

DOCKET

07-AFC-5

DATE MAY 25 2010

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STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

In the Matter of:)
)
Application for Certification for the Ivanpah Solar) Docket No. 07-AFC-5
Electric Generating System)
)
_____)

**APPLICANT'S RESPONSE TO INTERVENOR CENTER FOR
BIOLOGICAL DIVERSITY'S REQUEST FOR OFFICIAL NOTICE**

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STATE OF CALIFORNIA

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) Docket No. 07-AFC-5
Application for Certification for the Ivanpah Solar)
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The Center for Biological Diversity’s (“CBD”) Request for Official Notice (“Request”), submitted on May 4, 2010, is a filing requesting that the Committee take official notice of a draft report prepared by a consultant to California’s Renewable Energy Transmission Initiative (“RETI”). Because the record is closed, Applicant is not certain whether the Committee intends to consider CBD’s request. To the extent that the Committee intends to consider CBD’s request, the Applicant wishes to be on the record as follows.

First, the record for the Ivanpah proceeding is closed. CBD’s request to introduce factual assertions contained within the draft report after the close of the record is untimely, and should not be granted.

Second, the draft report is not a proper matter for official notice by the Commission. The Commission’s regulations provide that the Commission may take official notice of (1) any generally accepted matter within the commission’s field of competence and (2) any fact which may be judicially noticed by the courts of this state.¹ It is telling that CBD does not assert that the opinions are “generally accepted matters” pursuant to Commission’s siting regulations, as the

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¹ 20 C.C.R. § 1213.

draft report was released for the purpose of soliciting comments, and does not represent the final views of the RETI Steering Committee.² Instead, CBD asserts that the Commission should take official notice of the draft report based on CBD's mistaken assumption that the draft report is a matter that may be judicially noticed by a court.

Section 452 of the California Evidence Code outlines the scope of matters that may be judicially noticed by a court. As CBD notes, the Evidence Code provides that judicial notice may be taken of:

- (c) Official acts of the legislative, executive, and judicial departments of the United States or of any state of the United States; and
- (h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.³

CBD asserts that the draft report can be officially noticed under Section 452(c), "as an official act" even though "RETI is itself not a state agency". CBD also asserts that "[o]fficial acts include records, reports, and orders of administrative agencies."⁴ However, it must be recognized that the draft report is not a report of an administrative agency; it is a draft report written by a third-party private consultant. Furthermore, even if the draft report were considered to be an "official act," the purpose of judicial notice is to recognize "the existence of the act, not that what is asserted in the act is true."⁵ The "truth of any factual matters that might be deduced from official records is not the proper subject of judicial notice."⁶ Thus, as explained in further detail below, pursuant to the Evidence Code, while the Commission can acknowledge the

² 20 C.C.R. § 1213.

³ Cal. Evidence Code § 452. It should be noted that the Evidence Code also provides for judicial notice of other matters; however, this Response will only address Subsections (c) and (h) of Section 452, as those are the only two sections at issue.

⁴ Intervenor Center for Biological Diversity, *Request for Official Notice*, pp. 2-3 (May 4, 2010).

⁵ *Lockley v. Law Office of Cantrell*, 91 Cal. App. 4th 875, 885 (Cal. App. 2d Dist. 2001).

⁶ *Lockley v. Law Office of Cantrell*, 91 Cal. App. 4th 875, 885 (Cal. App. 2d Dist. 2001), citing to *Mangini v. R.J. Reynolds Tobacco Co.* 7 Cal. 4th 1057 (1994).

existence of the draft report, the Commission cannot accept as true the factual assertions contained within the draft report. Yet, this is precisely what CBD asks the Commission to do. CBD asks that the Commission accept as true the factual assertions in the draft report regarding capacity factors and costs of parabolic solar thermal technologies and solar PV thin-film technologies.⁷ This request is not supported by law.

CBD also asserts that “the draft report could be officially noticed as a fact- the existence of the draft report and its stated findings- which is not reasonably subject to dispute and is capable of immediate and accurate determination.”⁸ This assertion is premised on an incorrect application of the law. While the *existence* of the draft report is not reasonably subject to dispute, the Center for Biological Diversity is not merely requesting that the *existence* of the draft report be made a part of the record. Instead, CBD requests that certain “stated findings” within the report be given official notice, alleging that these findings are “not reasonably subject to dispute” and are “capable of immediate and accurate determination.”⁹

However, the “stated findings” included within the draft report *are* reasonably subject to dispute, as is evident by comments submitted by various members of the RETI Stakeholder Steering Committee.¹⁰ For example, one member noted “potential discrepancies” regarding transmission costs in the draft report that would have to be “clarif[ied]” in the final Phase 2B

⁷ Intervenor Center for Biological Diversity, *Request for Official Notice*, p. 1 (May 4, 2010).

⁸ Intervenor Center for Biological Diversity, *Request for Official Notice*, pp. 2-3 (May 4, 2010).

⁹ Intervenor Center for Biological Diversity, *Request for Official Notice*, pp. 2-3 (May 4, 2010).

¹⁰ Comments made to date on the draft Phase 2B report are available at <http://www.energy.ca.gov/reti/documents/phase2B/comments/>. Comments by the Wind Industry noted contradictions in the report and omitted data that should be included in the draft report, such as “Section 7.4.1 indicates that the Ranking Cost for marginal CREZ to meet the state net short of 52,000 GWh is about “\$10/MWh to \$15/MWh. This clearly contradicts the data presented in Table 1-3 and other figures and tables that show the value to be around \$19/MWh;” and “It is not clear what Table 7-5 and Figure 7-5 are intending to present. Either these tables indicate that no tax incentives were considered in the Phase 2B report for Mexican and Canadian renewable projects or they indicate that the report eliminated only U.S. tax credits. This matter should be clarified in the final report.” (available at http://www.energy.ca.gov/reti/documents/phase2B/comments/2010-04-26_Wind_Industry.pdf); also see

report.¹¹ Another member questioned the “development process” for certain sensitivity cases relied on in the draft report, as the methodology resulted in “unrealistic” scenarios and revealed “several methodological flaws.”¹² Clearly, the factual findings in the draft report are reasonably subject to dispute and, in this case, are in dispute.

Given that two members noted “potential discrepancies” and “methodological flaws” in the draft report, it is also clear the draft report is not a source of “reasonably indisputable accuracy” as required by Section 452. As noted above, the “truth of any factual matters that might be deduced from official records is not the proper subject of judicial notice.”¹³ Therefore, contrary to CBD’s assertions, the “stated findings” of the draft report are not matters that judicial notice may be taken of, and should not be given official notice by the Commission.

Finally, the “comparative information” provided by CBD in its Request is not relevant to the Ivanpah proceeding. The generic cost associated with one type of photovoltaic technology deployed in 20 MW or larger configurations¹⁴ relative to the generic cost associated with another type of solar thermal technology has no bearing on the decision before the Commission. The cost information provided in the draft report for solar thermal is for a different type of solar thermal technology - parabolic solar troughs - rather than the technology to be employed by the Ivanpah Solar Project, which is a far more efficient solar power tower design.

¹¹ Specifically, the Wind Industry noted that “OOS CREZ transmission costs presented in Figure 7-6 seem to be larger than expected, especially for OOS CREZ that are just across the border from California – e.g., Nevada South. Also, the transmission costs for some OOS CREZ do not seem to properly compare to those of other similar OOS CREZ – e.g., Nevada-West versus Nevada-North. Additional explanation in the final Phase 2B report should clarify such potential discrepancies.” The Wind Industry also noted contradictions in the report, and observed that certain omitted data should be included in the draft report. (*available at* http://www.energy.ca.gov/reti/documents/phase2B/comments/2010-04-26_Wind_Industry.pdf).

¹² http://www.energy.ca.gov/reti/documents/phase2B/comments/2010-04-26_Geothermal_Energy_Association.pdf

¹³ *Lockley v. Law Office of Cantrell*, 91 Cal. App. 4th 875, 885 (Cal. App. 2d Dist. 2001), citing to *Mangini v. R.J. Reynolds Tobacco Co.* 7 Cal. 4th 1057 (1994).

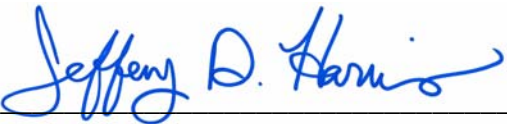
¹⁴ It should also be noted that the cost information for solar PV provided in its Request and the draft report fails to include transmission costs, which the draft report acknowledges could increase as a result of solar PV projects of 20 megawatts or more, RETI Phase 2B Draft Report, p. 7-23 (April 2010), *available at* <http://www.energy.ca.gov/reti/docuemtns/index.html> .

In sum, the Commission should disregard or deny CBD's Request for Official Notice of the draft RETI Phase 2B Report.

May 25, 2010

Respectfully submitted,

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By:  _____

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PROOF OF SERVICE

I, Karen A. Mitchell, declare that on May 25, 2010, I served the attached *Applicant's Response to Intervenor Center for Biological Diversity's Request for Official Notice* via electronic mail and United States 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



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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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