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**09-AFC-3**

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STATE OF CALIFORNIA

Energy Resources Conservation  
and Development Commission

Application for Certification for the  
MARIPOSA ENERGY PROJECT

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Docket No. 09-AFC-3

**APPLICANT'S RESPONSE  
TO THE JOINT MOTION  
OF ROBERT SARVEY, RAJESH DIGHE AND CALPILOTS  
TO ADOPT THE COMMITTEE'S OCTOBER 12, 2010 SCHEDULE**

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December 1, 2010

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STATE OF CALIFORNIA

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Mariposa Energy Project, LLC (“Applicant”) submits this Response to the Joint Motion of Robert Sarvey, Rajesh Dighe and CalPilots (collectively “Intervenors”) to Adopt the Committee’s October 12, 2010 Schedule (“Motion”). The Intervenors’ Motion, in effect, requests a delay in the proceeding. The Applicant urges the Committee to reject the Motion. The Motion fails to state good cause for any delay in this proceeding. As explained below, the Revised Committee Schedule provides generous time periods for filing Intervenor Opening and Rebuttal Testimony that meet or exceed the time periods provided to intervenors in typical siting cases. In fact, the time periods for filing testimony and for evidentiary hearings in the Revised Committee Schedule are actually longer and later than the time periods proposed by Intervenor Sarvey.

**Procedural Background**

The Application for Certification for the Mariposa Energy Project was deemed data adequate on August 26, 2009. Over the course of fifteen months, the Application has been subject to a thorough and comprehensive review by Staff, intervenors and interested agencies.

On October 6, 2010, the Committee held a mandatory scheduling conference. The Applicant, Staff and Intervenor Sarvey submitted proposed schedules. The schedule proposed by Mr. Sarvey recommended evidentiary hearings commencing January 11 and 12, 2011. Mr. Dighe and CalPilots did not submit proposed schedules. Following the scheduling conference, the Committee issued a schedule for this proceeding (“October 20 Schedule”). Thereafter, on October 29, 2010, the Committee issued a Revised Committee Scheduling Order (“Revised Schedule”). The Revised Schedule slightly shortened the time for filing of Applicant’s and Intervenors’ Opening Testimony, and shortened by a single day the deadline for filing Rebuttal Testimony. The Revised Schedule set evidentiary hearings for February 3 and 4, 2011, three weeks after the date proposed by Mr. Sarvey.

Staff published the Staff Assessment (“SA”) on November 8, 2010 – two days ahead of schedule. Thereafter, on November 24, 2010, the Bay Area Air Quality Management District issued the Final Determination of Compliance for the Mariposa Energy Project. A Staff Assessment workshop was held on November 29, 2010. As a result of discussions at the workshop, Applicant is in substantial agreement with Staff’s proposed conditions of certification. Applicant anticipates that there will be no contested issues between Staff and Applicant.

**I. Intervenor’s Fail to State Good Cause for Any Delay in this Proceeding.**

The Intervenors’ Motion fails to state good cause for delaying the schedule of this proceeding. The Motion merely alleges, without explanation or justification, that the adopted schedule “accelerates the submission of testimony and requires the interveners to prepare their testimony during the holiday period” and that this will allegedly “create undue hardship on the CEC staff, interveners, and their experts who are unpaid volunteers.”<sup>1</sup>

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<sup>1</sup> Intervenor’s Motion, p. 1.

While it is true the Revised Schedule calls for both Applicant and Intervenors to submit Opening Testimony in December, the Revised Schedule provides more than adequate time for the Intervenors to prepare their Opening Testimony. Opening testimony is each party's independent, affirmative testimony, and is not necessarily responsive to the testimony of other parties.<sup>2</sup> In this light, the Intervenors will have had a full 16 months since the Application was deemed to be data adequate to prepare their independent, affirmative Opening Testimony.<sup>3</sup> Given that the statutory period for processing an Application is supposed to be 12 months, 16 months should be more than adequate to prepare and file Opening Testimony, even for "unpaid" parties.

While the Revised Schedule slightly shortened the time period for filing Intervenor's Opening Testimony following publication of the Supplemental Staff Assessment ("SSA"), review of the SA or SSA is not necessary to the filing of Intervenors' Opening Testimony. As noted above, opening testimony is each party's independent, affirmative testimony and is not required to be responsive to the SA or SSA. If Intervenors believe that they must wait until publication of the SSA in order to begin drafting their testimony, they misunderstand the licensing process. Nor do Intervenors have to file their Opening Testimony during the "Holiday Period." Intervenors may file their Opening Testimony any time prior to December 29, 2010. Intervenors may file their Opening Testimony concurrent with the Applicant's Opening Testimony on December 20, 2010, if they so desire. After 16 months, Intervenors should be prepared to file their Opening Testimony, regardless of when the SSA is published.

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<sup>2</sup> Committee Order Denying Motion for Revised Schedule, Docket No. 08-AFC-5, July 12, 2010, p. 1.

<sup>3</sup> The schedule provides Mr. Sarvey 14 months from the time he became a party to prepare his Opening Testimony. Mr. Dighe will have had more than 10 months since he became a party. While CalPilots only became a party recently, this is not good cause for a delay in the schedule. The Committee Order of October 20, 2010 granting Cal Pilot's Petition to Intervene expressly provides that "The deadlines for conducting discovery and other matters shall not be extended by the granting of this Petition." Moreover, even Cal Pilots will have had more than 2 months since they became a party in which to prepare Opening Testimony.

As for Rebuttal Testimony, the Revised Schedule provides Intervenors practically the same length of time to prepare Rebuttal Testimony as the October 20 Schedule. The October 20 Schedule required Rebuttal Testimony to be filed on January 13, 2011. The Revised Schedule requires Rebuttal Testimony on January 12, 2011, just one day earlier. Intervenors state that the previous Committee Schedule did not pose a hardship on Intervenors. Intervenors fail to show good cause why a mere one day reduction in the time period for filing Rebuttal Testimony suddenly creates undue hardship.

**II. The Committee Revised Schedule Provides Intervenors Time Periods that Meet or Exceed Typical CEC Licensing Proceedings.**

The question of the appropriate length of time to prepare Intervenor testimony was addressed recently in the Imperial Valley Solar Project proceeding. In that case, the California Native Plant Society (“CNPS”) requested a revised schedule, just as certain Intervenors have requested a revised schedule in this case. The CNPS complained that the schedule did not provide adequate time to prepare its testimony because its Opening Testimony was due only one week after the publication of the Supplemental Staff Assessment. The Committee disagreed, and found that the schedule was adequate:

“Moving party CNPS claims that it will have less than one week to review the SSA and prepare its opening testimony. However, review of the SSA is not necessary in order to file opening testimony....Opening testimony is each party’s independent, affirmative testimony, and is not necessarily responsive to the testimony of other parties.”<sup>4</sup>

CNPS also complained that 2 weeks from the publication of the SSA was not sufficient time to prepare its rebuttal testimony. Again, the Committee disagreed:

“The Committee agrees with Intervenor CNPS that parties need time to review the opening testimony of the other parties in order to prepare rebuttal testimony. The schedule provides for two weeks from the date of publication of the SSA, which

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<sup>4</sup> Committee Order Denying Motion for Revised Schedule, Docket No. 08-AFC-5, July 12, 2010, p. 1

is ample time. Typical Energy Commission Scheduling Orders allow no more than two weeks for preparation of rebuttal, and frequently allow less time.”<sup>5</sup>

In the case at bar, the Revised Schedule provides the Intervenors more time to prepare opening testimony than was provided in the Imperial Valley proceeding. In Imperial Valley, Opening and Rebuttal Testimony was due 7 and 14 days following issuance of the SSA, respectively. In this case, Intervenors’ Opening and Rebuttal Testimony is due 16 and 30 days after issuance of the SSA. Given the timelines set by the Imperial Valley case, and the fact that “Typical Energy Commission Scheduling Orders allow no more than two weeks for preparation of rebuttal, and frequently allow less time”, the 30 days provided to the Intervenors in this case is certainly ample time.

**III. The Revised Schedule is Consistent with the Scheduling Recommendation of CalPilots and the Schedule Proposed by Mr. Sarvey.**

The Committee invited the parties to propose a schedule for the proceeding. Of the parties to this Motion, only Mr. Sarvey proposed a schedule. Because neither Mr. Dighe nor Mr. Wilson<sup>6</sup> proposed a schedule, they have no standing to now complain that the Revised Schedule adopted by the Committee should be different. If they had specific, legitimate scheduling concerns, they should have raised these concerns at the mandatory scheduling conference.

Although CalPilots did not propose a schedule, their spokesman stated at the scheduling conference that “we’re really not recommending any acceleration of the Commission’s typical schedule, we’re only urging the Commission to meet the standard schedule.” As explained above, the Revised Schedule provides time periods for filing testimony that meet or exceed the typical or standard schedule that would be typically applied in an AFC proceeding. Thus,

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<sup>5</sup> *Id.*

<sup>6</sup> October 6, 2010 Transcript of Mandatory Status Conference, Tr. 17

CalPilots' request that the Commission "meet the standard schedule" has been more than adequately addressed.

The Schedule offered by Mr. Sarvey proposed issuance of the Final Staff Assessment on December 20, 2010 and proposed evidentiary hearings on January 11-12, 2011. Mr. Sarvey's schedule does not specify the dates for filing Opening and Rebuttal testimony. However, given that Mr. Sarvey proposed only a 21-day interval between the Staff Assessment and the Evidentiary hearings, the Opening Testimony under Mr. Sarvey's schedule would need to be due on or about December 27 (during the Holiday period) and Rebuttal Testimony would need to be due on or about January 4, 2011, in order to accommodate hearings on January 11 and 12, 2011.

The Revised Schedule, rather than accelerating the deadlines for filing testimony, is actually more generous than the schedule that Mr. Sarvey proposed. The Revised Schedule provides a more generous 53 days between the issuance of the SSA and the Evidentiary Hearings, rather than the 21-day interval proposed by Mr. Sarvey. The Revised Schedule calls for Intervenor's Opening Testimony on December 29, 2010, approximately the same time that Opening Testimony would be due under Mr. Sarvey's schedule. The Revised Schedule calls for Rebuttal Testimony on January 12, 2011 - the date Mr. Sarvey proposed that Evidentiary Hearings be concluded. In other words, the Revised Schedule actually provides more time for the preparation and filing of Rebuttal Testimony than Mr. Sarvey requested.

Assuming that Mr. Sarvey proposed a schedule in good faith, and assuming that he proposed a schedule that would not cause himself any undue hardship (even though his schedule would have required filing Opening Testimony during the holiday period), he has no grounds for now complaining that the Revised Schedule with *later* dates than he proposed (for filing testimony and evidentiary hearings) could be unfair.

## Conclusion

Intervenors' Motion speculates that the FDOC or SSA will be delayed, and thus justifies a delay in this proceeding.<sup>7</sup> This speculation is baseless. The FDOC was issued on November 23, 2010. The Applicant has already submitted its written comments on the SA. On November 29, 2010 Staff conducted a SA Workshop, where it was determined that there are no major substantive differences between the Applicant and Staff on any topic area. Apart from the normal editorial cleanup of the SA, we expect that there will be a consensus between the Staff and Applicant on all conditions of certification by the issuance of the SSA. In summary, there is no cause for further delay in completing the evidentiary portion of this proceeding.

The Applicant welcomes the timely participation of Intervenors in this proceeding. We look forward to their constructive recommendations on topics relevant to the Application. At the same time, the Commission should not tolerate obstructionist tactics that seek to "slow down" the process and "tie up" the Commission.<sup>8</sup> The Committee should deny the Motion, and maintain the schedule set forth in the Revised Committee Schedule.

Dated: December 1, 2010

ELLISON, SCHNEIDER & HARRIS L.L.P.

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<sup>7</sup> Motion, p. 2

<sup>8</sup> October 6, 2010 Transcript of Mandatory Status Conference, Tr. 78-83.



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**PROOF OF SERVICE**

I, Karen A. Mitchell, declare that on December 1, 2010, I served the attached  
APPLICANT’S RESPONSE TO THE JOINT MOTION OF ROBERT SARVEY, RAJESH  
DIGHE AND CALPILOTS TO ADOPT THE COMMITTEE’S OCTOBER 12, 2010  
SCHEDULE 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**  
**09-AFC-3**

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