



DOCKET	
07-AFC-5	
DATE	<u>MAR 03 2010</u>
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March 3, 2010

California Energy Commission
Attn: John Kessler, Project Manager
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

Re: **Ivanpah Solar Electric Generating System, Docket No. 07-AFC- 5**

Dear Mr. Kessler,

Please find enclosed for filing the original and one extra copy of Environmental Intervenors' Motion to Compel Prehearing Conference, Set Briefing Schedule and Clarify Other Procedural Matters. Please return a file-endorsed copy in the self-addressed, stamped envelope provided. If you have any questions or need additional information, please contact me at (415) 977-5766 or violet.lehrer@sierraclub.org. Thank you for your attention to this matter.

Sincerely,

Violet Lehrer
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Sierra Club Environmental Law Program
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STATE OF CALIFORNIA

**Energy Resources Conservation and
Development Commission**

In the Matter of:)
)
The Application for Certification for the) Docket No. 07-AFC-5
IVANPAH SOLAR ELECTRIC)
GENERATING SYSTEM)
_____)

**ENVIRONMENTAL INTERVENORS' MOTION TO COMPEL PREHEARING
CONFERENCE, SET BRIEFING SCHEDULE AND
CLARIFY OTHER PROCEDURAL MATTERS**

Intervenors Sierra Club, Center for Biological Diversity, Defenders of Wildlife, California Native Plant Society, Western Watersheds Project and Basin and Range Watch bring this motion to compel a prehearing conference, set a briefing schedule and clarify other procedural matters in the above referenced proceeding. This motion is in response to the March 2, 2010, email from Hearing Officer Kramer which appeared to bypass the Commission's normal procedures for admitting additional evidence into a proceeding's hearing record after evidentiary hearings have concluded and for the timing of legal briefing. In that email, Mr. Kramer notified the parties that the Commission had reserved March 18, 2010 for additional evidentiary hearings, and set March 16, 2010, as the "extended" deadline for filing opening legal briefs, although no briefing deadline had been set.

The apparent need for additional evidentiary hearings arose when the applicant filed a new project alternative. Specifically, after the evidentiary hearings concluded on January 14, 2010, the applicant transmitted via a series of emails from January 28 to February 3, 2010 a new project alternative referred to as "Mitigated Ivanpah 3" that eliminated a small portion of the top

of the proposed Ivanpah 3. On February 8, 2010, Hearing Officer Kramer provided copies of several days of the transcripts to the parties via email and stated, “later this week, I’ll put out a statement of the precise briefing deadlines.” Nearly a month later, on March 2, 2010, absent any prior notice of a briefing schedule, Hearing Officer Kramer set an “extended” briefing deadline for March 16, 2010. For the reasons set forth below, the Commission must follow its regular procedures for consideration of new evidence and the inclusion of that evidence into the FSA and the hearing record, and for establishing a subsequent schedule for legal briefs.

I. COMMISSION REGULATIONS REQUIRE A PREHEARING CONFERENCE TO DISCUSS THE PARAMETERS AND TIMING OF FURTHER EVIDENTIARY HEARINGS

Under its own regulations, the Commission may not unilaterally calendar new evidentiary hearings in this proceeding. Instead, it is required to hold a prehearing conference with all parties “to establish the procedures, identify issues, and set schedules for adjudicatory or nonadjudicatory hearings...” (Section 1718.5.) A prehearing conference to establish the procedures going forward is essential in this instance given the proposed changes and submission of A new, reduced project alternative. Indeed, by the applicant’s own reckoning, the new project alternative “merits further consideration by the Commission and the BLM, focusing on the project area of most concern to the Parties, Ivanpah 3. “ (*See* Letter to Paul Kramer, California Energy Commission Hearing Officer, from Jeffery Harris, Ellison, Schneider & Harris L.L.P. (February 3, 2010).) The idea that the applicant could simply docket a new alternative absent any agency analysis or expert response by the parties violates long standing notions of open government and fair play, to say nothing of the Commission’s own organic statute and its implementing regulations.

The issue of project alternatives as a means of avoiding, among other things, the project's significant and unmitigated impacts on biological resources was the most hotly contested and thoroughly explored subject of the evidentiary hearings. Accordingly, any new hearing on alternatives must be equally thorough. For additional evidentiary hearings on the new alternative to be fair, the parties need to discuss with the Commission the timing of the Commission's own additional analyses, and a schedule for submitting written opening and rebuttal expert testimony, and discuss an agreed upon date to hear such expert testimony. A prehearing conference is the only way to ensure that all parties and their experts will be fully apprised of the new issues presented, and are available to adjudicate this matter.

It is critical that the parties discuss the scope and timing of the staff's and other agencies' supplemental analyses of the new alternative pursuant to California Environmental Quality Act (CEQA), California Endangered Species Act (CESA), Endangered Species Act (ESA), and the Warren-Alquist Act. Because it was the applicant who proposed a new alternative, it may well turn out to be staff's preferred alternative. If "Mitigated Ivanpah 3" turns out to be the preferred alternative, this constitutes significant changes to the proposed project. CEQA requires the Commission to prepare a supplemental FSA and circulate it for public review. (Pub. Resources Code, § 21166; CEQA Guidelines, §§ 15162, 15163.)

Providing supplemental agency analysis to the public prior to the evidentiary hearing should be discussed at the pre-hearing conference because this additional agency investigation will be the starting point for the additional hearings. Finally, once the hearings conclude, and transcripts are made available, then, and only then, will the parties be ready to set a briefing schedule based upon a complete evidentiary record. This too should be part of the prehearing conference. For all of these reasons, the Commission must hold a prehearing conference prior to

taking any formal actions on the applicant's new, "Mitigated Ivanpah 3" or requiring the parties to likewise take a position on the proposal.

II. THE COMMISSION MUST ESTABLISH A BRIEFING SCHEDULE THAT TAKES INTO CONSIDERATION THE ENTIRE EVIDENTIARY RECORD

Environmental intervenors have been waiting in good faith for a schedule that will set deadlines for opening and reply legal briefs. We understood that the Commission would provide written notice of the briefing schedule after the hearing transcripts were made publicly available. (Hearing Transcript at 343-344 (Jan. 14, 2010).) Initially, the tentative schedule entailed parties filing opening briefs approximately three weeks after the hearing transcripts were finalized. However, once the applicant submitted its new alternative everything changed. The fact that it was the applicant who introduced a new project alternative, and not another party, is significant because such a submission indicates the applicant is preliminarily willing to accept a reduced project alternative pending staff and/or other agency analyses and recommendations for that option. The environmental intervenors appropriately assumed the Commission was busy analyzing the new alternative, and thus the briefing schedule was understandably delayed.

Most relevant, it defied logic that the Commission would require briefing on a partial evidentiary record. It could safely be assumed that much of the legal briefing would be centered around biological resources and alternatives *before* the applicant proposed a new alternative. Now that another proposal is on the table, it is certain that alternatives and impacts on biological resources will be even more central. The parties cannot form an opinion on the "project" until they review the entire evidentiary record in its totality and understand what exactly the scope of the project entails. Similarly, a complete final record is required before parties can ascertain

whether staff's and other affected agencies' final factual analyses and recommendations complied with CEQA, ESA, CESA, the Warren-Alquist Act, among other legal requirements.

Perhaps a possible solution is to allow briefing to go forward on those few issues that are certain not to implicate the new project alternative if they can truly be segregated from the alternatives analysis. However, for the majority of issues and resource areas affected by a new project alternative, opening and reply briefing for those matters should not be due until after the transcripts are made available for the final evidentiary hearing. Again, this is something that should be explored at a prehearing conference.

III. CONCLUSION

Just because it was the applicant, rather than another party, that introduced an alternative at the eleventh hour of this proceeding, coupled with the fact that this project is on the so-called fast track for approval, does not release the Commission from its legal obligations. Given the extraordinary time and resources committed to this project to date by numerous agencies, parties and members of the public, it is inexcusable for the Commission to commit a reversible procedural error at this late date. Thank your for your consideration of this motion. Please do not hesitate to contact me to discuss these issues further.

Dated: March 3, 2010

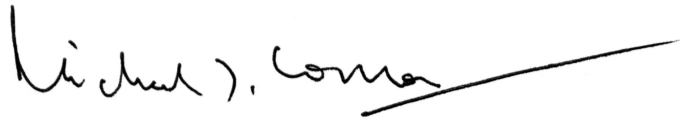
Respectfully submitted,



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APPLICATION FOR CERTIFICATION
FOR THE *IVANPAH SOLAR ELECTRIC
GENERATING SYSTEM*

DOCKET No. 07-AFC-5
PROOF OF SERVICE
(Revised 2/8/10)

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DECLARATION OF SERVICE

I, Violet Lehrer, declare that on 3/3, 2010, I served and filed copies of the attached, Motion dated, 3/3, 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: **[www.energy.ca.gov/sitingcases/ivanpah].**

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)

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 Sierra Club 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. 07-AFC-5
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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

Violet Lehrer