

DOCKET

09-AFC-5

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Application for Certification for the)
ABENGOA MOJAVE SOLAR POWER PLANT)
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)
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Docket No. 09-AFC-5

**ABENGOA MOJAVE SOLAR PROJECT'S
MOTION TO STRIKE
THE ENERGY COMMISSION STAFF'S SUPPLEMENTAL OPENING TESTIMONY
REGARDING PROPOSED CONDITION OF CERTIFICATION WORKER SAFETY-6
AND SHORTEN TIME**

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Pursuant to Title 20, California Code of Regulations, Section 1716.5, Abengoa Mojave Solar Project ("Applicant" or "Project") hereby moves to strike The Energy Commission Staff's Supplemental Opening Testimony Regarding Proposed Condition Of Certification Worker Safety-6.

On June 23, 2010, the Committee issued a Revised Notice of Evidentiary Hearing ("Revised Order"). The Revised Notice authorized: (1) the Staff to file and serve "Supplemental Opening Testimony" on the topic of Worker Safety & Fire Protection by July 6, 2010; (2) the Applicant to file "Supplemental Opening Testimony" on this topic by July 13, 2010; and (3) all parties to file rebuttal testimony on this topic by July 14, 2010.

Staff filed "Supplemental Opening Testimony" regarding proposed condition Worker-Safety 6" on July 6, 2010. The Applicant moves to strike this testimony on the grounds that the testimony far exceeds the scope of "Supplemental" testimony authorized by the Revised Order. This new testimony does not merely "Supplement" Staff's Opening Testimony – this new testimony: (1) increases Staff's proposed mitigation for alleged impacts on fire services by a factor of seven times-- from approximately \$3.5 million to more than \$24 million; (2) introduces for the first time (without any supporting documentation) in a Commission proceeding an avalanche of voluminous new information, including complex analytical matrices; and (3) asserts Staff's position on key issues in direct contravention of the position Staff has taken in this case and other cases currently pending for similar solar projects in San Bernardino and Kern Counties.

Given the scope and magnitude of the revisions in Staff's new testimony, the Committee should strike the testimony because it clearly exceeds the authorization to file "Supplemental"

testimony and would constitute extreme prejudice to the Applicant if Staff were permitted to flood the record with this volume of new data at this very late stage of the proceeding.

Regardless of whether the Committee grants the motion to strike this new testimony, the Applicant requests a 30-day extension of time in which to file its Opening and Rebuttal Testimony. The Applicant is fully cognizant that such a delay would delay the scheduled evidentiary hearing and will delay the issuance of the PMPD, unless the Committee chooses to issue the PMPD while this matter is still pending. However, as strongly as the Applicant desires a timely decision by the Commission on this Application that would allow the Project to qualify for ARRA funding this year (as evidenced by Applicant's efforts and results to resolve issues with intervenors), Staff's newly proposed assessment of more than \$24.6 million for fire services, if adopted by the Commission, would be fatal to this Project. Even the Staff's earlier position seeking \$3 million constitutes a dramatic departure from the mitigation the Commission is demanding from other solar projects in the Mojave with whom this Project must compete. It would be a Pyrrhic victory for the Commission to expedite its decision and approve this Project in time for the ARRA deadlines if that decision makes the Project infeasible. As strongly as the Applicant desires a timely decision, it is compelled to seek additional time to engage additional expert witnesses to address Staff's testimony. Therefore, in order to have a fair opportunity to address this issue, the Applicant requests adequate time to review and analyze the voluminous new information, and to conduct discovery of the Staff and San Bernardino County ("County").

Applicant requests the continuance for the additional reason that it is currently in discussions with the County regarding this issue and additional time would enable a possible agreement. It is for this reason that Applicant seeks a continuance regardless of the Committee's disposition of the Motion to Strike. The adoption by the Committee of any

mitigation number—and perhaps even just the taking of evidence on this issue—may prejudice these on-going discussions.

BACKGROUND

The Project was found to be data adequate on October 21, 2009. On November 10, 2009, the Commission formally requested the County's participation and analysis of this Application.

The Staff Assessment was issued on March 15, 2010. Two public workshops were held on the Staff Assessment in April 2010. The Staff filed Supplements to the Staff Assessment on May 12 and May 25, 2010. Despite the outstanding invitation to participate and submit analyses in this proceeding, the County did not submit information prior to the issuance of the Staff Assessment, did not file comments on the Staff Assessment, and did not raise concerns about any impacts on fire services during the public workshops in April.

The County filed a Petition to Intervene on May 14, 2010. Although the Petition asked that the Commission “perform an adequate review” of various issues, including “the cost and provision of emergency services,” the Petition did not express any dissatisfaction with the review of this issue in the FSA, nor did the Petition express any intent to introduce additional information on this topic. The Committee granted the County's Petition to Intervene on May 27, 2010. The order granting the Petition advised the County “As an intervenor, Petitioner is required to file and serve documents on other parties and to follow the Commission's procedures and orders regarding presenting witnesses and evidence.”

The Committee's scheduling order required parties to file direct testimony on June 9, 2010, and rebuttal testimony on June 18, 2010. Neither the County nor the Staff filed additional testimony on the issue of Fire services, either on June 9 or June 18. Instead, the Staff waited until the filing of their rebuttal testimony to announce their intent to file further testimony on this

issue at an unspecified later date. At the same time, the County filed a Prehearing Conference Statement on June 18, 2010, stating that all issues were complete and ready to proceed to evidentiary hearing. The County's prehearing conference statement did not identify fire services as an issue that was incomplete or that was contested.

Despite any showing of good cause by the Staff or the County, and despite the vigorous objection of the Applicant, the Committee granted the Staff leave to file "Supplemental" opening testimony.

ARGUMENT

I. THE COMMITTEE SHOULD STRIKE THE "STAFF'S SUPPLEMENTAL OPENING TESTIMONY REGARDING PROPOSED CONDITION OF CERTIFICATION WORKER SAFETY-6" IN ITS ENTIRETY.

The "Supplemental" testimony of the Commission Staff on fire services is more than a mere supplement or refinement of the Staff's Opening Testimony. The new testimony is a dramatic departure from Staff's Opening Testimony in scope, magnitude of costs and detail of information.

First, the new testimony dramatically increases Staff's proposed "mitigation." The FSA, in proposed Condition Worker Safety-6, recommended that:

"The project owner shall either (1) reach an agreement with the San Bernardino County Fire Department regarding funding of its project related share of capital costs to provide appropriate equipment as mitigation of project-related impacts on fire protection, HazMat, and/or EMS services along with an annual payment to maintain and provide these services, **or**, if no agreement can be reached shall (2) fund its share of the capital costs in the amount of \$350,000 plus provide an annual payment of \$100,000 to the SBCFD for the support of additional fire department staff commencing with the date of site mobilization and continuing annually thereafter on the anniversary until the final date of power plant decommissioning."

The proposed mitigation in the Staff Assessment, assuming a 30-year life of the Project, would have totaled approximately \$3,550,000.

The new testimony, in contrast, recommends as follows:

“The project owner shall either:

(1) Reach an agreement, either individually or in conjunction with a power generation industry association or group that negotiates on behalf of its members, with the San Bernardino County Fire Department (SBCFD) regarding funding of its project-related share of capital and operating costs to build and operate new fire protection/response infrastructure and provide appropriate equipment as mitigation of project-related impacts on fire protection services within the jurisdiction.

or

(2) Shall fund its share of the capital costs in the amount of \$860,000 and provide an annual payment of \$793,000 to the SBCFD for the support of new fire department staff and operations and maintenance commencing with the start of construction and continuing annually thereafter on the anniversary until the final date of power plant decommissioning.”

Assuming a 30-year project life, the recommended mitigation fee now totals \$24,650,000! This is nearly a seven-fold increase in the proposed mitigation. This is more than a mere Supplement – it is an entirely new position. The Applicant respectfully submits that it is fundamentally unfair for the Committee to allow the Staff to modify its testimony to this magnitude at this late date in the proceeding.

Second, the new testimony provides an avalanche of new information that is impossible to analyze, much less rebut, in a span of just one week. The new material includes an elaborate Emergency Response Matrix, detailed Estimated Costs of Station Construction, Equipment and Staffing of a new fire station at an undisclosed location, and a new, detailed Estimated Allocation of Fire Facility Costs to Proposed Solar Energy Installations, all of which were disclosed for the first time *after* the June 21, 2010, prehearing conference. If this material had been produced as part of the Staff Assessment or with either of the first two Staff Supplements, the Applicant would have had a reasonable opportunity to review the information and respond.

However, when the new information is presented at the last minute, the Applicant is denied a meaningful opportunity to review.

The Applicant is particularly concerned with the Emergency Response Matrix that Staff offers into this proceeding for the very first time. Staff is recommending that this new matrix be used by fire departments and project owners to assess the level of emergency response needed. Yet, when the Staff provided this matrix to the County to be adopted and introduced into this proceeding, the Staff did not simultaneously provide the matrix to the Applicant.

According to the Staff, this new “analytical tool” has a weighting scheme for the various categories of fire department response and utilizes professional judgment in the assignment of the “score” to the categories. However, this tool was not developed through workshops, stakeholder groups or any other transparent forum of which Applicant is aware. Nor has the Staff provided any documentation or explanation of how the criteria for this form were developed, the rationale for the scoring scheme, the basis for the weighting or any other information that would allow an informed understanding of this proposed “tool.”

The detailed Estimated Costs of Construction, Equipment and Staffing of a new fire station at an undisclosed location is similarly merely a conclusory spreadsheet, without any supporting documentation and work papers.

Given the absence of any supporting documentation, these documents should not be received into evidence and the testimony which relies upon these documents should be summarily stricken.

Third, the new testimony does not merely supplement the Staff’s position on key facts – it completely reverses the Staff’s previous position on key fire-related issues in this case and in other proceedings currently pending before the Commission – including cases of other projects

in San Bernardino County. For example, Staff's Opening Testimony claimed that Staff reviewed and evaluated the local fire department capabilities and response time in each area and interviewed the local fire officials to determine if they feel adequately trained, manned, and equipped to respond to the needs of a power plant. The original testimony did not report any concerns from local fire officials about the adequacy of training, equipment or response. Yet, the new testimony alleges that the adequacy of training, equipment, facilities, and response times are lacking. The new testimony alleges: "Presently, the SBCFD is not able to respond to fire, hazmat, rescue, and EMS emergencies in a timely manner at the AMS power plant." This is a dramatic reversal from the Staff's position in its Opening Testimony, which expressed no concern with response times for fire, hazmat or EMS; yet the new testimony does not explain how the response times suddenly became so inadequate.

Given that the new testimony offered by Staff is not a mere supplement to its Opening Testimony, but is instead: (1) a fundamental reversal of its Opening Testimony; (2) a dramatic and unprecedented escalation of recommended mitigation fees; and (3) introduces new analyses which lack supporting explanation and substantiation, the Committee should strike the testimony as beyond the scope of the authorized supplement.

II. THE COMMITTEE SHOULD ISSUE AN ORDER SHORTENING TIME FOR RESPONSES TO THIS MOTION.

Rule 1716.5 provides that responses to the petition by other parties shall be filed within 15 days of the filing of the petition unless otherwise specified by the presiding member. In this

instance, because the deadline for filing the Applicant's testimony is imminent, the Applicant requests that the Commission issue an order shortening time for responses to this Motion.

Dated: July 9, 2010

ELLISON, SCHNEIDER & HARRIS L.L.P.

By  _____

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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on July 9, 2010, I served the attached *ABENGOA MOJAVE SOLAR PROJECT'S MOTION TO STRIKE THE ENERGY COMMISSION STAFF'S SUPPLEMENTAL OPENING TESTIMONY REGARDING PROPOSED CONDITION OF CERTIFICATION WORKER SAFETY-6 AND SHORTEN TIME* via electronic and U.S. mail to all parties on the attached service list.

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



Karen A. Mitchell

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09-AFC-5

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