STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

Application for Certification for the IVANPAH SOLAR ELECTRIC GENERATING SYSTEM	))))	Docket No. 07-AFC-5

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

ELLISON, SCHNEIDER & HARRIS L.L.P.
Jeffery D. Harris
Greggory L. Wheatland
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
(916) 447-2166 - Phone
(916) 447-3512 - Facsimile

Solar Partners I, LLC, Solar Partners II, LLC and Solar Partners VIII, LLC ("Applicant") submits this Opposition to Intervenors'[1] motion to compel a prehearing conference, set a briefing schedule and clarify other procedural matters.

Although the Intervenors' Motion is styled as a motion to compel a briefing schedule, the Applicant submits that a briefing schedule has already been set. The true purpose and effect of this Motion is to make an untimely request for a further extension of the briefing schedule. However, good cause has not been shown for a further delay in the briefing schedule. Intervenors' Motion should be summarily denied.

I. A Briefing Schedule Has Been Properly Set and Duly Noticed.

During the hearing on January 14, 2010 at which the Intervenors were present, the Committee discussed the briefing schedule with the parties. In the course of this discussion, the Committee announced the briefing schedule. The Hearing Officer informed the parties that opening briefs would be due "three weeks after the transcripts are available"[2] and reply briefs would be due ten days after opening briefs.[3]

The Hearing Officer further informed the parties that the specific date the briefs would be due would not be announced by a formal order. Instead, "when the transcripts are available I will send out a document under my signature. I won't ask the Committee to get involved in that. Just telling you when they [the transcripts] were received. And in that email I will provide the specific deadline date."[4]

None of the Intervenors' present at the hearing objected to the three week time period following the receipt of the transcripts in which to file an opening brief on the matters that had

[1] Intervenors refers to the Sierra Club, Center for Biological Diversity, Defenders of Wildlife, California Native Plant Society, Western Watersheds Project and Basin and Range Watch.
[2] 1/14 Record Transcript ("RT") 343.
[3] 1/14 RT 344.
[4] 1/14 RT 343-344.

been heard and received into evidence up to and including January 14, 2010.[5] None of the Intervenors present at the hearing objected to the ten day period following the filing of opening briefs in which to file reply briefs.[6] And none of the parties objected to receiving notice of the specific filing dates by email from the Hearing Officer.[7]

It is therefore, disingenuous, at best, for Intervenors to characterize the briefing schedule as "tentative" or to suggest that the Hearing Officer "bypass[ed] the Commission's normal procedures .... for the timing of legal briefs."[8] There was nothing tentative about the pronouncement of three weeks from the receipt of the transcripts for the filing of opening briefs.

Intervenors concede that they received the transcripts on February 8, 2010. However, because the specific deadline was not confirmed until March 2, 2010, the Committee generously has granted parties an additional sixteen days (on top of the original three weeks) to file opening briefs. The Committee also granted additional time for reply briefs, extending the deadline from ten to eighteen days. The manner in which these deadlines were set (by email from the Hearing Officer following receipt of transcripts) did not bypass the Commission's normal procedures. This notice of the briefing schedule followed the procedures of which the parties were expressly informed on January 14, 2010.

In summary, a briefing schedule has been set in accordance with the procedures announced at the January 14, 2010 hearing. While it is true that the Committee has generously extended this schedule, such an extension does not constitute a departure from normal procedures or a cause of reversible error.

[5] 1/14 RT 343-346.
[6] *Id.*
[7] *Id.*
[8] Motion, p. 1.

II. Intervenors Have Not Shown Good Cause For a Further Extension of the Briefing Schedule on Evidence That Has Been Received To Date.

The original briefing schedule announced by the Committee allowed parties approximately six and one half weeks from the January 14, 2010 hearing, and three weeks from the last transcript, in which to file Opening Briefs. This is, by any measure, a generous briefing schedule, virtually unprecedented in the length of time that has been provided. In addition, this already generous schedule has been extended even further by the Hearing Officer's email, another eighteen days, so that the total time allowed for opening briefs is more than two months from the January 14, 2010 hearing.

In light of the extraordinarily lengthy briefing schedule that has been afforded to the parties, the Intervenors have not shown good cause for any further extension of time to brief the issues that have already been received into evidence.

The Intervenors claim that they simply "assumed" the briefing schedule was "delayed". Yet notably, there is no allegation by Intervenors of any reasonable steps taken by the Intervenors prior to March 2 to confirm their extraordinary assumption with the Hearing Officer. The Applicant respectfully submits that where a briefing schedule has been set, the prudent assumption by experienced litigants such as the Intervenors should be that briefs will be due as ruled, rather than to assume that the schedule has been "delayed". If Intervenors were proceeding in good faith, they should have been hard at work since February 8, 2010 (if not sooner) in preparing their briefs. Nevertheless, even if such an assumption of a delay was remotely reasonable, the Intervenors were disavowed of that assumption when they received notice on March 2 of a March 18 deadline. The time between March 2 and March 18 is the better part of three weeks, and so even if Intervenors begin only now to draft their briefs, they have ample time to complete the task.

The reason that Intervenors claim to be most relevant to their request to extend the briefing schedule is that it allegedly "defied logic that the Commission would require briefing on a partial evidentiary record."[9] In truth, there is nothing illogical in requiring that briefs be filed on the evidence that has been received to date. Whether the supplemental Biological Mitigation Proposal is characterized as further mitigation to the proposed project or as an alternative to the proposed project, the fact remains that this is a supplemental proposal. It is both logical and procedurally proper to require briefing on the matters of record to date, and to allow supplemental briefing, if requested, on a supplemental proposal intended to mitigate impacts. In addition to the opportunity for reply briefs already afforded in this case, supplemental briefs have routinely been permitted in other Commission proceedings.[10] There is no reason why they cannot be utilized here.

Intervenors claim that they "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."[11] Clearly, however, the Intervenors have already formed an opinion about the project. The supplemental Biological Mitigation Proposal is a discrete proposal, which focuses primarily on Ivanpah 3, and we welcome the Intervenors' discrete response. On the other hand, for the Intervenors to claim that briefing cannot commence until the last exhibit is received, is an argument founded on delay and obstruction, and not upon reason.

III. A Prehearing Conference Is Not Required In Order For the Committee to Schedule a Supplemental Hearing.

While conceding that the Committee has the discretion to schedule further hearings in this proceeding, Intervenors make the extraordinary argument that the Commission is *required* to

[9] Motion, p. 4.
[10] For example, the Committee in the Metcalf case had three rounds of briefing (99-AFC-3). There were four rounds of briefing in the Morro Bay case (00-AFC-12).
[11] Motion, p. 4.

conduct a Prehearing Conference before setting a further hearing on the Applicant's supplemental proposal.[12] On its face, Section 1718.5 does not require a Prehearing Conference at this time. Section 1718.5 merely states that the Commission shall "hold one or more prehearing conferences" during the proceeding. The Commission has held at least one prehearing conference in this proceeding. Therefore, the Commission has fully satisfied Section 1718.5.

Notably, this regulation does not require a Prehearing Conference before each new hearing in a proceeding. The Commission has routinely set hearings as Intervenors would say, "unilaterally". Moreover, the Commission also regularly schedules Prehearing Conferences and Evidentiary hearings for the same day, making the delay sought by the Intervenors all the more absurd.[13] The Commission may consult with parties as a matter of comity and accommodation, but the ultimate decision of when and where to hold hearings is not a "bilateral" decision requiring the approval of the Intervenors.

The Intervenors also state that 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." This assertion, of course, is patently untrue. The Applicant has not sought to enter this supplemental proposal into evidence "absent any agency analysis or expert response." The Applicant served this supplemental proposal on Staff and Intervenors for their express consideration. Intervenors have already had three weeks to review this document. "Fair play" certainly requires that the parties have a reasonable opportunity to

[12] Motion, p. 2.
[13] See, for example, the October 13, 2009, Notice Of Prehearing Conference And Evidentiary Hearing in the Canyon Power Plant proceeding (07-AFC-9). See also similar orders in the following cases: Russell City Energy Center (01-AFC-7C, dated June 28, 2007; and Lodi Energy Center (08-AFC-10), dated November 24, 2009.

review and respond to this document in a timely manner. But "fair play" also demands that this take place in a timely manner.

IV. The Committee Should Proceed in a Timely Manner to Conduct a Hearing on the Biological Mitigation Proposal.

It seems that the Intervenors may have forgotten who is charged by the Warren Alquist Act and Commission regulations to conduct this AFC proceeding. It is not the Intervenors. Instead, it is the presiding member who may conclude the hearings whenever he or she is satisfied that the purposes of the Warren Alquist Act have been achieved and that the evidentiary record and issues are sufficiently developed to prepare the proposed decision. It is not "reversible error" for the Committee, in its discretion as the trier-of-fact, to schedule a supplemental day of hearing to receive additional evidence that it deems relevant.[14]

March 18, 2010 is an appropriate day for a supplemental hearing to review the Biological Mitigation Proposal and any evidence that other parties wish to offer relevant to this proposal. If the hearing is held on this date, the Applicant recommends that the Committee allow supplemental concurrent briefs to be filed on this proposal on April 5, 2010, when Reply Briefs are due. If the hearing is set after March 18, 2010, the Applicant recommends that an expedited (overnight) transcript be ordered and that concurrent briefs be filed on the Supplemental proposal no later than one week after the hearing.

One power of the Committee overlooked by the Intervenors is the Committee's power to swiftly and definitely dispose of motions – frivolous and otherwise – with resounding speed and

[14] As one example of the Committee's plenary authority, 20 CCR 1203 provides, in part:
"In addition to all other powers conferred by this article, the chairman or presiding member designated pursuant to Section 1204 shall have the power to:
(a) Request and secure such information as is relevant and necessary in carrying out the purposes of the proceeding.
***
(c) Regulate the conduct of the proceedings and hearings, including, but not limited to, disposing of procedural requests, admitting or excluding evidence, receiving exhibits, designating the order of appearance of persons making oral comments or testimony, and continuing the hearings.
(d) Set the time and place of hearings.***"

clarity. In this regard, the Committee should confirm, and for those who missed this important point, reassert its firm grip on the reigns of the schedule for this proceeding and swiftly issue an order denying the Intervenors' motion.

Dated: March 4, 2010

ELLISON, SCHNEIDER & HARRIS L.L.P.

By 

Jeffery D. Harris
Greggory L. Wheatland
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Solar Partners I, LLC, Solar Partners II, LLC and Solar Partners VIII, LLC

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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on March 4, 2010, I served the attached *Opposition To Environmental Intervenors' Motion To Compel Prehearing Conference, Set Briefing Schedule And Clarify Other Procedural Matters* via electronic and U.S. mail to all parties on the attached service list.

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

Karen A. Mitchell

SERVICE LIST
07-AFC-5

APPLICANT

Solar Partners, LLC
John Woolard, Chief Executive Officer
1999 Harrison Street, Suite #500
Oakland, CA 94612

Todd A. Stewart, Project Manager
Ivanpah SEGS
sdeyoung@brightsourceenergy.com
E-mail Preferred

Steve De Young, Project Manager
Ivanpah SEGS
1999 Harrison Street, Ste. 2150
Oakland, CA 94612
sdeyoung@brightsourceenergy.com

APPLICANT'S CONSULTANTS

John L. Carrier, J. D.
2485 Natomas Park Dr. #600
Sacramento, CA 95833-2937
jcarrier@ch2m.com

COUNSEL FOR APPLICANT

Jeffery D. Harris
Ellison, Schneider & Harris L.L.P.
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816
jdh@eslawfirm.com

INTERESTED AGENCIES

California ISO
e-recipient@caiso.com

Tom Hurshman, Project Manager
Bureau of Land Management
2465 South Townsend Ave.
Montrose, CO 81401
tom_hurshman@blm.gov

Raymond C. Lee, Field Manager
Bureau of Land Management
1303 South Highway 95
Needles, CA 92363
Raymond_Lee@ca.blm.gov

Becky Jones
California Department of Fish & Game
36431 41st Street East
Palmdale, CA 93552
dfgpalm@adelphia.net

INTERVENORS

California Unions for Reliable Energy
Tanya A. Gulesserian
Marc D. Joseph
Adams Broadwell Joseph & Cardozo
601 Gateway Boulevard, Suite 1000
South San Francisco, CA 94080
tgulesserian@adamsbroadwell.com

Western Watersheds Project
Michael J. Connor, Ph.D.
P.O. Box 2364
Reseda, CA 91337-2364
mjconnor@westernwatersheds.org

Gloria Smith, Joanne Spalding
Sidney Silliman, Devorah Ancel
Sierra Club
85 Second Street, 2nd Floor
San Francisco, CA 94105
E-mail Service Preferred
gloria.smith@sierraclub.org
joanne.spalding@sierraclub.org
gssilliman@csupomona.edu
devorah.ancel@sierraclub.org

Joshua Basofin
Defenders of Wildlife
1303 J Street, Suite 270
Sacramento, CA 95814
E-mail Service Preferred
jbasofin@defenders.org

Basin and Range Watch
Laura Cunningham
Kevin Emmerich
P.O. Box 70
Beatty, NV 89003
atomictoadranch@netzero.net

Center for Biological Diversity
Lisa T. Belenky, Sr. Attorney
Ileene Anderson, Public Lands Desert Director
351 California Street, Ste. 600
San Francisco, CA 94104
E-mail Service Preferred
lbelenky@biologicaldiversity.org
ianderson@biologicaldiversity.org

California Native Plant Society
Greg Suba, Tara Hansen & Jim Andre
2707 K Street, Suite 1
Sacramento, California, 95816-5113
E-mail Service Preferred
gsuba@cnps.org
thansen@cnps.org
granite@telis.org

County of San Bernardino
Bart W. Brizzee, Deputy Co. Counsel
385 N. Arrowhead Avenue, 4th Floor
San Bernardino, CA 92415
bbrizzee@cc.sbcounty.gov

ENERGY COMMISSION

Jeffrey D. Byron
Commissioner and Presiding Member
jbyron@energy.state.ca.us

James D. Boyd
Vice Chairman and Associate Member
jboyd@energy.state.ca.us

Paul Kramer
Hearing Officer
pkramer@energy.state.ca.us

John Kessler
Project Manager
jkessler@energy.state.ca.us

Dick Ratliff
Staff Counsel
dratliff@energy.state.ca.us

Jennifer Jennings
Public Adviser
publicadviser@energy.state.ca.us