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May 29, 2012

By Email and Hand Delivery

Christopher J. Marxen
Compliance Office Manager
Siting, Transmission and
Environmental Division
California Energy Commission
1516 Ninth Street
Sacramento, California 95814-5512

DOCKET	
09-AFC-5C	
DATE	<u>MAY 29 2012</u>
RECD.	<u>MAY 29 2012</u>

Re: Abengoa Mojave Solar Project Compliance with Condition Worker Safety-6

Dear Mr. Marxen:

This letter responds to your attached letter of May 25, 2012¹, regarding the compliance of the Mojave Solar Project (“Project”) with condition Worker Safety-6 of the California Energy Commission’s (“CEC”) final certification decision dated September 2010 (“Decision”). In your letter, you allege that the Project is currently out of compliance with this condition.

For the reasons set forth below, we believe the Project is in full compliance with condition Worker Safety-6. We therefore think that your letter alleging otherwise is missinterpreting the condition and it does not even acknowledge that the Project has fully paid the \$200,000 identified in the Commission’s required independent study as the County’s capital costs. We are confident that the CEC will concur with this position once all the relevant facts are reviewed by CEC attorneys and management.

However, even if ultimately corrected in the normal course of business, your letter will cause irreparable harm to the Project unless this matter is resolved and the letter rescinded within the next four business days. That is because the Project’s financing agreements with the federal Department of Energy (“DOE”) pursuant to the American Reinvestment and Recovery Act (“ARRA”) require that we report any alleged non-compliance with our CEC permit within five business days to DOE. The consequence of such a report could potentially be the immediate

¹ The letter is dated May 29, 2012. However, it was signed and delivered to Mojave Solar on Friday, May 25, just prior to a holiday weekend.

suspension of project payments critical to the continued timely development of the project. Accordingly, it is of the utmost importance that the CEC review this matter immediately.

Your claim that the Project is not in compliance is based upon a claim that a temporary assembly building constructed at the site is “permanent” and that the Project failed to fund County fire safety measures prior to construction of permanent structures as required by condition Worker Safety-6. Both of these facts are wrong. In fact, the building in question is not permanent. It is a temporary building for the assembly of solar arrays during construction that will be completely removed once construction is finished. Moreover, even if it were deemed permanent, the Project has fully paid the \$200,000 necessary to satisfy the requirements of the condition regarding funding the County’s fire safety needs.

Attachment A sets forth in full the requirements of condition Worker Safety-6 including the verification provisions. In summary, that condition provides optional paths for the Project to resolve the question of funding of County safety requirements. Among those optional paths is the preparation of an independent study of the impact of the Project on County fire services and funding of the County based on such study. Notwithstanding the temporary nature of the building in question, the Project fully met this optional compliance path prior to initiating its construction of the building in question.

Specifically, the verification language for WORKER SAFETY-6 reads as follows:

Verification: *At least five (5) days before construction of permanent aboveground structures, the project owner shall provide to the CPM:*

(1) A copy of the individual agreement with the SBCFD or, if the owner joins a power generation industry association, a copy of the group’s bylaws and a copy of the group’s agreement with the SBCFD; and evidence in each January Monthly Compliance Report that the project owner is in full compliance with the terms of such bylaws and/or agreement; or

(2) A protocol, scope and schedule of work for the independent study and the qualifications of proposed contractor(s) for review and approval by the CPM; a copy of the completed study showing the precise amount the project owner shall pay for mitigation; and documentation that the amount has been paid.

Annually thereafter, the owner shall provide the CPM with verification of funding to the SBCFD if annual payments were approved or recommended under either of the above-described funding resolution options. (Emphasis added)²

² Compliance with a condition of certification is determined by meeting these verification requirements pursuant to Condition of Certification COMPLIANCE-3. That condition describes the Energy Commission’s procedures to verify the project’s conformance with the conditions and states:

Each Condition of Certification is followed by a means of verification. The verification describes the Energy Commission’s procedure(s) to ensure post-certification compliance with adopted Conditions. (Emphasis added)

The Project has met all of the requirements of subsection (2) of the verification by taking the following actions:

- The protocol, or scope, for the independent study was sent to the Energy Commission on January 18, 2012 as submittal number WKSF6-01-00. After several communications, the final protocol/scope was established, and BAE Urban Economics conducted the independent study.
- On March 28, 2012, BAE Urban Economics provided a copy of the completed study to the Energy Commission and Mojave Solar LLC (“Mojave Solar”). Table 5 on page 34 of the study lists a required mitigation payment of \$200,000 to cover one-time capital costs associated with the San Bernardino County Fire Department’s (“SBCFD”) obligation to provide fire and emergency services to the project.
- On August 4, 2011 (nearly eight months prior to the completion of the independent study), Mojave Solar submitted documentation to the Commission (as submittal number WKSF7-01-00) showing that \$200,000 had been paid to the SBCFD.³

At no time has your office taken issue with any of the above facts. We have received no indication that the Staff does not accept the results of the study or that the \$200,000 paid to the SBCFD is insufficient pursuant to such study. To the contrary, your letter acknowledges that the study was finalized in a meeting among CEC staff, the County and Mojave Solar on March 27, 2012. Your letter further correctly notes that construction of the temporary assembly building did not commence until April 25, 2012.

Yet your letter asserts non-compliance with the statement that “[f]unding of Abengoa’s share of capital costs has not occurred as of May 29, 2012.” This statement appears to ignore entirely the \$200,000 payment referenced above. Project representatives have specifically brought this payment to the attention of Compliance Project Manager (“CPM”) Dale Rundquist when this issue was first brought to our attention. Given that fact, the failure of your letter to even mention it is remarkable.⁴

³ This payment is a requirement of condition WORKER SAFETY-7 and was payable prior to the start of construction. WORKER SAFETY-7 states that the \$200,000 “...shall off-set any initial funding required by WORKER SAFETY-6 above until the funds are exhausted. This offset will be based on a full accounting by the San Bernardino County Fire Department regarding the use of these funds.”

⁴ Upon learning of the CPM’s initial reaction to the construction of the Temporary Assembly Building, Mojave Solar personnel immediately reached out to the CPM and explained the steps that had been taken to comply with WORKER SAFETY-6. The CPM understood and seemed to agree with the Mojave Solar position, but explained that further discussion within the Energy Commission was warranted. Since that time, Mojave Solar made multiple phone calls to the CPM, sent several emails, and suggested conference calls in an effort to understand the Energy

May 29, 2012

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Finally, your letter asserts a deadline—June 14, 2012—by which Mojave Solar is compelled to execute an agreement with the San Bernardino County Fire Department. Nowhere in the Commission Decision is there any basis for arbitrarily establishing a date by which an agreement must be in place. In fact, the Decision recognized the difficulties inherent in reaching an agreement with SBCFD and, in order to prevent the issue from holding up construction of the project, established an alternate path to arrive at a mitigation payment. By pursuing this alternate path, Mojave Solar has met its current obligations with respect to WORKER SAFETY-6.

In conclusion, the Mojave Solar Project is in full compliance with condition Worker Safety-6 even if the temporary assembly building in question is deemed “permanent”, which clearly is not the case. Your letter alleging non-compliance fails to adhere to the language of the condition and ignores entirely the \$200,000 paid to the County. By incorrectly claiming non-compliance, your letter threatens significant and irreparable harm to the Project. It is regrettable, to say the least, that this mistaken letter was issued without responding to Mojave Solar’s numerous requests to discuss this matter. Such discussion would have averted a situation which now requires urgent action to avoid very serious consequences to the Project and potential Commission liability for such consequences.

For all these reasons, Mojave Solar respectfully requests that your letter be rescinded immediately.

Respectfully



Christopher T. Ellison

Cc: Kourtney Vaccaro, Hearing Advisor
Kevin Bell, Staff Counsel
Dale Rundquist, CPM

Commission’s position with respect to these conditions. Not once did the Energy Commission indicate that: 1) the Temporary Assembly Building was, in their opinion, a permanent structure; 2) a finalized agreement with SBCFD was required prior to the construction of above-ground structures; or 3) the payment made to SBCFD to date was in any way inconsistent with the independent study prepared by BAE Urban Economics. As stated in this letter, Mojave Solar is in disagreement with all three of those points. However, the project owner would have been more than willing to discuss the matter with Energy Commission staff to understand the Energy Commission’s position. Several requests to have this conversation were ignored, and instead the first communication from the Energy Commission staff explaining their position was received via the letter dated May 29 (but received on May 25).

Attachment A

WORKER SAFETY-6 *The project owner shall either:*

*(1) Reach an agreement with the San Bernardino County Fire Department (SBCFD) regarding funding of its project-related share of capital and operating costs to improve fire protection/emergency response infrastructure and provide appropriate equipment as mitigation of project-related impacts on fire protection/emergency response services within the jurisdiction; **or***

(2) If no agreement can be reached, the project owner shall fund a study (the “independent fire needs assessment and risk assessment”) conducted by an independent contractor who shall be selected by the project owner and approved by the CEC Compliance Project Manager (CPM), in consultation with San Bernardino County Fire Department, and fulfill all mitigation identified in the independent fire needs assessment and a risk assessment. The study will evaluate the project’s proportionate funding responsibility for the above-identified mitigation measures, with particular attention to emergency response and equipment/staffing/location needs.

Should the project owner pursue option (2), above, the study shall evaluate the following:

(a) The project’s proportionate (incremental) contribution to potential cumulative impacts on the SBCFD and the project allocated costs of enhanced fire protection/emergency response services including the fire response, hazardous materials spill/leak response, rescue, and emergency medical services necessary to mitigate such impacts;

(b) The extent that the project’s contribution to local tax revenue will reduce impacts on local fire protection and emergency response services; and

(c) Recommend an amount of funding (and corresponding payment plan) that represents the project’s proportional payment obligation for the above-identified mitigation measures.

Compliance Protocols shall be as follows:

(a) The study shall be conducted by an independent consultant selected by the project owner and approved by the CPM. The project owner shall provide the CPM with the names of at least

three consultants, whether entities or individuals, from which to make a selection, together with statements of qualifications;

(b) The study shall be fully funded by the project owner.

(c) The project owner shall provide the protocols for conducting the independent study for review and comment by the SBCFD and review and approval by the CPM prior to the independent consultant's commencement of the study;

(d) The consultant shall not communicate directly with the project owner or SBCFD without express prior authorization from the CPM. When such approval is given, the CPM shall be copied on any correspondence between or among the project owner, SBCFD, and the consultant (including emails) and included in any conversations between or among the project owner, SBCFD and consultant; and

*(e) The CPM shall verify that the study is prepared consistent with the approved protocols, **or***

(3) If the project owner and SBCFD do not agree to the recommendations of the independent consultant's study, the Energy Commission or its designee shall, based on the results of the study and comments from the project owner and SBCFD, make the final determination regarding the funding to be provided to the SBCFD to accomplish the above-identified mitigation.

No construction of permanent above-ground structures shall occur until funding of mitigation occurs pursuant to either of the resolution options set forth above.

CALIFORNIA ENERGY COMMISSION

1516 NINTH STREET
SACRAMENTO, CA 95814-5512



May 29, 2012

Frederick Redell
Abengoa Solar Inc.
11500 West 13th Avenue
Lakewood, CO 80215

**SUBJECT: COMPLIANCE WITH ABENGOA MOJAVE SOLAR PROJECT
WORKER SAFETY-6**

Dear Mr. Redell:

This letter is to inform you that the California Energy Commission (Energy Commission) is in receipt of information that the Abengoa Mojave Solar (Abengoa) project is currently out of compliance with Condition of Certification **WORKER SAFETY-6**.

BACKGROUND

On August 10, 2009, Abengoa submitted an Application for Certification for a solar thermal power plant located near Hinkley, California. During the Energy Commission licensing process and before the Energy Commission decision, Abengoa and San Bernardino County Fire Department (SBCFD) were unable to reach concurrence regarding mitigation of project-related impacts for fire protection and emergency services during the construction and operation of the project. As a result, **WORKER SAFETY-6** (Attachment 1) was included in Abengoa's September 2010 Final Decision, so an agreement would be reached post-certification and be in place prior to any potential fire and emergency services impacts on the fire department.

Abengoa initiated construction of the project on August 29, 2011. From the time of the decision until December 2011, Abengoa and SBCFD continued to be unable to reach an agreement.

At a site visit on December 16, 2011, the Compliance Project Manager discovered that Abengoa had started placing mirror foundations below ground. It was mentioned that the mirror fabrication building foundation was going to be started in February or March of 2012. Upon hearing that Abengoa was starting construction of structures, staff was concerned that the conditions in **WORKER SAFETY-6** had not been met. Because of the lack of agreement, staff contacted Abengoa in mid-December and it was agreed that a third party would be contracted to draft a mitigation agreement pursuant to the provisions of **WORKER SAFETY-6(2)**.

BAE Urban Economics (BAE) was selected to perform the Abengoa funded study on December 29, 2011. The scope of the study was to:

- evaluate the project's proportionate (incremental) contribution to potential cumulative impacts on the SBCFD;

- determine the extent of the project's contribution to local tax revenue; and
- recommend the amount of funding.

On March 15, 2012, a meeting took place between the Energy Commission, SBCFD, and Abengoa to discuss the first draft of the study, and the parties appeared to agree on the mitigation plan set forth. The study was finalized on March 27, 2012.

NON-COMPLIANCE WITH WORKER SAFETY-6

Per Public Resources Code (PRC), Section 25532, the Energy Commission shall assure that any facility certified under this division is operating in compliance with conditions adopted or established by the Energy Commission or specified in the written decision on the application. In addition, California Code of Regulations, Title 20, Section 1770 states that the Energy Commission shall provide adequate monitoring of all conditions and measures set forth in the final decision required to mitigate potential impacts and to assure that the facility is constructed and operated in compliance with all applicable laws.

Condition of Certification **WORKER SAFETY-6** requires that the project owner fund its project-related share of capital costs and reach an agreement with SBCFD to improve fire protection/emergency response infrastructure and provide appropriate equipment, as mitigation of project-related impacts.

Staff notes that Abengoa began construction of the above-ground structural steel portion of an 81,287 square-foot mirror array fabrication building on April 25, 2012. Nicholas Potrovitza (Abengoa Director of Engineering and Construction Supervision) indicated to Compliance Project Manager Dale Rundquist, on a site visit conducted on Thursday, May 3, 2012, that the building will remain on-site for the duration of the construction activities (May 15, 2015).

Energy Commission staff considers this structure to be a permanent above-ground structure because Condition of Certification **GEN-1** states, "*The project owner shall design, construct, and inspect the project in accordance with the 2007 California Building Standards Code (CBSC)...*" The 2007 version (as well as the 2010 version) of the California Building Code (CBC)¹ Part 2, Section 202 defines permanent as "*facilities which, are intended to be used for periods longer than those designated in this code under the definition of "Temporary."*"²

Funding of the Abengoa share of capital costs has not occurred as of May 29, 2012.³ Therefore, Abengoa is in violation of Condition of Certification **WORKER SAFETY-6**,

¹ Contained in Title 24, California Code of Regulations (24 CCR)

² "TEMPORARY shall mean buildings and facilities intended for use at one location for not more than one year and seats intended for use at one location for not more than 90 days." To be considered temporary, the existence of the building for a period of one year appears to be the maximum allowed.

³ Notwithstanding any interpretation of the contents of the BAE Independent Fire Needs Assessment (i.e., the e-mail from Fred Redell on May 10, 2012 concerning the timing of annual payments), the Assessment cannot provide grounds to override the requirements of Condition of Certification **WORKER SAFETY-6**. The mitigation payment dates on the spreadsheet in the BAE Assessment were provided for illustrative

because a permanent above-ground structure is being constructed prior to the funding of mitigation.

This letter is a formal request by staff for Abengoa to submit a copy of the final mitigation agreement between Abengoa and the SBCFD along with proof of mitigation payment(s) to the SBCFD. This information must be submitted to the Compliance Project Manager by June 8, 2012. If the information is not provided by that date, staff will consider issuing a stop work order for above-ground permanent structures to address the project's non-compliance.

If the violation is not addressed pursuant to the provisions contained in this letter, any continuing violations may result in formal Energy Commission actions, including the assessment of penalties in accordance with the provisions of PRC Section 25534. Staff may consider whether to recommend to the Energy Commission that penalties, in accordance with PRC Section 25534, be imposed for the failure to comply with the Condition of Certification **WORKER SAFETY-6**. Should staff file a complaint, you will be notified pursuant to the provisions of Section 1232, Title 20, California Code of Regulations (20 CCR) and have an opportunity to respond pursuant to the provisions of Sections 1233 and/or 1237, 20 CCR.

Please notify Dale Rundquist, Compliance Project Manager, at (916) 651-2072, or via e-mail at: drundqui@energy.ca.gov as soon as the agreement is finalized and the payment(s) are made. At that time, staff will authorize Abengoa to proceed in the construction of above ground permanent structures at the site.

Sincerely,



CHRISTOPHER J. MARXEN
Compliance Office Manager
Siting, Transmission, and
Environmental Protection Division

ATTACHMENT 1
Text of Worker Safety-6 from the Abengoa Final Decision

WORKER SAFETY-6 The project owner shall either:

(1) Reach an agreement with the San Bernardino County Fire Department (SBCFD) regarding funding of its project-related share of capital and operating costs to improve fire protection/emergency response infrastructure and provide appropriate equipment as mitigation of project-related impacts on fire protection/emergency response services within the jurisdiction; or

(2) If no agreement can be reached, the project owner shall fund a study (the "independent fire needs assessment and risk assessment") conducted by an independent contractor who shall be selected by the project owner and approved by the CEC Compliance Project Manager (CPM), in consultation with San Bernardino County Fire Department, and fulfill all mitigation identified in the independent fire needs assessment and a risk assessment. The study will evaluate the project's proportionate funding responsibility for the above-identified mitigation measures, with particular attention to emergency response and equipment/staffing/location needs.

Should the project owner pursue option (2), above, the study shall evaluate the following:

- (a) The project's proportionate (incremental) contribution to potential cumulative impacts on the SBCFD and the project allocated costs of enhanced fire protection/emergency response services including the fire response, hazardous materials spill/leak response, rescue, and emergency medical services necessary to mitigate such impacts;
- (b) The extent that the project's contribution to local tax revenue will reduce impacts on local fire protection and emergency response services; and

- (c) Recommend an amount of funding (and corresponding payment plan) that represents the project's proportional payment obligation for the above-identified mitigation measures.

Compliance Protocols shall be as follows:

- (a) The study shall be conducted by an independent consultant selected by the project owner and approved by the CPM. The project owner shall provide the CPM with the names of at least three consultants, whether entities or individuals, from which to make a selection, together with statements of qualifications;

- (b) The study shall be fully funded by the project owner.

- (c) The project owner shall provide the protocols for conducting the independent study for review and comment by the SBCFD and review and approval by the CPM prior to the independent consultant's commencement of the study;
- (d) The consultant shall not communicate directly with the project owner or SBCFD without express prior authorization from the CPM. When such approval is given, the CPM shall be copied on any correspondence between or among the project owner, SBCFD, and the consultant (including emails) and included in any conversations between or among the project owner, SBCFD and consultant; and
- (e) The CPM shall verify that the study is prepared consistent with the approved protocols, or

(3) If the project owner and SBCFD do not agree to the recommendations of the independent consultant's study, the Energy Commission or its designee shall, based on the results of the study and comments from the project owner and SBCFD, make the final determination regarding the funding to be provided to the SBCFD to accomplish the above-identified mitigation.

No construction of permanent above-ground structures shall occur until funding of mitigation occurs pursuant to either of the resolution options set forth above.

Verification: At least five (5) days before construction of permanent above-ground structures, the project owner shall provide to the CPM:

(1) A copy of the individual agreement with the SBCFD or, if the owner joins a power generation industry association, a copy of the group's bylaws and a copy of the group's agreement with the SBCFD; and evidence in each January Monthly Compliance Report that the project owner is in full compliance with the terms of such bylaws and/or agreement; or

(2) A protocol, scope and schedule of work for the independent study and the qualifications of proposed contractor(s) for review and approval by the CPM; a copy of the completed study showing the precise amount the project owner shall pay for mitigation; and documentation that the amount has been paid.

Annually thereafter, the owner shall provide the CPM with verification of funding to the SBCFD if annual payments were approved or recommended under either of the above-described funding resolution options.