A fundamental principle of CEQA is that a project’s description be stable, finite and accurate so that the environmental impacts of a proposed project can be assessed. At the time the Project’s Application for Certification (“AFC”) was filed,

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the Applicant failed to provide a description of the transmission upgrades necessary for interconnection to the grid or a reliable source of water necessary for Project operation. In the fourteen months since the AFC was filed, the Applicant has still not provided an adequate description of the transmission line or water supply. Without a stable, finite and accurate description of the Project's transmission line and water supply, the Commission cannot analyze the Project's impacts as required by CEQA. Until the Applicant can provide the detail necessary for this review, the Commission cannot issue a valid SA/DEIS.

A. Transmission Line

The 850 megawatt ("MW") Calico Solar Project cannot deliver 575 MW of its power to market without the construction of a number of substantial transmission upgrades that include a 67-mile Pisgah to Lugo 500kV transmission line, an expansion of the Pisgah substation from 5 acres to 40 acres, and an additional substation in an undetermined location. Although the majority of the Project could not function without these transmission upgrades, the AFC did not contain Project-specific data about these upgrades.

The AFC only briefly referred to these transmission upgrades as an "SCE [Southern California Edison] proposal".¹ An appendix to the AFC contained an environmental report that included "general estimates as to environmental impacts" of the transmission upgrades.² Although the location of the new substation and the Pisgah to Lugo transmission line are unknown, the report explained that part of the new transmission line will likely be sited in the existing SCE right of way ("ROW").

Federally threatened desert tortoises occur in the SCE ROW where part of the 67-mile transmission line is likely to be located.³ Roughly 80% (4,720 acres) of the area in the Pisgah to Lugo SCE ROW is suitable habitat for desert tortoise.⁴ Besides desert tortoise, Mohave ground squirrel, short-joint beavertail cactus, white-margined beardtongue, Mojave fringe-toed lizard, western burrowing owl, golden eagle, American badger, horned lark, yellow warbler and loggerhead shrike are known to occur in the ROW.

¹ Stirling Energy Systems, Inc., Application for Certification, p. 3-28.

² SES Environmental Summary Report – Lugo – Pisgah No. 2 500 kV Transmission Line and Substation Upgrades Ecosphere Environmental Services, November 21, 2008, p. 8.

³ *Id.* at p. 19.

⁴ *Id.*

Commission Staff understood that the Project could not proceed without the transmission upgrades and requested detailed Project-level information in a memo to the Applicant four months ago.⁵ In that memo, Staff requested the Applicant “*complete special-status species surveys for both plants and animals done when the organisms are identifiable (meaning multiple trips out, especially for plants).*”⁶

In response, rather than waiting to conduct the surveys when detailed designs for the transmission upgrades were available, the Applicant provided general survey data focused on some of the species likely to occur in the potential areas of impact. No data was filed that showed the distribution and abundance of special-status species within the areas impacted by the transmission line upgrades, as is required by Commission rules,⁷ because the ultimate location of the transmission upgrades has not been determined.

Staff also requested the Applicant provide a “[b]reakdown of temporary vs. permanent impact acreage in the various habitat types, with acreage for each habitat type.”⁸ The Applicant responded “*temporary vs. permanent potential transmission line impacts to habitat types cannot be assessed at this time because a final transmission line design has not been engineered and construction methods have not been described.*”⁹

The Applicant’s response to Staff’s request for cultural resources data was no more informative than the Applicant’s response for biological survey data. Commission Staff directed the Applicant to provide a “[p]edestrian cultural resources survey of no less than 25 percent of the transmission line ROW and regulatory buffer zone, sample structure to be developed in consultation with the BLM and CEC.”¹⁰ The Applicant flatly rejected this approach and instead responded that it would “*perform a record search and denote all areas within the*

⁵ Letter from Christopher Meyer to Felicia Bellows, SES Solar One, LLC, October 21, 2009.

⁶ *Id.*

⁷ Commission siting regulations require that the Applicant conduct biological resources surveys using appropriate field survey protocols during the appropriate season(s), and that State and federal agencies with jurisdiction be consulted for field survey protocol guidance prior to surveys if a protocol exists. California Energy Commission (2007) Appendix B of Rules of Practice and Procedure and Power Plant Site Certification Regulations.

⁸ Letter from Christopher Meyer to Felicia Bellows, SES Solar One, LLC, October 21, 2009.

⁹ Applicant’s Responses to CEC Memo Regarding Transmission Line Upgrades, January 8, 2010.

¹⁰ Letter from Christopher Meyer to Felicia Bellows, SES Solar One, LLC, October 21, 2009.

*transmission line right-of-way and regulatory buffers which have been previously surveyed.”*¹¹

Worse still, the Applicant’s response to Staff’s cultural resources request for a “[c]omplete description of the upgrade and the construction methods involved”¹² failed even to provide a location for an entire substation that will potentially impact one hundred acres at some undisclosed location. The Applicant simply stated that “the likely location would be approximately within 6 miles southwest of the current location in the vicinity of the existing SCE right-of-way.”¹³ This one hundred acre substation is five times bigger than many entire power plant projects before the Commission.

In an October 2009 status report, Commission Staff explained that the transmission upgrades are part of the “whole of the project” which the Energy Commission, as Lead Agency, must review, pursuant to CEQA.¹⁴ Despite the Staff’s clear explanation of the obvious – the transmission line is a necessary part of the power plant project – the Applicant claimed that the transmission line required to deliver the output of the Project is not actually part of the Project. Instead, the Applicant claimed that review should be at a *programmatic or conceptual level, rather than at a Project-specific-level*.¹⁵

Because SCE has not yet determined the precise layout and design parameters for the Upgrade Project, the environmental summary focused on identifying the areas of potential impacts associated with the project and by assessing whether mitigation measures will be available to avoid or minimize such impacts. By necessity, this analysis was completed on a conceptual or programmatic level. Project level environmental review will be completed during the subsequent permitting of the Upgrade Project by SCE at the CPUC with the BLM...Because the Upgrade Project is not a component of the Solar One Project and will undergo independent review and approval,

¹¹ Applicant’s Responses to CEC Memo Regarding Transmission Line Upgrades, January 8, 2010.

¹² Letter from Christopher Meyer to Felicia Bellows, SES Solar One, LLC, October 21, 2009.

¹³ Applicant’s Responses to CEC Memo Regarding Transmission Line Upgrades, January 8, 2010.

¹⁴ CEC Staff Status Report (October 27, 2009).

¹⁵ Applicant’s Response to CEC Staff Status Reports, January 20, 2010.

complete project level information is not necessary for the CEC and BLM to satisfy the requirements under CEQA and NEPA.¹⁶

The Applicant's filings on the transmission upgrades consistently indicate that detailed information is not available because the design of the upgrades has not been finalized. The Applicant could not describe the transmission upgrades when it submitted the AFC, and still cannot describe those upgrades.

Additionally, the Applicant's filings do not include information about the location or impact intensity from a number of auxiliary transmission structures, including an as yet floating 100-acre substation, the transmission pole locations, new access roads, the 5-20 acre marshalling yards or the 1 to 3 acre material staging areas.¹⁷

According to the Bureau of Land Management ("BLM") staff at the January 7, 2009 status conference, the Applicant's failure to provide project-specific information about the transmission upgrades has led the U.S. Fish and Wildlife Service ("USFWS") to refuse to issue a Biological Opinion ("BO") on the full 850 MW build-out of the Project. The BLM, on the other hand, seeks to approve the entire 850 MW Project even though the BO would only cover the initial 275 MW portion of the Project. BLM is considering making the Applicant wait to proceed with construction of the 575 MW portion of the power plant until the USFWS issues a BO that will cover the impacts associated with the 67-mile transmission line, the Pisgah substation expansion, the new additional substation and auxiliary transmission facilities.

The Applicant now urges the Commission to approve the entire 850 MW Project without knowing what transmission upgrades are needed, where they will be located, and what the impacts of those upgrades will be, even though the transmission line, new substation and other upgrades are an indispensable part of the Project.

¹⁶ SES Solar One Project, Required Consideration of the Proposed Lugo-Pisgah 500kV Transmission Line and Substation Upgrades in Solar One Project Approvals Under CEQA/NEPA, November 30, 2009.

¹⁷ Southern California Edison Project Description for Full Interconnection of SES Solar One, Submitted by SCE on January 7, 2010, included as part of the Applicant's January 8, 2010, Responses to the CEC Memo Regarding Transmission Line Upgrades.
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B. Water Supply

The Project will require water for mirror washing, hydrogen production, potable uses, fire protection and construction. The Applicant initially indicated that the Project would rely upon groundwater in the Project area.¹⁸ The Applicant later proposed alternative sources of water, including the Mojave Water Agency and the Barstow Wastewater Treatment Facility. The Applicant has since concluded that each of these sources is not a viable option.

On January 27, 2010, the Applicant filed an AFC Supplement indicating for the first time that the Project will rely on yet another source of water, this time from the Cadiz well, *65 miles away from the Project site*. According to the AFC Supplement, the water would either be transported by rail or by *39 truck trips per day, six days per week*. The Applicant has not chosen the method of water transport.

At a February 23, 2010 status conference, it appeared that the Applicant, yet again, may be changing its plans for the water supply for the Project. The Applicant explained that it is currently in the process of evaluating the use of groundwater at the Project site by testing wells adjacent to the site on private lands and would prefer to use water from the Project site. For expediency, it was decided that Commission Staff would continue its breakneck effort to incorporate the Cadiz water data into the SA/DEIS, even while knowing that this does not reflect the actual current plan for the Project. Thus, 15 months after filing its AFC, the Applicant has yet to provide evidence of a firm water supply or the impacts from its use.

II. The Project Must Have a Stable, Finite and Accurate Description Before the SA/DEIS Is Released

The courts have repeatedly held that “an accurate, stable and finite project description is the sine qua non of an informative and legally sufficient [CEQA document].”¹⁹ CEQA requires that a project be described with enough particularity that its impacts can be assessed.²⁰

¹⁸ SES Solar One AFC p. 1-4.

¹⁹ *County of Inyo v. City of Los Angeles* (3d Dist. 1977) 71 Cal.App.3d 185, 193.

²⁰ *Id.* at 192.

CEQA defines a project as “the whole of an action” which has the potential to result in a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.²¹ The transmission upgrades and water supply are an indispensable part of the Project. There must be an accurate, stable and finite description of those parts of the Project. As such, the transmission upgrades and water supply must be described with Project-level specificity to enable adequate environmental review under CEQA. The Staff was fully aware of this requirement when, in its October 21, 2009 memo to the Applicant, it requested detailed Project-level information along the transmission line route.

The “project” refers to the activity being approved and which may be subject to several discretionary approvals by governmental agencies. “Project does not mean each separate governmental approval.”²² Even if the transmission upgrades may also undergo a separate approval by the California Public Utilities Commission, the transmission upgrades are a part of the whole of the Calico Solar Project that the Energy Commission must study as the lead agency under CEQA.

It is impossible for the public to make informed comments on a project of unknown or ever-changing description. “A curtailed or distorted project description may stultify the objectives of the reporting process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental costs”²³ “A curtailed, enigmatic or unstable project description draws a red herring across the path of public input.”²⁴ Without a complete project description, the environmental analysis under CEQA is impermissibly narrow, thus minimizing the project’s impacts and undercutting public review.²⁵

The ever-changing, questionably accurate, description of the transmission upgrades and water supply, deprive both the public and governmental decision-makers of the ability to review the environmental impacts of the Project. Clearly, the Project design is not far enough along for the Project to be adequately defined and studied in a CEQA document.

²¹ CEQA Guidelines § 15378.

²² *Id.* at subd. (c).

²³ *County of Inyo, supra*, 71 Cal.App.3d at 192-193.

²⁴ *Id.* at 197-198.

²⁵ See, e.g., *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376.

The primary harm caused by “the incessant shifts among different project descriptions” is that the inconsistency confuses the public and commenting agencies, thus vitiating the usefulness of the process “as a vehicle for intelligent public participation.”²⁶

The constant changes to the Calico Solar Project and the vast amount of information that continues to be unavailable results in a Project that has not been defined adequately and accurately enough to enable licensing by the Energy Commission. The Project’s location and transportation requirements for the water supply are still in flux, and the design of the transmission line and substations remain at a conceptual level.

The Applicant has failed to provide a stable, finite and accurate Project description as is required by CEQA. This has hampered review of the Project by the public and the resource agencies, including the Energy Commission. A significant amount of additional information is needed in order to adequately analyze the potentially significant environmental impacts posed by the ultimate design of this Project.

III. Program-level CEQA Review Is Not Appropriate for the Transmission Portion of the Project

The Applicant’s proposal that the Commission conduct program-level review of the transmission upgrades required for Project operation violates CEQA. The Energy Commission must conduct project-level review of the Calico Solar Project, including transmission and all other appurtenant facilities, because the transmission line and related facilities are indispensable parts of the power plant, without which the SunCatcher units would not have any purpose.

Case law cited by the Applicant in a November 30, 2009 legal memo docketed on January 22, 2010 is inapplicable.²⁷ The Applicant cites *River Watch v. County of San Diego* and argues that an EIR is adequate if it includes general information regarding construction impacts from a related road widening, but defers project specific environmental review of the road widening. In that case, a rock quarry was

²⁶ *County of Inyo, supra*, 71 Cal.App.3d at 197-198.

²⁷ SES Solar One Project (08-AFC-13), Applicant’s Response to CEC Staff Status Report 1/22/2010, Attachment 2: Required Consideration of the Proposed Lugo-Pisgah 500kV Transmission Line and Substation Upgrades in Solar One Project Approvals Under CEQA/NEPA, November 30, 2009. 2309-049d

being developed on Rosemary's Mountain in San Diego County.²⁸ A local group challenged the validity of the EIR on the basis that it had not sufficiently addressed the road widening which would be required to accommodate increased truck traffic generated by the quarry. The court examined the record and found that the EIR was based upon calculations "assuming that the originally proposed four lane [road] was to be built by the proponent. The new project which proposed a widening to three lanes would further reduce already acceptable impacts as calculated for the four lane proposal."²⁹ Therefore, in *River Watch*, the EIR did consider the project-specific impacts of the road. In fact, the EIR considered the worst-case impacts associated with the road and concluded that mitigation would result in less than significant impacts.

Here, the Applicant has not even described the transmission line, substation, and other appurtenant facilities, let alone analyzed the impacts of these integral aspects of the project. However, the Energy Commission is required to do so as part of its CEQA-equivalent review.

The Applicant's reference to the decision in *No Oil v. City of Los Angeles* is similarly inapplicable. In *No Oil*, the Court held that future pipeline facilities did not need to be studied in great detail in an EIR that examined an exploratory oil well because the quality and quantity of oil in the well was speculative.³⁰ Here, the Calico Solar Project Applicant claims that the reliability of the SunCatcher technology is not speculative and would be brought to market by a transmission line if the Project is approved. Further, the Calico Solar Project cannot be licensed unless the Commission finds that the Project will reliably produce power. Thus, there is nothing speculative about the need for the transmission line, the quantity of power that would be transmitted or where the electrons would need to go in order for the Project to serve its intended purpose.

Finally, the Applicant cites to *National Parks and Conservation Association v. County of Riverside* for the proposition that an EIR for a solid waste landfill need not consider specific locations of transfer stations when the precise location of the stations is unknown and the EIR properly discussed the impacts associated with the stations in general terms. However, *National Parks and Conservation Association* is inapplicable because the Court found that the EIR for the landfill project made no

²⁸ *River Watch v. County of San Diego* (1999) 76 Cal.App.4th 1428.

²⁹ *Id.*

³⁰ *No Oil v. City of Los Angeles* (1987) 196 Cal.App.3d 223.

commitment to build transfer stations as future facilities and that the transfer facilities were not “crucial elements without which the proposed projects cannot go forward.”³¹

In contrast to transfer stations that were not necessary for the landfill to operate in *National Parks and Conservation Association*, the Calico Solar Project is entirely dependent on the transmission line and substation. It cannot function without these integral pieces of the Project. By approving the Project, the Commission must find that the transmission line and substations would be built and capable of delivering power.

Instead, the Project is governed by the Court’s holding in *San Joaquin Raptor*.³² In *San Joaquin Raptor*, the Court overturned an EIR for a housing development, because the EIR’s project description failed to include an offsite sewer expansion that was necessary to serve the Project. The Court held that even though a separate EIR was prepared for the sewage expansion, the housing development’s project description was inadequate, rendering the analysis in the EIR inadequate.

As in *San Joaquin Raptor*, the Energy Commission must study the environmental impacts associated with the transmission line and substation expansion. Without these facilities, the Calico Solar Project is useless. The Calico Solar Project description must include the transmission upgrades necessary to deliver the power to the grid and water supply necessary for the Project.

IV. Conclusion

The Applicant has not provided a stable, finite and accurate description of the Calico Solar Project. Many aspects of the transmission upgrades needed for the Calico Solar Project to operate have not been defined and the Applicant has not adequately studied or clearly defined its preferred water supply. The transmission upgrades and water supply are so fundamental to the reliable operation of the Project that without these components, there is no project to license. It is the Commission’s responsibility as lead agency under CEQA to analyze the whole of the

³¹ *National Parks and Conservation Association v. County of Riverside* (1996) 42 Cal.App.4th 1505.

³² *San Joaquin Raptor/Wildlife Rescue Center et al., v. County of Stanislaus* (1994) 27 Cal.App.4th 713.

Christopher Meyer
March 11, 2010
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Project, including the transmission upgrades and water supply necessary for the reliable operation of the Project, at the project level.

Sincerely,

/s/

Loulena A. Miles

LAM:cnh

DECLARATION OF SERVICE

I, Carol N. Horton, declare that on March 11, 2010, I served and filed copies of the attached CALIFORNIA UNIONS FOR RELIABLE ENERGY LETTER FOR THE CALICO SOLAR PROJECT RE PROJECT DESCRIPTION, dated March 11, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at www.energy.ca.gov/sitingcases/calicosolar. The document has been sent to both the other parties in this proceeding as shown on the Proof of Service list and to the Commission's Docket Unit electronically to all email addresses on the Proof of Service list; and by depositing in the U.S. mail at Sacramento, California, with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses NOT marked "email preferred."

AND

By sending an original paper copy and one electronic copy, mailed and emailed respectively to:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 08-AFC-13
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Sacramento, CA 95814-5512
docket@energy.state.us.ca.

I declare under penalty of perjury that the foregoing is true and correct.
Executed at Sacramento, California, on March 11, 2010.

/s/

Carol N. Horton

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