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July 2, 2010

California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: **PALEN SOLAR I, LLC'S OPPOSITION TO CALIFORNIA UNIONS FOR RELIABLE ENERGY'S MOTION TO COMPEL PRODUCTION OF INFORMATION**
DOCKET NO. (09-AFC-7)

Enclosed for filing with the California Energy Commission is the original of **PALEN SOLAR I, LLC'S OPPOSITION TO CALIFORNIA UNIONS FOR RELIABLE ENERGY'S MOTION TO COMPEL PRODUCTION OF INFORMATION**, for the Palen Solar Power Project (09-AFC-7).

Sincerely,

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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of: Application for Certification for the PALEN SOLAR POWER PROJECT	**DOCKET NO. 09-AFC-7** **PALEN SOLAR I, LLC'S OPPOSITION TO CALIFORNIA UNIONS FOR RELIABLE ENERGY'S MOTION TO COMPEL PRODUCTION OF INFORMATION**

INTRODUCTION

Palen Solar I, LLC (PSI), pursuant to 20 CCR §1716.5, hereby files its Opposition to the Motion to Compel Production of Information propounded on June 17, 2010, by the California Unions For Reliable Energy (CURE). PSI has objected to the data requests that seek information that is untimely, unduly burdensome, not relevant to the proceedings, not reasonably necessary for the Commission to make a decision concerning its Application For Certification (AFC), and is not reasonably available to PSI as set forth below.

The gross effect of filing data requests so late is that it will place an undue hardship on PSI. Much of relevant information related to the topics addressed in the "195" data requests to which PSI has objected relate to information that has already been conveyed in the AFC and supplemental filings or within the numerous workshops that also addressed the information that has now been formally requested by CURE. This excessive demand at such a late date diminishes the import purported by CURE in

view of the fact that CURE has retained experts since data adequacy (Fall of 2009) and participated in no less than seven different days for which workshops were held.

CURE invokes the principles of CEQA in a forced effort to conform their theory of relevance, making the assertion that the information it seeks is important to Committee's needs for CEQA compliance in order to cure the SA/DEIS deficiencies and then to help formulate mitigation. This implies that the Staff did not undertake its duties in assessing the topic areas and providing methods of mitigation. PSI may disagree with conclusions by Staff but not that Staff did an inadequate environmental assessment. CURE claims that a stake will be driven through the heart of CEQA if more studies, more information, ad nauseam are not secured to meet the CEQA goal of sufficiency. That position blatantly ignores the good faith efforts of Staff and PSI to date, as well as the standard of 14 CCR §15003(j) which states that the process by which the environmental document be produced "not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement." PSI contends that the information already given over to Staff has allowed them to produce a more than sufficient SA/DEIS, save those topic areas still under consideration (transmission line). The derailing of process here is not by PSI – or Staff, it is from CURE in its untimely, excessive and burdensome request.

Finally, and most importantly, the fact that the evidentiary hearing has been delayed is of no consequence to what was intended by CURE when it filed the data requests so late – to delay. It is that time frame that the Committee must assess in determining propriety. CURE's dismissive nature of this aspect should not be lost on the Committee just because it has advanced legal arguments for relevance.

To assist the Committee's review of PSI's Opposition to CURE's Motion to Compel, we have organized the legal argument to include our fundamental arguments as they relate to all 195 data requests of CURE.

ARGUMENT

PSI hereby incorporates and does not waive any and all objections previously docketed concerning the recent data request from CURE. PSI's objections are based

on the following three fundamental theories and principles. And, PSI submits that each and every data request should be denied under all or any one of the following objections.

1. Untimely And Intended To Cause Delay

On December 23, 2009 the Committee granted CURE's Petition to Intervene. In that order the Committee specifically stated:

> **The Committee will not permit** unnecessary, irrelevant or unreasonably burdensome data requests and may, on the motion of a party or on its own motion, exercise its authority pursuant to sections 1203 and 1204 (Cal. Code Regs., tit. 20, §§ 1203, 1204) to enforce the provisions of section 1716, setting forth procedures for obtaining information (Cal. Code Regs., tit. 20, § 1716), in order to eliminate undue delay in the completion of these proceedings.

This order clearly indicates that the Committee did set reasonable limits on the actions by CURE in securing discovery requests, at whatever time in the proceedings.

As expressed in Title 20 CCR §1716 (i) "…. The presiding member may set reasonable time limits on the use of, and compliance with, information requests in order to avoid interference with any party's preparation for hearings or imposing other undue burdens on a party." Noteworthy here is that there is no limitation on this section being imposed anytime before the upper limit of 180 days for discovery - after data adequacy is achieved. In fact, to hold a contrary position would be to make the Intervention Order meaningless by implying that the directive to CURE was only effective after the 180 day period. And, it would run contrary to the express abilities of the Committee to control, direct and regulate the proceedings under 20 CCR §§ 1203, 1204 and 1212.

Here, CURE waited until the 11th hour to file "195" data requests for the sole purpose of causing delay. That delay is self-evident and the initiation of this 11th hour discovery came:

1) before the Scheduling Order was revised; and
2) while PSI was beginning its preparation for evidentiary hearing.

The change in the Scheduling Order does not diminish the intent of CURE **at the time the data requests were made**, nor does it eliminate the realities of why the Scheduling Order was changed. Simply put, the evidentiary preparation has been supplanted by an even more burdensome task: to re-design the facility to meet the environmental concerns of the interested agencies (as well as CURE) and still keep on the ARRA funding fast-track – and, to be licensed within the 12 month statutory time-frame.

The re-design endeavor by PSI is Herculean and requires exorbitant person hours and commitment that contravenes any reasonable possibility to produce discovery for duplicative and or extraneous matters, as well as those that have already been attended to in the seven different days of workshops (all attended by CURE). Bringing the request at the time it was propounded and then sustaining it in light of the current endeavors by PSI to re-design the project footprint at the request of Staff and interested agencies, only secures one goal – to delay the proceedings even more by causing PSI to engage in the redundant task of supplying information that has already been conveyed and or should have and could have easily been secured by CURE at an earlier date.

As noted in its expert testimony in the Genesis and the Blythe projects[1], CURE's experts have been attending to the renewable projects since before they achieved data adequacy. In this matter, CURE also attended the multiple Workshops which were held for the purpose of discussing and providing the exact clarifications that CURE alleges it now seeks.

To excuse the six to eight month delay by CURE in formulating the discovery requests is not supported by logic, law or reason. If CURE truly required this information to meaningfully participate in these proceedings it would have made the requests earlier in the proceedings as the scope of review was unfolding and as numerous workshops (all attended by CURE) discussed the range of issues embodied in its data requests. There simply is no excuse or legal justification for these delay tactics.

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[1] Genesis Solar Energy Project (GSEP) 09-AFC-8 and Blythe Solar Power Project (BSPP) 09-AFC-6

2. Unduly Burdensome or Unavailable

PSI objects to CURE's May 14, 2010 Data Requests on the grounds that they would impose an undue burden on PSI; originally coming at a time during which PSI and its consultants were actively preparing for evidentiary hearings, working with the wildlife agencies to finalize various compliance plans, and working diligently to finalize engineering to meet the objectives of qualifying for stimulus funding under the American Recovery and Reinvestment Act (ARRA). Even more importantly now, in an effort to allay the concerns of the involved agencies, PSI is also now actively preparing a re-design of the entire project site to eliminate the fears of the agencies as it relates to biological resources as well as to stay on target for securing the ARRA funding. This information is not new to CURE.

As referenced above, the Commission's Regulations provide that the Presiding Member of the siting committee "may set reasonable time limits on the use of, or compliance with, information requests in order to avoid interference with any party's preparation for hearings **or imposing other undue burdens on a party**" (emphasis added). CURE's 11th hour filing of its Data Requests (requiring PSI to answer 195 questions) imposes a continuing undue burden on PSI because:

- PSI is engaged in engineering, economic and environmental review and preparation of the re-designed site in order to meet the demands of the agencies and CURE related to biological concerns; all the while, striving to keep the ARRA funding timelines;
- PSI has limited resources to engage in the futile attempts to secure information that is, at best, tangentially related to the proceedings (unavailable);
- PSI is still pooling its resources to prepare testimony in those areas of low to moderate dispute which have become abundantly clear during the seven workshops, and further prepare for evidentiary hearings in which some subject areas may require adjudication;
- PSI is also still working to provide information to the federal permitting agencies pursuant to the work performed at the Staff Assessment/Draft Environmental Impact Statement (SA/DEIS) Workshops.

Further to this, much of the information requested is not reasonably available to PSI. CURE has claimed it is necessary to request information from PSI so that they can evaluate purported issues not addressed by the SA/DEIS. This unreasonably assumes that PSI knows why the assessment by Staff included or did not include something or some analysis. PSI does not believe the SA/DEIS is deficient and asserts that the purported insufficiency alleged by CURE should have been addressed to Staff three months ago through comments on the SA/DEIS or information requests directed to Staff. Instead, CURE sat idle.

PSI believes that the Staff Assessment does comport with the substantial evidence standard; that it already contains enough relevant information such that reasonable inferences to sustain a fair argument can be made to support an ultimate conclusion by the Commission even though other conclusions might also be reached. As such, any requests for information on already concluded topics only perpetuates the endless delay in matters already sufficiently addressed by Staff.

Nevertheless, as a matter of good faith, responses were tendered that address the queries that were not unduly burdensome and were within the ability of PSI to reasonably respond to.

3. <u>Irrelevant, Cumulative and Unnecessary</u>

PSI also objects to the Data Requests on the grounds that the information is not relevant, is cumulative and is not needed for the Committee/Commission to make a final decision on the Application for Certification.

Under 20 CCR §1212, the Committee is charged with only allowing in evidence of those matters of non-cumulative relevance and to exclude those matters that are cumulative, even if relevant.

Assuming arguendo that the data requests of CURE are considered relevant, it would still not be proper to facilitate the requests since they are either cumulative to all other matters that have already been addressed in the AFC, supplemental dockets, the multitude of workshops and incorporated into the SA/DEIS or they are excessive to the

legal needs of the Staff Assessment and the ultimate decision to be made by the Commission.

Again, if CURE needed this information and or actually believed that it would lead to other discoverable evidence – then waiting until the 11th hour to make the request (effectively sandbagging PSI, Staff and the Committee) only increases the patent observation that this is a tactic intended to delay the proceedings. As such, there can be no doubt that these irrelevant, excessive and or relevant but redundant requests at this late date should be denied.

Staff and the agencies have requested additional information from PSI since the AFC was deemed data adequate on November 18, 2009 (and, to some extent, even before). This information has already been supplied and has been served on CURE. Staff had sufficient detailed information to write the SA/DEIS and any additional information it needed to develop a Revised Staff Assessment; all of which has been provided to all parties.

The excessive and unnecessary information sought by CURE runs in opposition to the legal principle that: "CEQA does not require a lead agency to conduct every recommended test and perform all recommended research to evaluate the impacts of a proposed project. The fact that additional studies might be helpful does not mean that they are required." Association of Irritated Residents v. County of Madera (2003) 107 Cal.App.4th 1383, 1396. PSI submits that whether it is studies and or information sought, the nature of the request by CURE does not change – it was intended to cause delay and remains irrelevant, cumulative and unnecessary.

Finally, it must not be lost on the Committee that CURE had numerous opportunities to comment on this process in a timely manner. But instead, CURE chose to remain idle and silent, and in doing so dismissed the import of the Committee's limiting intervention order by propounding this late set of "195" data requests. PSI contends that CURE (just like Staff has evinced in the SA/DEIS) already has all the information necessary to meaningfully participate in the proceedings and as such does not need any of the information sought in its Data Requests beyond that which has already been given.

CONCLUSION

PSI respectfully requests that the Committee deny CURE's Motion to Compel in its entirety for the reasons provided above and in the oral argument that may be held on a hearing in this matter. We continue to urge the Committee on its own motion to issue an Order granting these objections thereby avoiding a lengthy and unnecessary hearing prior to the RSA being published. As intimated by CURE in their moving papers, the RSA may answer questions that they alone believe were not accomplished by Staff in the SA/DEIS.

July 2, 2010

Respectfully submitted,

// original signed //

_____
Robert Gladden
Counsel for PSI, LLC

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APPLICATION FOR CERTIFICATION FOR THE *PALEN SOLAR POWER PLANT PROJECT*

Docket No. 09-AFC-7

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(Revised 7/2/10)

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DECLARATION OF SERVICE

I, Marie Mills, declare that on July 2, 2010, I served and filed copies of the attached **PALEN SOLAR I, LLC'S OPPOSITION TO CALIFORNIA UNIONS FOR RELIABLE ENERGY'S MOTION TO COMPEL PRODUCTION OF INFORMATION,** dated **July 2, 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:
[http://www.energy.ca.gov/sitingcases/solar_millennium_palen]

The documents have 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, in the following manner:

(*Check all that Apply*)

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CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 09-AFC-7
1516 Ninth Street, MS-4
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I declare under penalty of perjury 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.

Marie Mills