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California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: **PALO VERDE SOLAR I, LLC & PALEN SOLAR I, LLC REPLY BRIEF**
DOCKET NOS. (08-AFC-13, 09-AFC-8, 08-AFC-5, 09-AFC-6, 09-AFC-7, 09-
AFC-9 & 10-CRD-1)

Enclosed for filing with the California Energy Commission is the original of **PALO VERDE SOLAR I, LLC & PALEN SOLAR I, LLC REPLY BRIEF**, for the Consolidated Hearing on Issues Concerning US Bureau of Land Management Cultural Resources Data (10-CRD-1).

Sincerely,



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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:
Application for Certification for the

Calico Solar (SES Solar One) Project,
Genesis Solar Energy Project,
Imperial Valley (SES Solar Two) Project,
Solar Millennium Blythe Project,
Solar Millennium Palen Project, and
Solar Millennium Ridgecrest Project

Consolidated Hearing on Issues
Concerning US Bureau of Land
Management Cultural Resources Data

DOCKET NOS.

08-AFC-13

09-AFC-8

08-AFC-5

09-AFC-6

09-AFC-7

09-AFC-9

10-CRD-1

**PALO VERDE SOLAR I, LLC AND
PALEN SOLAR I, LLC REPLY
BRIEF**

INTRODUCTION

Palo Verde Solar I, LLC and Palen Solar I, LLC (hereinafter referred to as Solar Millennium) are wholly-owned subsidiaries of Solar Millennium, LLC and are the Applicants for the Blythe Solar Power Project (BSPP) and the Palen Solar Power Project (PSPP), respectively. Both projects are currently pending before the California Energy Commission (Commission). In accordance with the Notice and Orders For Consolidated Hearing on Issues Concerning US Bureau of Land Management Cultural Resources Data, dated May 21, 2010, Solar Millennium files this Reply Brief. On June 2, 2010, CURE filed a Petition for Inspection and Copying of Confidential Cultural Resource Materials in the PSPP Proceeding. On June 3, 2010, CURE filed an identical Petition in the BSPP Proceedings.

Solar Millennium did not file an Opening Brief because CURE had not sought Confidential Cultural Resources Materials until after Opening Briefs were due. After reading CURE's Opening Brief it is clear that CURE is asserting that Confidential Cultural Resources Material is necessary for it to participate in AFC Proceedings. Solar Millennium strongly disagrees. Therefore, Solar Millennium hereby files this Reply Brief in response to CURE's assertions that it needs this information.

For the reasons discussed below we recommend that the Commission and BLM enter into a confidentiality agreement whereby the Commission be given the Confidential Cultural Resource Materials subject to non-disclosure to the public and interveners. CURE simply does not need the material to participate in the AFC Proceedings.

ANALYSIS

APPLICABLE REGULATORY GUIDANCE

CURE's Opening Brief makes the broad assumption, with no legal support, that as a party/intervener it is entitled to the same information as Staff. While Solar Millennium agrees that CURE is a party to the BSPP and PSPP Proceedings¹, any rights derived from the status as an Intervener must come from either the Commission's authorizing Statute or its regulations.²

CURE elected to pursue obtaining the Confidential Cultural Resources Materials through its Petition made pursuant to 20 CCR Section 2506 rather than a Data Request pursuant to 20 CCR Section 1716. It is important to note that Section 2506 is a procedural regulation that determines whether **any person** can "inspect" a confidential record while Section 1716 governs whether **a party** "needs" and can therefore "use" that or any other record in an AFC Siting Proceeding. It is well settled where there are two applicable authorities, specific provisions override general provisions. Therefore, while Solar Millennium neither opposes nor supports CURE's Petition to "inspect" the records under Section 2506, the Committee should use the standards outlined in Section 1716 to determine whether CURE needs or is entitled to the specific information it has requested to fully participate in the BSPP or PSPP Proceedings.

Section 1716 governs the substance and process for a party to the proceeding to obtain information. While Solar Millennium, Staff and CURE are all "parties", Section 1716 does not treat all "parties" equally. Section 1716 (a) allows Staff to obtain information that "**is necessary for a complete staff assessment**". Parties on the other hand are governed by Section 1716 (b) and (d) and are limited to only obtaining information that is "**reasonably available**" to the responding party, information that "**cannot otherwise be obtained**" by the requesting party and "**is relevant to the proceeding**" or "**reasonably necessary to make any decision on the notice or application**".

RELEVANT QUESTIONS

Using the language of Section 1716, Solar Millennium believes that the relevant questions for the Committee are:

1. Is the Confidential Cultural Resources Material necessary for Staff to complete its Staff Assessment?

¹ Title 20 California Code of Regulations (CCR) Section 1207 authorizes the Presiding Member to grant Intervener Status to CURE, which occurred on December 23, 2009 for both projects; 20 CCR 1702 defines a "party" to include Interveners.

² Public Resources Code (PRC) Section 25000 et seq; Title 20 California Code of Regulations (CCR) Section 1001 et seq.

2. Is the Confidential Cultural Resources Material available to CURE under Section 1716 because it is a party?
 - a. Is the Confidential Cultural Resources Material reasonably available to Staff?
 - b. Is the Confidential Cultural Resources Material information which cannot otherwise be obtained by CURE?
 - c. Is the Confidential Cultural Resources Material relevant to the proceeding?
 - d. Is the Confidential Cultural Resources Material reasonably necessary to make any decision on the notice or application?

In order to answer these important questions it is essential for the Committee to understand the nature of the Confidential Cultural Resources Materials that are the subject of the dispute.

The information contained in these materials is detailed descriptions of field observations including specific locations where the cultural resources will be found. The public policy behind keeping the information confidential under all of the laws intended to protect these resources is to prevent looting and damage to the resources. Therefore, the detailed information and the locations must be kept confidential. An example of the type of information that would be included in the Confidential Cultural Resources Materials would be a description of observations of lithic fragments scattered across the ground surface including exact location. Another example is detailed information describing, including location of, a known archaeological site that has undergone previous excavation and evaluation and the report was discovered by the Applicant Cultural Resource experts during literature review.

What Staff has done for decades is review that confidential information and describe it and the resource in a general way so that the public and all parties understand the potential significance of the resource without revealing the details (e.g. how many flakes and composition is contained in the lithic scatter or the exact artifacts that may have been left in place at the known archaeological dig). And, in no case does Staff include a map of where these resources are. However, Staff does identify whether the construction activities could potentially impact such resources and proposes mitigation measures that may include avoidance, minimization or further study to evaluate the significance of the resource to determine whether and under what circumstances it might be recovered, treated and archived. Members of the public and parties do not need to know the detailed information to be fully informed of the potential impacts and to respond to and evaluate the Staff-proposed mitigation measures. This approach is consistent with every other CEQA document prepared in the State of California and, more importantly, it is consistent with Commission regulations and decades of past practices.

1. Necessary for Staff to Complete its Staff Assessment

Solar Millennium agrees with Staff that the information is necessary for Staff to describe the environmental baseline of the projects and necessary for Staff to evaluate and analyze the potential impacts and feasible mitigation measures. Staff has used the same type of confidential information and has an excellent track record (decades) of describing the setting and environmental baseline of projects as it relates to Cultural Resources in a manner that is detailed enough to allow an understanding of potential impacts and feasible mitigation measures without disclosing the information that must be kept confidential. Staff needs access to the Confidential Cultural Resources Information in order to fulfill its regulatory obligations. Our understanding is that the sole reason Staff is being denied access by BLM is the Commission's recent determination to share the information with CURE. Therefore, the central issue is whether CURE as a party to an AFC Proceeding has a right and is entitled to the Confidential Cultural Resources Materials.

2. CURE Is Not Entitled To The Information Under Section 1716

a. Reasonably Available

Solar Millennium agrees that the Confidential Cultural Resources Materials is "available" to Staff since it has been docketed and therefore provide to them... However, it should be noted that while it is available to Staff, BLM has required the Staff to keep and use the information without disclosure to CURE pursuant to several federal non-disclosure directives³. Therefore, although the information is available to Staff, it belongs to BLM and should be treated like the information is really in the hands of a third party. In past proceedings when CURE has requested information from Applicants and such information was controlled by third parties, the Commission has upheld objections by Applicants that the information was not "reasonably" available to them.⁴ The Commission should treat this information the same way.

b. Otherwise Available to CURE

Solar Millennium is unaware of whether CURE's expert has access to the previously recorded information or has the ability to apply for a permit to BLM for authorization to conduct its own pedestrian surveys. CURE has stated that it hired an expert who did conduct biological surveys on the GSEP site proposed by Nextera.

³ See BLM letters attached to the Notice of this Proceeding

⁴ See Sunrise Power Project, 98-AFC-4, Orders on CURE Motions to Compel

Therefore it may be possible for CURE to obtain a permit from BLM and conduct its own Cultural Resource surveys of BLM land for the BSPP or PSPP. In any event if that approach was available to CURE it should have undertaken it when they intervened 6 months ago rather than wait till the “eve of trial” to file its Petition.

c. Relevant to the Proceeding

Solar Millennium contends that the details contained in the Confidential Cultural Resources Information is relevant to the proceeding but submit that it is relevant only to Staff. Staff is an independent “party” to the proceeding⁵ and it is charged with a responsibility to perform an independent safety assessment and review of environmental issues⁶. The regulations do not impose any regulatory burden on an intervener to perform any assessment. The Commission should reject the notion that Staff and CURE are therefore equal parties. Information that is necessary for Staff to discharge its regulatory obligation may not be relevant for an Intervener even though both are parties.

Additionally, the Commission should use the balancing test employed by courts when determining the admissibility of evidence that may be relevant but highly prejudicial. Evidence Code Section 352, while not binding on the Commission, provides instructive guidance. The probative value of the detailed information to CURE is clearly outweighed by the prejudicial value to the Commission and BLM. If the material is provided to CURE, BLM has contended that the Commission will be violating federal law. This prejudicial effect can be averted by not providing the detailed information to CURE and instead providing a redacted version or summary that comports with the public policy of confidentiality of these kinds of resources. That redacted version and summary is the Cultural Resources Section of the Staff Assessment. It is this redacted version and summary that has been acceptable to all interveners (including CURE) for decades and Solar Millennium urges the Committee to reject CURE’s contention that the information is “relevant” to its testimony in order to fully participate.

⁵ 20 CCR 1712.5

⁶ 20 CCR 1742,1742.5 and 1743

d. Reasonably Necessary to Make A Decision

CURE's Opening Brief is riddled with unsupported statements that the information is needed for its full participation in the Genesis and Imperial proceedings. The Commission must reject this contention. First, CURE has not requested the detailed information in the past and yet it has fully participated. While CURE will argue that solar projects are different because they involve large sites and therefore numerous cultural resources, this argument is a distraction. Whether a project will impact one important resource or many important resources is irrelevant to the question of whether CURE must know the specific location and field observations about the resource to contend the project should be modified or to propose mitigation different than Staff. The detailed information concerning location and specific observations has not been needed by CURE for projects that involved several tens of miles of pipelines, several miles of transmission lines and other lengthy linear facilities crossing BLM land in the past. It is simply not persuasive to believe that there is some fundamental threshold of the amount of cultural resource observations that now require independent review by CURE of the detailed information.

CURE also supports its contention that it needs the information by claiming it should have the same rights to Confidential Cultural Resources Materials as Native American Tribes. This contention should also be rejected on its face. CURE is merely a party to the proceeding whereby the Native American Tribes are recognized as governmental entities with specific interest in the cultural resources and as such are treated as a government under the federal laws cited by BLM in its letters to the Commission.

CONCLUSION

Ultimately, the Commission and BLM must come to some agreement regarding whether CURE can even inspect the Confidential Cultural Resources Materials. However, for the reasons discussed above, we urge the Committee to reject CURE's contention that the information is needed for them to fully participate in the BSPP or PSPP Proceedings. If the Commission finds otherwise, CURE will use that decision to unnecessarily delay the BSPP and PSPP and all other proceedings. This is in direct contradiction to the Orders granting CURE Intervener Status. In those Orders the Commission required CURE to refrain from unduly burdensome and delaying tactics. Solar Millennium requests that the Commission enter into an agreement with BLM which would allow the Confidential Cultural Resources Information to be shared with the Staff while denying access to all third parties, whether a recognized AFC Siting Case Intervener or not. If BLM determines the information can and should be shared with others such as Native Americans, the Commission should defer to BLM in the administration and interpretation of federal law.

Further, Solar Millennium requests that the Commission issue a specific order to CURE to refrain from delay tactics such as those employed in the BSPP and PSPP Proceedings.

Respectfully Submitted,

Dated: June 4, 2010

/original signed/

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APPLICATION FOR CERTIFICATION
For the CALICO SOLAR (Formerly SES Solar One)

Docket No. 08-AFC-13

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(Revised 5/28/10)

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**APPLICATION FOR CERTIFICATION FOR THE
GENESIS SOLAR ENERGY PROJECT**

Docket No. 09-AFC-8

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(Revised 5/20/10)**

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**APPLICATION FOR CERTIFICATION FOR THE
IMPERIAL VALLEY SOLAR PROJECT**
(formerly known as SES Solar Two Project)
IMPERIAL VALLEY SOLAR, LLC

**Docket No. 08-AFC-5
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**APPLICATION FOR CERTIFICATION
FOR THE *BLYTHE SOLAR
POWER PLANT PROJECT***

Docket No. 09-AFC-6

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**APPLICATION FOR CERTIFICATION
FOR THE PALEN SOLAR POWER
PLANT PROJECT**

Docket No. 09-AFC-7

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**BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
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**APPLICATION FOR CERTIFICATION
For the *RIDGECREST SOLAR
POWER PROJECT***

Docket No. 09-AFC-9

**PROOF OF SERVICE
(Revised 5/12/2010)**

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DECLARATION OF SERVICE

I, Marie Mills, declare that on June 4, 2010, I served and filed copies of the attached **PALO VERDE SOLAR I, LLC AND PALEN SOLAR I, LLC REPLY BRIEF**, dated June 4, 2010. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service lists, located on the following web pages for this project at:

[www.energy.ca.gov/sitingcases/solarone.com]

[http://www.energy.ca.gov/sitingcases/genesis_solar]

[<http://www.energy.ca.gov/sitingcases/solartwo/index.html>]

[http://www.energy.ca.gov/sitingcases/solar_millennium_blythe]

http://www.energy.ca.gov/sitingcases/solar_millennium_palen/index.html

[http://www.energy.ca.gov/sitingcases/solar_millennium_ridgecrest]

The document has 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 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 Nos. 08-AFC-13, 09-AFC-8, 08-AFC-5, 09-AFC-6, 09-AFC-7, 09-AFC-9 & 10-CRD-1

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



Marie Mills