

**STATE OF CALIFORNIA**  
**Energy Resources Conservation and**  
**Development Commission**

<b>DOCKET</b>
<b>07-AFC-5</b>
DATE <u>MAR 17 2010</u>
RECD. <u>MAR 17 2010</u>

In the Matter of: )  
 )  
The Application for Certification for the )  
**IVANPAH SOLAR ELECTRIC** )  
**GENERATING SYSTEM** )  
\_\_\_\_\_ )

Docket No. 07-AFC-5

**EXPEDITED OBJECTION TO REVISED BRIEFING SCHEDULE AND**  
**REQUEST TO CONTINUE THE BRIEFING SCHEDULE**

In light of this week’s voluminous filings, Sierra Club, Center for Biological Diversity, Defenders of Wildlife, California Native Plant Society, Western Watersheds Project and Basin and Range Watch (“Environmental Intervenors”) **strongly** object to the revised briefing schedule provided in the Committee’s March 11, 2010 Notice of Additional Evidentiary Hearing, Revised Briefing Schedule and Ruling on Environmental Intervenors’ Motion to Compel Prehearing Conference, Set Briefing Schedule and Clarify Other Procedural Matters (hereinafter “March 11 Notice”), and request that the briefing schedule be continued as follows: Opening Briefs due three weeks after the complete transcript is available for the March 22, 2010 hearing and Reply Briefs due two weeks thereafter.

**I. INTRODUCTION**

In the March 11 Notice, the Committee notified the parties and the public that there would be an additional Evidentiary Hearing in this matter on March 22, 2010 to review the “Applicant’s Biological Mitigation Proposal”. The Committee also set a briefing schedule requiring the opening brief in this matter to be filed by Wednesday, March 24, 2010, less than

two working days after the reopened hearings (in reality, parties will have approximately one and one-half days to draft their briefs) and Reply Briefs to be filed by Monday April 12, 2010.

Regarding the reply briefs, the Committee stated that “In addition to responding to the opening briefs, the reply briefs may address any new issues raised by the evidence presented at the March 22, 2010 Evidentiary Hearing.” (March 11 Notice at 2.)

On March 16, 2010, the Staff filed a 108-page document entitled “Final Staff Assessment Addendum” that provides a new “Proposed Action Alternative/Project Description.” Based on this document, Environmental Intervenors now assume this is the current project proposal. Then on March 17, the staff recommended to the Committee a finding of overriding considerations for visual and cumulative impacts. It is clear that all of the new information recently submitted will be raised at the additional hearing and will be relevant to all of the issues briefed in this matter. Most significant to the Environmental Intervenors will be briefing that *analyzes and compares alternatives* with the *proposed project*. The evidentiary hearing for all of this new information is scheduled to be completed in just one day. Adding to the impossibility of all of this, is the directive that opening briefs be filed immediately after that. Environmental Intervenors have endeavored to comply with the Commission’s often untenable scheduling; and importantly, it was the Applicant that proposed a new project alternative at the eleventh hour. The Environmental Intervenors assert that these back to back filings and hearing deadlines create an undue and unfair burden on all intervenors as this is their only opportunity to address an entirely new project proposal with a new layout and new mitigation and minimization measures.

## **II. THE EXISTING BRIEFING SCHEDULE COMPROMISES INTEVENORS’ ABILITY TO FULLY PRESENT THEIR ISSUES**

The present schedule requires the Environmental Intervenors and other parties to provide initial, partial briefing on March 24, 2010 and later re-briefing on these same issues. This is a

waste of time and resources, and stands to prejudice the ability of the Environmental Intervenors to present the issues they have raised throughout these proceedings in a clear, concise, and coherent manner that responds to Staff's current proposed project. Likewise, the schedule places an unfair burden on the Environmental Intervenors by requiring them to prepare for a new hearing at the same time as preparing detailed legal briefing on issues to be addressed at the hearing. This is unworkable and undermines fair and open participation and the due process rights of the Environmental Intervenors.

Moreover, as the Environmental Intervenors pointed out previously, the issue of project alternatives as a means of avoiding, among other things, the project's significant and unmitigated impacts on biological resources was a disputed and thoroughly explored subject of the concluded evidentiary hearings. Accordingly, any new hearing on alternatives must be similarly thorough.

Due to the short notice for the additional evidentiary hearing date, several of the parties and their experts are not able to appear in person and will need to appear by phone, and other experts are not available to appear at all. As a result, the ability of the Environmental Intervenors to provide expert testimony and to cross-examine witnesses may also be prejudiced. This is particularly troubling given that the additional evidentiary hearing is not limited to a new filing by the Applicant but will also be considering a new "Proposed Action Alternative/Project Description" submitted by the Staff in the Final Staff Assessment Addendum on March 16, 2010. Finally, as a practical matter, the current schedule makes no sense. It is our understanding that the Bureau of Land Management is working on a Supplemental Environmental Impact Statement that will not be released for several more weeks. Given the extraordinary time and resources committed to this project by numerous agencies, parties and members of the public, we urge the Commission not to undermine a full and fair process at this late date.

### III. THE EXISTING BRIEFING SCHEDULE DOES NOT COMPLY WITH CEQA

It is beyond dispute that CEQA requires a consistent, stable description of the Project and its impacts. (CEQA Guidelines §15124.)<sup>1</sup>

“[A]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR.” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) However, “[a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input.” (Id. at p. 198.) “[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives ... .” (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454.) (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655-56.)

The staff has now presented a Final Staff Assessment Addendum with a “proposed action alternative/project description” for review at the additional evidentiary hearing on March 22, 2010, that appears to supersede the earlier project description in the FSA. As a result, the project description for the proposed project is now in flux and it is not entirely clear what exactly is being proposed. To require the parties to submit legal briefs at this stage will in no way concentrate or clarify the issues in dispute; rather, adhering to the existing briefing schedule will only serve to confuse the issues before the Committee and deprives the Environmental Intervenors of the opportunity to fully and adequately make their cases.

CEQA requires that the Commission facilitate full and fair environmental review. In this way, the Commission’s environmental review documents must provide “sufficient information about each alternative to allow meaningful evaluation, analysis and *comparison with the*

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<sup>1</sup> The Commission’s power plant siting process is a certified regulatory program for purposes of CEQA. See Public Resources Code § 21080.5; CEQA Guidelines, 14 C.C.R. § 15251(j). Although certification exempts the Commission from CEQA’s environmental impact report requirement, the Commission still must comply with CEQA’s substantive and procedural mandates. Public Resources Code §§ 21000, 21002, 21080.5; *Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Joy Road Area Forest and Watershed Association v. Cal. Dept. of Forestry and Fire Protection* (2006) 142 Cal.App.4th 656, 667-68.

*proposed project.*" (CEQA Guidelines § 15126.6(d) (emphasis added). As the Supreme Court put it:

The core of an EIR is the mitigation and alternatives sections. The Legislature has declared it the policy of the State to "consider alternatives to proposed actions affecting the environment." ( Pub. Resources Code, § 21001(g); *Laurel Heights*, supra, 47 Cal.3d at p. 400.) Section 21002.1, subdivision (a) of the Public Resources Code provides: "The purpose of an environmental impact report is to identify the significant effects of a project on the environment, *to identify alternatives to the project*, and to indicate the manner in which those significant effects can be mitigated or avoided." (Italics added. See also Pub. Resources Code, § 21061 ["The purpose of an environmental impact report is . . . to list ways in which the significant effects of such a project might be minimized; *and to indicate alternatives to such a project.*"

(*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-65 (italics added by Supreme Court).)

Because a significant aspect of the upcoming hearing will serve to educate the parties on the new project, requiring legal briefs less than two days later cannot possibly comport with CEQA's procedural requirements.

#### **IV. REQUEST FOR RELIEF**

Based on the above extraordinary circumstances, the Environmental Intervenors respectfully request that the briefing schedule be revised so that opening briefs are due three weeks after the transcript is available for the March 22, 2010 hearing, with reply briefs due two weeks thereafter. This proposed schedule reflects the schedule that was discussed during the earlier hearings in this matter and would provide all parties with reasonable time to provide complete briefing to the Committee on all of the disputed issues.

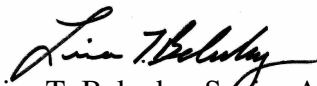
Thank you for your consideration of this request. Please do not hesitate to contact me to discuss these issues further.

Dated: March 17, 2010

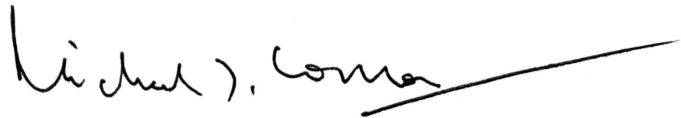
Respectfully submitted,



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

DOCKET No. 07-AFC-5  
PROOF OF SERVICE  
(Revised 3/11/10)

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**DECLARATION OF SERVICE**

I, Violet Lehrer, declare that on March 17, 2010, I served and filed copies of the attached, Objection dated, March 17, 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: [\[www.energy.ca.gov/sitingcases/ivanpah\]](http://www.energy.ca.gov/sitingcases/ivanpah).

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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.

*Violet Lehrer*