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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

DOCKET NO. 09-AFC-7C

Petition For Amendment for the **PALEN
SOLAR ELECTRIC GENERATING
SYSTEM**

**PALEN SOLAR HOLDINGS, LLC's
SUPPLEMENTAL RESPONSE TO
MOTION TO REOPEN EVIDENTIARY
RECORD AND SCHEDULING ORDER**

Palen Solar Holdings, LLC (PSH) files this Supplemental Response to its Motion to Reopen the Evidentiary Record (Motion). Interveners Center for Biological Diversity (CBD), Basin and Range Watch, and the Colorado River Indian Tribes (CRIT) each filed oppositions to the Motion. Staff filed a responsive pleading that took no position on either the Motion or the Proposed Schedule. As the moving party, PSH bears the burden of supporting its Motion and customary procedures allow the moving party to respond to opposition to its Motion. Since the Committee has not set a hearing on the Motion where PSH can address the opposition orally, PSH files this Supplemental Response.

INTRODUCTION

PSH filed its Motion to open the evidentiary record for:

- Biological Resources – Limited to Avian-Related Issues
- Cultural Resources – Limited to Condition of Certification **CUL-1**
- Alternatives – Limited to the Infeasibility of Project Alternatives
- Overriding Considerations – Limited to the Project Benefits

The Motion contained a Proposed Schedule which, due to Staff's Request For Delay in responding to the Motion, is now moot. Staff's Request For Delay was granted unilaterally without an opportunity for PSH to respond. Staff's Request For Delay was based solely on its reasoning that it wanted to conduct its April 16, 2014 workshop to better inform its position on the Motion. However, Staff subsequently took no position on the Motion and offered no explanation why the workshop was important to its position. Staff's actions have further delayed the schedule to the detriment to PSH without a clear and commensurate benefit to the decision making process. Such actions by Staff continue to

prevent PSH from having a full and fair dialogue with Staff on the most basic questions surrounding its positions on the PSEGS Amendment.

To put the Motion and PSH responses in context, we have included in this Supplemental Response the specific direction given by the Committee at the January 7, 2014 PMPD Conference.

As the Committee explained at the PMPD Conference,

I'm very much looking forward to hearing from the parties and from the public about the PMPD, but really more importantly about how we move forward in light of the Petitioner's motion to extend the record – extend the timeline -- and to gather and provide additional information that we requested in the PMPD.

As everyone here and listening already knows, or probably already knows, the PMPD proposes denying the Palen Amendment without prejudice on the grounds that the factual record developed in this proceeding does not justify the overrides of adverse unmitigable environmental impacts that we found would result from the project; however, we left the door open for Petitioner to do a number of things: build a project that has already been permitted, propose a different project on the site, or **to ask the Committee to reconsider our findings on this project if and when Petitioner is able to provide additional data that we requested in the PMPD, particularly on Avian mortality from this and other solar generating technologies.**¹

The question before the Committee is whether or not PSH has submitted additional information responsive to the Committee direction provided at the PMPD Conference and whether such additional information is new and relevant to the ultimate decision on the PSEGS Amendment. Those opposed to the Motion focus their opposition not on the relevant question, but rather on the weight of and premature conclusions drawn from the additional information. Questions of how much credence to give the additional information is properly the subject of due process at evidentiary hearings when subjected to direct and cross-examination.

Filings Since PMPD

Since the date of the PMPD Conference, PSH has filed the following additional information:

- A table providing a comparison of avian mortality data reported by projects utilizing various solar technologies; filed on February 10, 2014 and updated on February 28, 2014 and March 21, 2014²;

¹ Transcript of the PMPD Conference held on January 7, 2014, pages 10 and 11 (emphasis added).

² PSH is working on incorporating the avian mortality data reported for the solar projects for the month of March 2014 and will file a further update when completed.

- Testimony providing a more detailed description of the benefits of the PSEGS, including the potential to incorporate thermal energy storage at the project in the future; filed on February 10, 2014;
- Testimony providing a more detailed description of the reasons why the No Project Alternative and the PV Alternative are infeasible alternatives to the PSEGS; filed on February 10, 2014;
- A proposed modification to Condition of Certification **CUL-1** that more appropriately provides mitigation directed towards tribal spiritual and cultural interests while also providing mitigation for the State's interest in recording important historical sites; filed on February 10, 2014;
- A response to CBD Data Request; filed on February 13, 2014;
- A proposed modification to Condition of Certification **BIO-16b** to require performance standards to be incorporated into the Bird and Bat Conservation Strategy (BBCS); filed on February 28, 2014;
- A drawing showing potential future storage equipment and location; filed on March 3, 2014;
- A report describing avian deterrent methods; filed on March 7, 2014;
- Fall 2013 Avian Field Survey Report for PSEGS, filed on April 10, 2014; and
- Fall 2013 Nocturnal Migration Survey Report for PSEGS, filed on April 10, 2014.

In addition to the above information docketed by PSH, other documents have been filed that may also be considered by the Commission when deciding the Motion:

- On April 7, 2014 CBD filed a report attached to its Supplemental Opposition to the Motion entitled "Avian Mortality at Solar Energy Facilities in Southern California; A Preliminary Analysis", prepared by National Fish and Wildlife Forensics Laboratory.
- On April 11, 2014 USFWS docketed a document entitled "Forensics Lab Report Evaluation."

Response to Interveners

CBD states that the Committee should not grant the Motion, but all grounds for rejection pertain to the weight of the evidence and do not address the questions relevant to the specific decision before the Committee. The first is that they state that the information provided is not sufficient to re-open the evidentiary record. To support this contention, CBD cites a document filed on November 14, 2013 by USFWS (U.S. Fish and Wildlife Service comments on CEC FSA for Proposed PSEGS). That document is wholly unrelated to whether the Committee should re-open the evidentiary record and, in fact, is related to baseline surveys that are and will continue to be conducted as part of Condition of Certification **BIO-16b**, which was not opposed at evidentiary hearing. At best, CBD's argument relates to the weight of evidence before the Committee and not whether there is additional information not previously considered by the Committee that should be the subject of an evidentiary hearing.

CBD alleges that the Committee needs one year of data from the ISEGS project. It also contends that the Committee should only rely on "systematically collected data" and that

there are only a few months of systematically collected data from ISEGS. First, the data provided by PSH includes avian mortality data collected by ISEGS pursuant to its regulatory approved Avian and Bat Monitoring and Management Plan (ABMMP) survey methods and protocol for 5 months (November 2013 through March 2014, to date). Pursuant to the schedule attached, the Committee will also have mortality data from ISEGS through the month of April 2014 to consider during PSH's requested evidentiary hearing. This information is not only new and was unavailable at the time of the evidentiary hearings, but it also represents the best available systematically collected data for 6 months of ISEGS operations. While the data collected from ISEGS prior to November 2013 was not regulatory approved, it was "systematically collected data" from April 2013 in accordance with publicly disclosed routine survey methods performed by accredited biologists (in addition to incidental finds by site workers). To date, avian mortality data from other solar facilities has been based on incidental finds only.

Second, CBD introduced some of the exact same data into the record at the evidentiary hearings that it now contends is unreliable. The data in question includes mortality information collected and reported by ISEGS prior to implementation of the November approved protocols. CBD previously argued that such data was sufficient to predict large avian mortalities at ISEGS yet now inconsistently argues that such data is insufficient. As is delineated in the Monthly Compliance Reports (MCRs) filed by ISEGS during 2013, the data was collected pursuant to a systematic approach in advance of finalized survey protocols while the ABMMP underwent 12 revisions by the relevant state and federal agencies. Contentions over data sufficiency and conclusions are not grounds for denial of the Motion as the subsequent data made available is clearly new evidence. At the evidentiary hearing, CBD can argue the Committee should not rely on the data. CBD's contention goes to the weight of the evidence which can only properly be considered by the Committee when it is introduced into evidence and considered fairly after direct and cross-examination.

CBD also cites that the comparison table provided is misleading. This contention does not amount to grounds for rejection that the data is not new or relevant to the Committee. CBD does *not* argue that the comparison table is non-responsive to the data requested by the Committee at the PMPD Conference. In fact, Staff agrees that the table is responsive to the Committee's request. The strengths and weaknesses of the table requested by the Committee should be the subject of an evidentiary hearing so that the Committee can determine how much weight the table should be given. Uncontested allegations of weaknesses should not be used as a basis to deny the motion.

CBD's additional reasons for opposition, including contentions relating to the ISEGS recent petition to amend certain Air Quality conditions of certification related to natural gas use, impacts of thermal storage, and effectiveness of deterrent methods, all similarly go to how much weight should be given to the additional evidence filed by PSH, not its relevance nor whether it is new information responsive to the Committee's direction at the PMPD Conference. These purported reasons for denial of the motion should be rejected by the Committee.

Further, CBD (and CRIT) raise an issue in their opposition about the scope of the proceedings. Both claim that if the solar trough and PV alternatives are infeasible, the

Commission cannot process the project as an amendment. Both interveners confuse the issue of environmental baseline with the scope of the evidentiary proceedings. First, it is absolutely clear that the FSA and the PMPD evaluate the “whole of the project”. That is, the Commission has properly disclosed the environmental setting now as undeveloped land. In every technical area, the Commission did not assume the solar trough was constructed and operating for purposes of describing the environmental setting. It is this undeveloped setting that was used as the basis for the analysis. For example, the mitigation required for biological impacts is not the difference between the amount of land developed for the solar trough project and the PSEGS Amendment. The impacts identified and the amount of habitat compensation is for the **total disturbance** compared to undeveloped land.

The interveners are confused about the scope of additional information that the Commission requires to process an amendment. Since the solar trough project has a CEC License which fully discloses the total impacts and mitigation, focusing the analysis on whether an impact is increased or decreased is properly within the CEC regulations for an amendment since CEQA expressly allows the Commission to build upon CEQA work already performed. In other words, the Commission requested information about the differences in impacts between the approved solar trough project and the PSEGS Amendment, so that it could tier off of the work performed for the approved project. Even though such tiering is specifically authorized by CEQA, the FSA and the PMPD clearly disclose the total impacts and mitigation proposed using the environmental baseline of undeveloped land. Therefore, the Committee should reject the contention that the analysis is somehow flawed.

Lastly, the Committee did not expressly make a finding as to the feasibility or infeasibility of the alternatives. The Committee articulated the following at the PMPD Conference:

In addition to supplementing the record on project benefits, the Petitioner may wish to consider supplementing the record on the feasibility of the No Action and the PV Alternatives. While the Committee did not make a finding of the feasibility of the Alternatives in the PMPD, I’ll note that the record is light in that area and the Petitioner has the burden of proof in demonstrating infeasibility of alternatives.³

While Staff carried forward the no project alternative and the PV alternative for analysis rather than exclude them from consideration on the basis of infeasibility, the ultimate determination on feasibility should be made by the Committee. The Committee specifically invited PSH to provide more information regarding infeasibility, and PSH’s February 10, 2014 testimony provides such additional information. CBD and CRIT are free to provide contrary evidence on infeasibility for consideration by the Committee in a fair evidentiary hearing subject to direct and cross-examination.

³ Transcript of the PMPD Conference held on January 7, 2014, pages 14 and 15.

Response to USFWS Comment

Ms. Jody Fraser, biologist from the USFWS, Carlsbad Office, filed an email commenting that she did not believe the information provided by PSH was new or substantive. This purported opposition to the Motion seems misplaced as USFWS is not a party to the proceeding and has no expertise relating to PSH's additional information on infeasibility of alternatives, potential for thermal storage to be added to PSEGS, or cultural mitigation proposed under PSH's revised Condition of Certification **CUL-1**. The Committee should understand the comment made by Ms. Fraser as relating only to the avian information collected at the solar projects. While this additional information may not be new to the USFWS, it is new and substantive to the Committee since it provides information that is not currently in the PSEGS record and is responsive to the specific request by the Committee at its PMPD Conference. For the reasons discussed above, the weight of the avian mortality data, fall survey results, Forensics Lab Report and USFWS's evaluation of it, and the parties testimony should all be properly considered and weighed at an evidentiary hearing where witnesses are subject to direct and cross-examination.

Response to Staff

The Committee should note that Staff has taken no position on the Motion or the Proposed Schedule. Staff has filed additional information that PSH is treating as testimony, and PSH is prepared to file responses to each and every one of Staff's contentions in PSH's testimony. Such additional information sets forth Staff's positions and should be subject to direct and cross-examination at an evidentiary hearing to assist the Committee in assessing their proper weight.

Schedule

As described above, the delay in a ruling on the Motion has made the previously proposed schedule moot. Therefore PSH proposes the attached schedule. The Committee should understand that further delay critically jeopardizes the opportunity for PSEGS to begin Desert Tortoise (DT) clearance activities in the allowable Fall window. The interveners have proposed schedules that will force a decision on the PSEGS Amendment beyond the Fall 2014 DT Clearance window. It is clear that the Interveners seek to permanently stop the project rather than to work towards an appropriate mitigation plan reached through dialog and collaboration that would allow it to proceed.

When considering the arguments of the Interveners, the Committee should note well that the evidentiary hearing would consider very limited issues. In order to ensure due process to all parties, including PSH, the Committee should not utilize its informal hearing procedures, but rather allow all parties to engage in direct and cross-examination. PSH believes that all legal issues have been properly briefed and therefore the Committee should dispense with briefs. Further, to ensure that all parties can properly summarize its arguments on how the facts should compel particular results, PSH proposes that all parties make a 10 minute Opening Statement that summarizes the evidence it intends to present, followed by a 20 minute Closing Statement at the close of evidentiary hearing.

Conclusion

The PMPD and the Committee at the PMPD Conference acknowledged that it would entertain this Motion to re-open the evidentiary record. For the reasons discussed above, PSH requests the Committee reopen the evidentiary record limited to the following areas and adopt the attached schedule.

- Biological Resources – Limited to Avian-Related Issues
- Cultural Resources – Limited to Condition of Certification **CUL-1**
- Alternatives – Limited to the Infeasibility of Project Alternatives
- Overriding Considerations – Limited to the Project Benefits

Dated: May 6, 2014

Respectfully Submitted,



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**PSH'S PROPOSED SCHEDULE – Palen Solar Electric Generating System
Petition For Amendment (09-AFC-7C)**

ACTIVITY	DATE
Staff Workshop on CUL-1	4/8/14
Staff Workshop on Biology, Alternatives and Overriding Considerations	4/16/14
Decision on Motion to Re-Open Evidentiary Record	5/9/14
All Parties File Opening Testimony	5/26/14
All Parties File Rebuttal Testimony	6/9/14
Evidentiary Hearing in Sacramento	Week of 6/23/14
Revised PMPD	7/24/14
Revised PMPD Comment Period Ends	8/11/14
Commission Business Meeting	8/13/14