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| DOCKET |
| 09-AFC-8 |
| DATE <u>JAN 5 2010</u> |
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January 5, 2010

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

Subject: **GENESIS SOLAR, LLC RESPONSE TO STAFF AND CURE'S
OPPOSITIONS TO MOTION FOR SCOPING ORDER, HEARING
AND ORDER SCHEDULING TIME FOR FILING OF BRIEFS
DOCKET NO. (09-AFC-8)**

Enclosed for filing with the California Energy Commission is the original of **GENESIS SOLAR, LLC RESPONSE TO STAFF AND CURE'S OPPOSITIONS TO MOTION FOR SCOPING ORDER, HEARING AND ORDER SCHEDULING TIME FOR FILING OF BRIEFS**, for the Genesis Solar Energy Project Docket No. (09-AFC-8).

Sincerely,

Ashley Y. Garner

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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

Application for Certification for the
Genesis Solar Energy Project

DOCKET NO. 09-AFC-8

**GENESIS SOLAR, LLC RESPONSE
TO STAFF AND CURE'S
OPPOSITIONS TO MOTION FOR
SCOPING ORDER, HEARING AND
ORDER SCHEDULING TIME FOR
FILING OF BRIEFS**

Genesis Solar, LLC (Genesis) hereby responds to Staff and CURE's Opposition to its Motion for Scoping Order, Hearing and Order Scheduling Time For Filing of Briefs (Motion). Staff and CURE erroneously conclude that evidentiary hearings on questions of fact are necessary for the Committee to answer the questions posed in our Motion. Genesis' Motion requests the Committee to articulate its position on matters of law and policy. It specifically does not seek a factual determination by the Committee. Indeed, the facts are not it dispute.

Staff articulated the issues as reasons that the GSEP may not be processed in time to obtain stimulus funding in its Issue Identification Report (IIR) presented at the December 10, 2009 Site Visit and Informational Hearing. Genesis contends that Staff's position is a veiled threat to circumvent the Committee's (and Hearing Officer's) independent decision-making authority and require Genesis to concede to the Staff's interpretations of law and policy without a full hearing by the Commission's decisionmakers. While Staff is charged with an independent analysis, it should apply Commission Policy and the law equally to all applicants and to all projects.

For clarity, the specific legal questions are summarized again here. Specifically, we ask the Committee to:

1. Articulate with specificity the Commission's Policy on use of water for power plant cooling purposes;
2. Articulate with specificity the legal affect of the US Bureau of Reclamation's Accounting Surface Methodology on groundwater pumping in the Chuckwalla Valley Groundwater Basin; and

3. Cumulative Impacts

- a. Define the legal standard for including future projects in the cumulative impact analysis under the California Environmental Quality Act (CEQA) and the National Environmental Policy Act (NEPA).
- b. Articulate whether the Commission has a policy of conserving water for use by projects that are not yet identified.

All of the facts necessary to determine these legal questions are clearly not in dispute.

- The Genesis Solar Energy Project (GSEP) is in the Chuckwalla Valley Basin and proposes to use groundwater for wet cooling.
- \The GSEP is a thermal electric solar power plant which will be constructed on federal land administered by the Bureau of Land Management (BLM) and therefore is currently being processed under both the CEQA and NEPA by BLM and the Commission.

COMMISSION POLICY

Genesis is not requesting the Committee decide whether the GSEP can use the groundwater in the Chuckwalla Basin for wet cooling at the Scoping Hearing. Genesis is, however, requesting the Committee articulate the policy the Commission has adopted concerning power plant cooling and the use of fresh water. Doing so requires reference only to adopted Commission policy documents, law and Decisions in other projects rather than specific factual analysis of the GSEP. Genesis has repeatedly requested that Staff articulate its understanding of the Commission policies it will apply to the undisputed facts of the GSEP. Staff has refused to do so.

As the Committee is aware, Staff identified this issue as a reason that the GSEP may not be processed in time to qualify for ARRA funding. Genesis believes that if the Committee articulated the specific terms of the Commission water policy to Staff this issue would no longer be an impediment to processing the GSEP application in time for ARRA funding. Since Genesis is not requesting the Committee determine whether the GSEP complies with any policy at this time, there is no need for evidentiary hearings to determine any fact. The mere clarification and articulation of a general policy of the Commission is not dependent on the particular facts of a Siting Case. It would clearly be arbitrary and capricious to interpret the terms of a general Commission policy, such as the policy on wet cooling as articulated in the 2003 Integrated Energy Policy Report (IEPR), differently between projects or applicants. This Committee need not determine any disputed fact specific to the GSEP in order to articulate its water policy. Therefore, there is no need to hold an evidentiary hearing to determine any fact.

ACCOUNTING SURFACE METHODOLOGY

Similarly, there is no reason to hold an evidentiary hearing to determine any fact related to the GSEP for the Committee to articulate what the legal affect of the Accounting Surface Methodology on pumping in the Chuckwalla Valley Groundwater Basin. Such an interpretation would apply to any project in the basin. Surely, Staff and CURE can

stipulate to the fact that GSEP has proposed to pump groundwater and will be located within the Chuckwalla Valley Groundwater Basin. To be clear, Genesis Solar LLC is not requesting the Committee determine whether or not the GSEP will pump below the Accounting Surface but only to determine if the Accounting Surface methodology applies to the groundwater in the Chuckwalla Valley Basin. This is clearly a matter of law and policy that all parties can brief. This is a critical issue as raised by Staff in its Issue Identification Report (IIR) as a reason that the GSEP cannot be processed in time to obtain ARRA funding. No factual determinations are necessary for the Committee to render an opinion of whether or not this policy would apply to any project that proposes to pump groundwater within the Basin.

CUMULATIVE IMPACTS

Genesis and Staff are disputing which other solar projects should be included in a cumulative impact analysis. In order to resolve that dispute, Genesis Solar is requesting the Committee articulate the standard by which Staff should include a project in its analysis. rather than identify each project that should be included.

CURE states that since all parties are represented by counsel, the Committee is not needed to articulate a standard. If that is the case, then briefs are not necessary on this issue and the parties can enter into a stipulation. Genesis Solar therefore presents the following proposal:

*In order for a project to be included in a cumulative impact analysis the project must be reasonably foreseeable as evidenced by **all** of the following:*

- 1. The project must have filed an application with a lead agency for a permit to construct and operate the project;*
- 2. The application must have been accepted as complete; and*
 - a. For a project on land managed by the Bureau of Land Management that must mean that a Plan of Development must have been accepted as complete.*
 - b. For a project within the jurisdiction of the Commission, the Commission must have found the AFC “data adequate”.*
 - c. For a project within the jurisdiction of another state agency or County, an application should have been accepted as complete*
- 3. Environmental review has begun.*
 - a. For a project on federal land, a Notice of Intent (NOI) to prepare an Environmental Impact Statement or Environmental Assessment under NEPA should have been noticed in the Federal Register*
 - b. For a project within the jurisdiction of the Commission, the Commission must have found the AFC “data adequate”.*
 - c. For a project within the jurisdiction of another state agency or County, the lead agency shall have published a Notice of Determination to prepare an Environmental Impact Report or Negative Declaration or a Notice of Exemption under CEQA.*

Additionally, Genesis Solar believes that the Commission has no policy nor is there state policy for conserving groundwater for other solar projects that do not meet the above criteria for inclusion in a cumulative impacts analysis.

If Staff and CURE can stipulate to these legal determinations then there is no need for the Committee to address the third issue outlined in our Motion. However, if there is no stipulation, the question presented is purely legal and can be determined through briefing on this issue before the Committee. As such, a Scoping Order that provides the legal standard for including projects in a cumulative impact analysis also does not require factual determinations in an evidentiary hearing.

CONCLUSION

Therefore, Genesis Solar requests the Committee issue an order requiring briefs be filed addressing the issues outlined in our original motion by January 18, 2010 and that a Hearing be scheduled as soon as possible thereafter.

Dated: January 5, 2010

/original signed/

Scott A Galati
Counsel to Genesis Solar, LLC



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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**APPLICATION FOR CERTIFICATION FOR THE
GENESIS SOLAR ENERGY PROJECT**

Docket No. 09-AFC-8

**PROOF OF SERVICE
(Revised 12/22/09)**

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DECLARATION OF SERVICE

I, Ashley Y Garner, declare that on January 5, 2010, I served and filed copies of the attached **GENESIS SOLAR, LLC RESPONSE TO STAFF AND CURE'S OPPOSITIONS TO MOTION FOR SCOPING ORDER, HEARING AND ORDER SCHEDULING TIME FOR FILING OF BRIEFS** dated **January 5, 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/genesis_solar].**

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, in the following manner:

(Check all that Apply)

For service to all other parties:

sent electronically to all email addresses on the Proof of Service list;

by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

AND

For filing with the Energy Commission:

sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (*preferred method*);

OR

depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 09-AFC-8
1516 Ninth Street, MS-4
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I declare under penalty of perjury that the foregoing is true and correct.



Ashley Y Garner