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Energy Resource Conservation and Development Commission

Application for Certification for the RIO MESA SOLAR ELECTRIC GENERATING FACILITY	)	Docket No. 11-AFC-04

OPENING BRIEF OF RIO MESA I, LLC, RIO MESA II, LLC, and RIO MESA III, LLC

ELLISON, SCHNEIDER & HARRIS L.L.P.
Christopher T. Ellison
Brian S. Biering
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Rio Mesa Solar Electric Generating Facility

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I. INTRODUCTION / SUMMARY

Rio Mesa Solar I, LLC, Rio Mesa II LLC, and Rio Mesa III, LLC (collectively "Applicant"), are pleased to provide the following Opening Brief, responding to the Committee's February 23, 2012 Notice of Mandatory Status Conference.[1] Applicant's Opening Brief responds to the four questions listed on page three of the Committee's notice. As discussed below, Applicant's Opening Brief provides responses to the Committee's questions. Applicant's responses are summarized as follows.

First, the AFC is data adequate in all technical areas, and there is no basis for reconsidering the Commission's December 14, 2011 data adequacy determination.

Second, no additional survey work is necessary or appropriate for the project. In order to fully examine the Committee's question regarding additional avian surveys, the Committee must first understand the surveys that have already been conducted, the history of approvals for such surveys and subsequent requests for additional surveys, and most fundamentally, the risk that the Rio Mesa technology and site pose to birds and bats. Applicant addresses the need for additional bird and bat surveys in great detail and demonstrates that the surveys already conducted are sufficient to meet all applicable licensing requirements. Nonetheless, Applicant proposes to conduct extensive additional surveys in the coming year notwithstanding its strongly held view that no such surveys are necessary.

Third, while Applicant cannot comment on the expected timing or outcome of the pending litigation, Applicant believes that regardless of the outcome or status of the litigation, the Commission can provide a decision on the Project, pursuant to its authority under the Warren Alquist Act.

Fourth, potentially significant impacts on desert kit fox need to be considered by the Commission, both under the Commission's CEQA responsibilities and in light of the adverse health impacts to kit foxes noted at the Genesis Solar Energy Project. Since parties will have at least a year to learn from projects currently under construction, Applicant does not believe that the consideration of potentially significant impacts to desert kit foxes should affect the scope or timeline of Commission review of the AFC.

Finally, in response to the Committee's request for additional information or information relating to scheduling, Applicant provides an updated schedule for the Committee's consideration. The schedule is substantially similar to the schedule provided in the Applicant's January 30, 2012 Comments on Staff Issue Identification Report and Proposed Schedule.[2] The updated schedule provides more detail and clarifies the Applicant's January 30, 2012 schedule.

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[1] 11-AFC-04, Committee Notice of Mandatory Status Conference (Feb. 23, 2012), available at: http://energy.ca.gov/sitingcases/riomesa/notices/2012-03-19_Status_Conference_Notice.pdf

[2] 11-AFC-04, *Comments Regarding Rio Mesa Solar Electric Generating Facility (11-AFC-04) Issues Identification Report and Staff Proposed Schedule*, (Jan. 30, 2012), available at: http://energy.ca.gov/sitingcases/riomesa/documents/applicant/2012-01-30_Applicant_Comments_re_Issues_Identification_Report_and_Staff_Proposed_Schedule_TN-63475.pdf

II. DISCUSSION

A. Whether the AFC is data adequate in the technical areas of Biological Resources and Cultural Resources.

As the Commission Staff has already found and the Commission has already affirmed, the AFC is data adequate in all technical areas. There is no basis for reconsidering the Commission's December 14, 2011 data adequacy determination. The requirements for data adequacy are contained in California Code of Regulations Section 1704, and Appendix B ("Siting Regulations"). The Commission's Siting Regulations set forth the specific information an AFC must provide in order for the Commission to start a licensing proceeding. The AFC need not address every issue necessary for an ultimate Commission Decision on a project, but rather the goal of the Siting Regulations is to provide staff and the Commission with enough information to start the licensing proceeding.

In preparing the AFC, Applicant carefully considered the Siting Regulations and submitted, along with the AFC, the Energy Commission's Data Adequacy Worksheets for each topical area of the AFC. The AFC was submitted on October 14, 2011, and on November 10, 2011, the CEC staff provided a recommendation to the Commission that the AFC did not satisfy the requirements of Section 1704 in five of the 23 technical areas. On November 21 and December 9, 2011, Applicant provided supplemental information for the AFC, and on December 12, 2011, staff issued a revised data adequacy recommendation finding the Applicant satisfied the requirements of Appendix B in all 23 technical areas. Staff's recommendation includes staff's completed data adequacy worksheet, which cites the specific page of the AFC, as well as the supplemental information where the staff determined that the AFC satisfies the specific requirements of the Siting Regulations. On December 14, 2011, the full Commission agreed with staff's recommendation and determined that the AFC is data adequate. In sum, for almost three months, the Commission and staff considered the data adequacy of the AFC, and staff's recommendation demonstrates, with particularity, that the AFC and supplemental information meet the data adequacy requirements.

No party has asserted or identified any requirement in the Siting Regulations that the AFC and the supplements fail to meet. Moreover, the Committee is not empowered to reverse a decision of the full Commission. Thus, there is no basis for reconsidering the Commission's December 14th, 2011 data adequacy determination.

B. Whether one additional year of bird and bat surveys will be adequate as indicated by the December 16, 2011 REAT communication or, if several years of additional bird and bat surveys are required as indicated by the January 31, 2012 USFWS communication.

In this section of the brief, Applicant addresses the need for additional bird and bat surveys in great detail and demonstrates that the surveys already conducted are sufficient to meet all applicable licensing requirements.[3] Nonetheless, at the conclusion of this section Applicant

[3] Applicant therefore respectfully suggests that the statement of the issue: "whether one additional year of bird and bat surveys . . . are required" should instead be characterized as whether ANY additional surveys are needed in light of the risk posed by the Project and the surveys already conducted.

proposes to conduct extensive additional surveys in the coming year notwithstanding its strongly held view that no such surveys are necessary.

In order to fully examine this question, and prior to considering any additional survey requests, the Committee must first understand the surveys that have already been conducted, the history of approvals for such surveys and subsequent requests for additional surveys and, most fundamentally, the risk that the Rio Mesa technology and site pose to birds and bats. The fact is that the Applicant has already conducted surveys that meet or exceed applicable requirements and that the work plan for these surveys were either approved or accepted without objection by the REAT agencies when submitted prior to their being conducted. BLM approved the work plan via email on March 29, 2011. These surveys compare favorably to applicable protocols and precedent for comparable energy projects. Most importantly, the Rio Mesa project does not pose a risk to birds or bats that is at all unique or different from the risks posed by many other energy facilities that have been licensed based on the type of survey data already submitted.

Accordingly, this brief begins by addressing those issues at length before turning to a discussion of the additional survey requests and our proposal to conduct substantial additional surveys.

1. Survey Work Completed to Date Is Consistent With BLM Protocol and Is Consistent With What Has Been Required of Other Projects.

Applicant has completed substantial surveys to date, and followed BLM protocol for avian surveys in both spring and winter 2011. With respect to migratory and resident bird surveys, the main points of the protocol are: one point count transect performed per square mile of the project site, for a total of sixteen transects (fourteen on the Project area and two on the potential mitigation lands to the east of the Project). Surveys were conducted on each transect once per week for four weeks in the spring and fall 2011. Transects were concentrated on areas with high potential for bird activity (e.g., washes, higher density vegetated areas). Each transect had eight point count locations, a minimum of 250 meters apart, where two biologists recorded all birds that were observed during a ten minute duration within a 100 meter radius. All species of passerine, upland, waterfowl, and raptors observed during these surveys were counted. In addition, incidental notations of birds were noted during the thousands of hours of surveys conducted throughout 2011 and were included in the AFC as "incidental sightings".

For golden eagle surveys, BLM recommended using subcontractor, Wildlife Research Institute ("WRI"), to conduct the surveys. Applicant subcontracted with WRI to perform eagle nest surveys per United States Fish and Wildlife Service ("USFWS") protocols.[4] To identify golden eagle nests, WRI conducted Phase 1 helicopter surveys in mid-March 2011 within ten miles of the project site, gen-tie line and alternative substation locations. Phase 2 helicopter surveys were conducted in early May 2011 to determine occupation of the identified nests by golden eagles. No golden eagle nests (active or inactive) were found on the project site, within the gen-tie corridor, or within the alternative substation locations associated with the Project. Four inactive golden eagle nests were found between five and ten miles of the Project, the closest

[4] All participants in golden eagle surveys have several years of experience conducting helicopter surveys and were fully qualified.

of which is 6.25 miles away. One incidental sighting of two golden eagles west of the project site in the Mule Mountains occurred during botanical surveys. That was the only sighting of eagles, incidental or otherwise, during all surveys conducted in 2011. In February of 2012, Dr. Joel Pagel of USFWS stated that he had an incidental sighting of an eagle approximately 6.5 miles south of the project site.

Applicant's work plan describing planned survey efforts was distributed to the agencies on February 21, 2011, prior to implementation in the Winter of 2011. BLM approved the work plan on March 29, 2011, and it was not until June of 2011 (after both winter and spring surveys had already been completed) that USFWS provided comments on the work plan, indicating that USWFS was requesting survey requirements exceeding the BLM's protocols.

2. The Additional Survey Work Requested By The REAT Agencies Has Been A "Moving Target"

The REAT Agencies' requests for additional surveys have become increasingly more onerous. On June 27, 2011, USFWS provided its first set of recommendations that were in addition to the BLM's approved protocols. Revised recommendations were provided on December 1, 2011, December 2, 2011, and December 16, 2011. Further clarifications were provided on January 31, 2012. Finally, CEC Staff Data Request Set 1A asked for survey information that was in addition to what was requested on December 16, 2011. The attached graphic (Attachment 1) summarizes how the recommendations have changed over time.

3. The Additional Survey Work Is Inconsistent With Other Energy Commission Siting Cases

All other CEC projects have used the BLM point count transect protocol for solar projects to document migratory bird presence and relative abundance. The level of effort to satisfy the BLM protocol is typically less than 600 field hours. The level of effort requested by the REAT agencies is more than 8600 hours in the field for all ground surveys combined.

The REAT agency surveys are more akin to the surveys required for large-scale wind energy projects, which have a far greater impact on avian species. For example, the West Butte Wind Project in eastern Oregon, a 2,236 acre project, that has requested an eagle take permit, conducted less than 100 hours of field observation in support of their permit application.[5] The Mojave wind project, a 38,099 acre project, that has also requested an eagle take permit conducted less than 500 hours of field observation in support of their permit application.[6] By comparison, the REAT agencies survey requests are therefore orders of magnitude greater than the level of surveys required for projects that pose a far greater risk of impact than the RMS Project.

[5] West Butte Wind Power LLC. *West Butte Wind Power Project Final Avian and Bat Protection Plan and Golden Eagle Conservation Plan.* pp. 28, appendices (2011).
[6] Tetra Tech, Inc. *Mohave County Wind Farm Draft Eagle Conservation Plan*. p. 49 (2012).

4. No Additional Survey Information Is Necessary Or Appropriate

a. The Additional Survey Information Is Predicated On A Misperception Of The Risks Of The Technology.

Fundamentally, the REAT agencies recommendations for extended additional surveys are predicated upon an assumption: that this technology poses a unique and significant hazard to birds and bats in the vicinity. Moreover, the assumption appears to rest on fears regarding heat impacts as opposed to more traditional and well-understood collision concerns.[7] Starting from that unquestioned assumption, the REAT biologists seek massive, unprecedented surveys to identify the species that they perceive to be at unique risk.

This risk assumption is simply wrong. As we will show next, the technology proposed for the Rio Mesa Project poses no hazards to birds or bats that are either unknown or substantially different from those posed by other large structures. Indeed, as the evidence discussed below will demonstrate, the "exotic" risk of heat impacts that appears to be the focus of the REAT biologists is virtually non-existent. To the extent the project poses a risk to birds and bats, it is the traditional and well-understood risk of collision with structures, not heat or other alleged sunlight impacts. Moreover, the evidence will show that collision risk is not substantial either—certainly not in comparison to the risk of large wind projects with spinning blades.

b. The Solar One Study Concluded That Avian Impacts Were "Minimal"

The only evidence that the REAT biologists have cited for their concern is a study done of the impacts of the Solar One power tower project on birds in 1986.[8] Thus, we begin our discussion of these issues with a discussion of that study.

The Solar One project was an 80-acre project supported by the U.S. Department of Energy and SCE. They sponsored a study to determine the bird mortality rate and causes of mortality at the Solar One project site (McCrary et al., 1986). This study involved forty weekly bird carcass surveys between May 1982 and May 1983. The study identified seventy bird fatalities including twenty six species over a period of forty weeks. The mean rate of mortality between weekly visits was 1.9 to 2.2 birds. The study made external examinations of broken bones and singed or burned feathers. Of the total seventy mortalities, thirteen were from heat injury and fifty seven were from impact trauma. The study also included surveys of birds present on the project site. The average daily bird count was 314 ± 203 standard deviation (111 to 517) over an area of 370 acres. Most of the fatal impacts were with mirrored heliostats. If

[7] In the Applicant's very first discussion of these issues with the REAT agencies, prior to any submission of information regarding the technology being proposed here, one of the REAT biologists stated "[w]e all know that solar power towers kill eagles." Later this same person pointedly asked a BrightSource physicist whether he "would be willing to parachute between the mirrors and the tower" revealing his belief that merely passing through the reflected sunlight between the mirrors and the tower is inherently hazardous. (The physicist's answer was "absolutely yes—we have people working for extended periods in that environment every day at our project in Israel."). Throughout our discussions with REAT, statements suggesting the technology is either known to be dangerous or that the dangers are unknown have been made repeatedly.

[8] McCrary, M.D., R.L. McKernan, R.W. Schreiber, W.D. Wagner, T.C. Sciarrotta. *Avian mortality at a Solar Energy Power Plant.* Journal of Field Ornithology 57: 235-141 (1986).

several heliostats are focused on a point in the air, they can produce very high levels of flux within a zone near the top of the tower. Birds may have flown into this zone and been unable to escape before receiving heat injury. At Solar One, 81.4 percent (57/70) of mortalities were due to strikes against the heliostats; only 18.6 percent of mortalities (13/70) were due to singeing from standby points. No fatal impacts against the tower or power lines were reported.

Overall, McCrary et al. concluded; "Considering all known avian fatalities (70 birds) at Solar One during this study the impact of the facility on birds after construction appears minimal… the impact of this mortality on the local bird population is considered minimal (0.6-0.7% per wk)."[9]

c. The Solar One Facility And Solar One Site Posed A Dramatically Greater Risk To Birds Than Rio Mesa

The Solar One Study conclusion that avian impacts were minimal should provide enormous assurance when evaluating the risk of impacts to avian species at the Rio Mesa Project. Due to several major design and site differences, Rio Mesa will be a much safer facility for birds than was Solar One. These differences include the following:

- When in standby mode, Solar One focused all its mirrors on only four points in the sky near the tower, concentrating solar energy on those nearly invisible points in the atmosphere. In contrast, the Rio Mesa mirrors will aim at the same location, but will not exceed 500kW/m^2. As a result, the energy levels at the standby points for Solar One were at least three times higher than what is projected for Rio Mesa and much more likely to impact birds than will be the case here.[10]
- Solar One used a lattice structure for its tower allowing birds to perch easily while the Rio Mesa towers will be solid structures that provide no perching opportunities.
- Solar One was surrounded by fertile agricultural land By contrast, Rio Mesa is buffered from any farmland (active or inactive) by more than one mile of desert scrub to the nearest heliostat and 3 miles of such buffer to the nearest tower (see further discussion in section B(4)(h), below).
- The Solar One heliostats, which were the cause of more than 80% of the mortality identified in the Solar One Study, were substantially larger than the Rio Mesa heliostats. Solar One used several types of heliostats, some of which were large and had multiple mirrors (430ft^2) and reached higher than 25 feet above grade. Rio Mesa will use all dual mirror LH-2.3 heliostats that are smaller (204ft^2) than Solar One heliostats and only reach as high as 13.5 feet above grade.

[9] The mortality rate is not cumulative, and based on the methods employed in the McCrary Study, the percentage would not change over a longer period of time (e.g. the mortality percentage would be .6 - .7% over the course of a year).

[10] Rio Mesa proposes to disperse the heliostats in standby mode to comply with applicable FAA regulations governing energy levels and not specifically to reduce avian impacts. As the Solar One Study concluded, the risk of bird impacts from heat is minimal even when the heliostats are focused on only two standby points. But certainly the far lower energy levels required by the FAA for Rio Mesa will have the consequence of providing an even safer environment for birds than was the case at Solar One.

- Compounding the impact of the larger mirrors, the Solar One facility included 126 acres of unnetted ponds providing an attractive environment for a greater diversity of birds. Rio Mesa will have only four acres of ponds—about three percent of Solar One—and the ponds at Rio Mesa will be netted to prevent birds from occupying them.

Taken together, these differences suggest that the Rio Mesa Project will have avian impacts that are substantially less than even the avian impacts found to be "minimal" in the Solar One Study. The heat-related impacts should be far less given that the concentration of solar energy at the standby points at Rio Mesa will only be a fraction of that at Solar One. The collision risk should be reduced by the lack of perching opportunity on the towers, the more than 97% reduction of total pond space near the mirrors (and the netting of the ponds that remain) and the much smaller size of the mirrors. In addition, the greater buffer between irrigated agriculture and the facility will further reduce the avian impacts compared to Solar One.

In short, the REAT biologists concerns regarding avian impacts and the Solar One study are misplaced. The Solar One Study itself suggests the impacts to bird populations were minimal. More importantly, the site and technology studied at Solar One are demonstrably more hazardous than the site and technology of Rio Mesa.

d. Experience at the SEDC Facility in Israel Supports the Conclusion that this Technology is Not Unduly Hazardous to Birds

BrightSource has more than three years of experience operating a facility similar to Rio Mesa in Israel. That facility, known as the Solar Energy Development Center ("SEDC"), is a 6 megawatt, fully operational solar thermal power tower project located in Rotem, Israel. Like RMS, the SEDC power tower and surrounding heliostats concentrate the sun's energy onto a boiler.

If anything, the avian impacts at SEDC should be greater than at Rio Mesa. That is true for at least two reasons. First, at SEDC the heliostats are concentrated on two points during standby in the same fashion as Solar One. Second, the SEDC site is located directly in the path of the major migratory bird flyway between Europe and Africa.

Despite its location and high concentration of energy on the standby points, the manager of the SEDC facility has indicated that during the more than three years of operation, with the plant manned daily including daily inspections of the solar field and area around the tower and boiler, no bird mortality has been observed. While there has not been a formal avian impact study completed at SEDC, the employees monitor the area around the tower and heliostats daily. Any avian death must be reported because it is both a health risk and SEDC is a research and development facility.

In contrast with the unfounded speculation and fears put forward by some, this is the best evidence possible: actual, real-world experience with the identical technology as reported under oath by an eye witness. Indeed, it is actual experience with the identical technology operated in

a more hazardous manner to birds than is proposed for Rio Mesa. Simply put, for three years this technology has been tested and no bird mortality has been observed. This evidence provides far more assurance of the impact of Rio Mesa than would any amount of bird surveys.

e. Engineering Analysis of the Heat Dispersion at Rio Mesa Supports the Conclusion that this Technology Will Not Be Unduly Hazardous to Birds

The possibility of heat impacts to birds at Rio Mesa can also be assessed by modeling the energies and temperatures that will occur during its operation at places accessible to birds. There are two possible sources of such impacts: 1) the concentration of solar energy at the standby points (also referred to as "solar flux"); and 2) atmospheric heat resulting from radiant energy from the Solar Receiver Steam Generator ("SRSG").

As already discussed, with regard to its standby points, Rio Mesa will operate entirely differently than either Solar One or SEDC in that it will not concentrate solar energy on defined standby points. Rio Mesa mirrors will aim at the same location, but will not exceed 500kW/m^2. The concentration of energy within this ring or halo will be far less than at the four fixed points of Solar One or two at SEDC.

Another key point regarding exposure to solar flux at standby points is that such concentrations, even at the levels of Solar One or SEDC, do not raise atmospheric temperatures. They are simply concentrations of solar energy that have no temperature impact until brought to bear upon an object with mass that can absorb the energy. Thus, a bird flying through the solar flux is only harmed when it is exposed long enough for the energy to raise its temperature, which does not happen instantaneously. At the higher concentrations of energy at Solar One or SEDC, the harmful duration of exposure may, in fact, be quick enough to affect a bird merely flying through the standby points. At Rio Mesa, the harmful exposure time will be far longer, such that merely flying through the standby ring would have no effect whatsoever. Indeed, we are aware of no evidence that exposure of any duration to such low levels of sunlight would be harmful.

Of course, there is also a concentration of energy around the boiler when the mirrors are focused there during operation. That presents two potential exposures: the solar flux near the boiler and the atmospheric heat near the boiler. The area of significant solar flux around the boiler where reflected sunbeams converge is very small, and represents only 0.0046% of the total airspace over the developed area of the Project (i.e., the area below the tower height and within the developed area of the project site).

In contrast to the solar flux, the heat radiating from the SRSG will raise the temperature of the nearby atmosphere. However, the area of such temperature rise is exceedingly small because the SRSG is designed to absorb energy, not reflect it. From the total energy that is concentrated on the tower, ~96% is absorbed and only 4% reflected back to the atmosphere. While the SRSG shines bright, it is designed to minimize heat loss, and elevated air temperatures are very limited.

> "Based on the data from the CFD model run for Ivanpah and extrapolated for Rio Mesa Solar, the maximum air temperature drops to ~15^{o}C above ambient at a distance of less

than a meter horizontally from the SRSG face, and approximately 1.5 meters above the SRSG. According to the CFD, the elevated temperature continues to dissipate rapidly as distance from the SRGS increases, and at a distance of 2 meters from the SRSG surface, there is no noticeable ambient temperature effect from the SRSG."

In summary, the engineering analysis of the solar flux and radiant heat signatures of Rio Mesa provides an independent basis for concluding that avian and bat heat impacts from the facility should be insignificant. The solar flux at the standby points, which led to some avian mortality at Solar One, will be dramatically reduced. The radiant heat signature of the SRSG will also be limited to a very small area immediately next to the boiler. The area of significantly elevated solar flux where the sunlight beams converge is also very small and is confined to an area surrounding the SRSG. Even there, the impact on a bird merely flying through should be insignificant. All this information is consistent with, and confirmed by the absence of bird impacts in real-world observations at the SEDC facility discussed above.

f. The Collision Risk Posed At Rio Mesa Is Not Significant Compared With Other Solar Or Wind Facilities Licensed Without Massive Additional Surveys

As already discussed, the collision risk identified at Solar One was not attributable to the towers or transmission lines, but rather to the combination of larger heliostats located immediately adjacent to irrigated farmland and 126 acres of unnetted ponds attracting birds. With regard to the collision risk of the heliostats, Rio Mesa heliostats will be approximately half the total area per heliostat than were those at Solar One. Moreover, there will be less than five percent of the total pond area and there will be no unnetted ponds at the Rio Mesa Project.

With respect to the three 750 foot tall towers, despite their height, the collision risk is no greater than many comparable energy facilities. The area of potential impact to a bird in flight occupied by the three towers is approximately equal to only three large modern wind turbines (including the space occupied by the spinning blades.) In addition, unlike wind facilities, the towers at the Project are static and do not present the much greater risk of having spinning blades that birds do not easily avoid.

For example, the High Winds Wind Farm is located within a mile of Birds Landing, CA, and generally abuts the Sherman Island Waterfowl Management area. This project was selected for comparison because two years of post-construction surveys had been completed, the project is in California, the wind farm is near a wildlife management area, and the project is near a major waterway. The High Winds Wind Farm consists of ninety units (162 MW), Vestas 1.8 MW turbines with eighty meter diameter blades on towers that are sixty meters tall.[11]

[11] See *Summary of Post-Construction Monitoring at Wind Projects Relevant to Minnesota, Identification of Data Gaps, and Recommendation for Further Research Regarding Wind-Energy Development in Minnesota, Prepared for the State of Minnesota, Department of Commerce by Western EcoSystems Technology, Inc.* (December 10, 2010).

The calculated turbine area (i.e., the area of rotor plus area of tower below rotor) is an eighty meter rotor diameter on sixty meter tower, with sixteen meter tower diameter = 53092 + 1040 = 54,132 sq. ft.

By comparison, the calculated solar tower Area is as follows: The diameter (sixty to eighty feet, 750 feet tall, with a lightning rod at 10' x .5' = 45,005 to 60,005 sq. ft.

Thus, the area ratio of a single wind turbine to a single power tower is 0.83 – 1.11, or one wind turbine is roughly equal in obstruction area to one power tower. For the High Winds project the study noted less than two bird fatalities per MW per year (i.e., less than 3.6 mortalities per wind tower). That same mortality rate, adjusted for area of the obstruction area would be 2.98 – 4.00 fatalities per power tower. If one considers obstruction area only, then the potential annual mortality rate across all species would be 2.98 – 4.00 per power tower.

g. The Additional Survey Requirements Misperceive The Risks Of The Site.

i The Lower Colorado River Valley Is A Secondary Migration Route.

Review of the ornithological literature suggests that the LCRV is a secondary bird migration route for certain neotropical migrant songbirds and the river valley is a minor wintering area for a few waterfowl and shorebird species.[12] The agricultural lands adjacent to the Rio Mesa site attract some birds as foraging and roosting habitat, especially when these fields are in an irrigated condition.

> The value of the LCRV to groups of migrants is highly variable. The river is not a major flyway for waterfowl.....Migration of raptors is poorly defined and often inconspicuous.....Shorebirds consistently follow the river valley, but numbers are unimpressive compared with flocks that concentrate at the nearby Salton Sea.[13]

The Rio Mesa site is dominated by desert scrub and desert wash habitats and is on the periphery of this migratory bird activity. The solar power generating facilities are planned to be west of the existing Western Area Power Administration 115 kV power line providing an approximate one mile buffer of desert habitat to the agricultural lands to the east that may limit the amount of "spillover" from the fields onto the project site but some "spillover" from the agricultural fields and occasional wayward migrant songbirds and other species still is likely to occur infrequently (e.g., the small flock of white pelicans observed by URS passing through the area on their way to their nest colonies in the Great Basin). The numbers of waterfowl are minor in the LCRV compared to the primary route associated with the California Central

[12] Rosenberg, K.V., R.D. Ohmart,W.C. Hunter, and B.W. Anderson. *Birds of the Lower Colorado River Valley*. Tucson: University of Arizona Press. pp 346 + appendices (1991).
Patten, M.A., G. McCaskie, and P. Unitt. 2006. *Birds of the Salton Sea: Status, Biogeography, and Ecology.* University of California Press, Berkeley.

[13] Id at p. 80

Valley (e.g., 20,000 Canada geese at LCRV compared to millions of geese in the Central Valley; about 800 sandhill cranes at LCRV vs. eight thousand cranes in the Central Valley[14]). The primary focus of the LCRV migration is the neotropical migrant songbirds (e.g., warblers) that typically fly at night well above 1000 feet altitude. Warblers accounted for less than ten percent of the total birds detected during the URS point count transect surveys, indicating that few warblers are attracted to the desert scrub habitat compared to their preferred riparian habitats which are absent at the Rio Mesa site.

ii. The Project Is Not Located Near Wetlands or Other Water Features That Would Attract Birds

The eastern boundary of the heliostat field is one mile from the agricultural fields and five miles from the Colorado River and associated riparian habitats. Hodges Drain is a jurisdictional wetland with connection to the Colorado River and is located along the western edge of the agricultural fields approximately one mile from the heliostat field. Other manmade agricultural drainages occur throughout the agricultural fields and provide additional foraging habitat similar to wetlands.

There are no mesic wetlands within the project site. Some marsh habitats may be present within Hodges Drain that passes through the agricultural fields. No waterfowl habitat is on the project site. There are no habitats onsite that would be attractive to waterbirds. The xeric habitats onsite are not conducive to supporting abundant insect populations. However, the irrigated agricultural fields and the Colorado River support abundant insect populations.

iii. Current Surveys Demonstrate That The Birds Observed In The Biological Study Area Do Not Occur In The Same Frequency As Those Near Or At The River And Wildlife Refuges

Bird species documented by biologists at Cibola National Wildlife Refuge include 287 species, many of which are waterbirds and other species not identified within the Rio Mesa Project area. Surveys at Rio Mesa have documented eighty one bird species, with most bird species being typically associated with desert scrub, desert wash woodlands, and agricultural fields. The only waterbird species detected was a small flock of 14 white pelicans flying over the site, and this observation occurred once.

The most common warbler species detected in spring 2011 were yellow-rumped warbler, Wilson's warbler, Lucy's warbler, and Orange-crowned warbler. Lucy's warbler breeds locally, primarily within woodlands dominated by mesquite or tamarisk and occasionally in cottonwood-willow scrub. Lucy's warbler is a cavity nester, meaning it requires trees for breeding sites and is closely associated with woodpecker occupied habitats. The remainder of the warblers listed above are spring migrants or winter visitors. Yellow-rumped warbler is a habitat generalist and can be found in all habitats in the project vicinity. Wilson warbler associates with riparian trees as well as any trees associated with agricultural fields and towns. Orange-crowned warblers

[14] USGS. 2006. The Cranes: Status Survey and Conservation Action Plan. Sandhill Crane *(Grus canadensis).* http://www.npwrc.usgs.gov/resource/birds/cranes/gruscana.htm

prefer riparian cottonwood-willow and saltbush-dominated scrub habitats typically found along the margins of riparian habitats and agricultural fields.

Other abundant or common migrant songbirds detected at Rio Mesa include tree swallow (the species with the most sightings during point count surveys), phainopepla, cliff swallow, Vaux's swift, barn swallow, Bullock's oriole, and white-throated swift. Phainopepla and white-throated swift breed in the project vicinity and the other species listed are spring migrants or winter visitors.

Common raptor species detected at Rio Mesa include turkey vulture and red-tailed hawk. As noted above, two individual golden eagles were observed west of the project site, in the Mule mountains. American kestrel, and northern harrier were also detected during site surveys. Turkey vulture is a summer resident, with very large migratory flocks often occurring in March and October. Red-tailed hawk is a common transient and winter resident from late September to early April.

Golden eagle is listed as a rare and irregular visitor to the immediate river valley, but breeds in remote cliff habitats in the desert mountains.[15] Focal helicopter surveys within a 10-mile radius of the Rio Mesa site detected only unoccupied eagle nest sites in 2011.[16] Three historically occupied territories in the project vicinity appear to be currently unoccupied. The two individuals detected on site in early March were likely wandering birds from more distant desert mountains or migrating individuals heading north to breeding areas in the northern portions of the Great Basin.

In light of the substantial survey efforts to date, the level of effort requested by the REAT agencies (more than 8600 hours in the field for all ground surveys combined) is neither necessary nor appropriate.

h. The Additional Survey Information Is Unlawful As It Would Compel A Violation Of Public Resources Code Section 25540.6.

Among the applicable laws, ordinances, regulations and standards that the Legislature has charged the Commission with enforcing in its review of proposed thermal power plants is Public Resources Code section 25540.6. This law, which is no less valid or mandatory than other statutes enforced in the siting process, states in pertinent part:

> "…the commission shall issue its final decision on the application, as specified in Section 25523, within 12 months after the filing of the application for certification of the powerplant and related

[15] Rosenberg, K.V., Ohmart, R.D., Hunter, W.C., and Anderson, B.W. *Birds of the Lower Colorado River Valley*. Univ. of Ariz. Press, Tucson, p. 346, and appendices (1991).

[16] Wildlife Research Institute, Inc. (WRI). *Phase 2 Summary of Findings: golden eagle survey surrounding the BSE PVM Solar Project in Riverside and Imperial Counties, California.* p. 26 (June 2011).

> facility or facilities, or at any later time as is mutually agreed by the commission and the applicant…."

This law was enacted to ensure that the Commission would render its decision in a timely manner. It compels the Commission and all parties to resist "paralysis by analysis" and to recognize that, while there is always more relevant information that can be developed, there is also an important public interest in making decisions in time for them to be meaningful. Plainly, California is not going to achieve a 33% by 2020 RPS goal if renewable licensing becomes a multi-year process. This law was also intended to prevent power plant opponents from presenting procedural or informational demands intended to simply delay projects and "run out the clock." In this proceeding the Commission must limit the demands of parties and agencies for massive additional surveys—which are not required by law—by the mandate of Section 25540.6 for a one year decision, which is required. Stated differently, the Commission is compelled by law to know when "enough is enough."

Pursuant to Section 25540.6, Applicant is willing to extend the 12 month deadline for a reasonable period to work with the REAT agencies and other parties to address their concerns. To that end, we are making the offer to conduct a year of additional surveys as discussed below. But Applicant is not waiving its right under Section 25540.6 to a reasonably timely decision consistent with its power sales agreement obligations, the state's RPS goals and many other important factors.

The additional surveys sought by the REAT agencies will take at least two years and are estimated to cost at least $3.9 million. As shown above, such surveys are not required by law, are not consistent with any precedent applicable to similar projects and are not justified by the evidence regarding the risk to birds and bats posed by this Project. Absent an agreement with Applicant to extend the schedule by several years, which Applicant is not agreeing to do, these surveys plainly will compel the Commission to violate Section 25540.6, and are therefore unlawful.

5. Although No Additional Survey Information Is Needed, Applicant Is Willing To Provide Additional Information

In an effort to resolve the avian issues in a timely fashion, Applicant will provide a revised compromise proposal as well as detailed cost estimates with its Reply Brief, which will be filed on March 14, 2012. The key components of Applicant's compromise proposal will include:

1. Additional migratory bird surveys will be conducted from February 21, 2012 through May 31, 2012, and from August 15, 2012 to November 15, 2012. The survey protocol to be used is the REAT recommended protocol dated 12/16/11 and the observation points approved in Data Request Set 1A.
2. Raptor migration surveys will be conducted from March 7, 2012 through April 20, 2012, and from September 1, 2012 to November 30, 2012. The survey protocol to be used is the

REAT recommended protocol dated 12/16/11 and the observation points approved in Data Request Set 1A.

3. Phase 1 and 2 golden eagle helicopter surveys and supplemental ground surveys will be conducted during the 2012 breeding season following Pagel et al. 2010 as suggested in the REAT recommended protocol dated 12/16/11. Pete Bloom is the lead biologist for these surveys.
4. Surveys for Gila woodpecker and other breeding birds will be conducted based on the protocol described in Data Request Set 1A.
5. Surveys for elf owl will be conducted based on the cactus ferruginous pygmy-owl protocol as suggested in Data Request Set 1A, if required by the Committee.
6. Bat monitoring started on February 9, 2012 and will continue for 1 full year using Anabat acoustical monitoring on the project site using the REAT recommended protocol dated 12/16/11 and the three REAT approved Anabat monitoring stations.
7. Radar technology will be utilized to monitor spring and fall nocturnal migration pulses of avifauna five nights per week from March 12, 2012 through May 31, 2012, and from September 1, 2012 to October 31, 2012.

In addition, Applicant has endeavored to address the REAT Agencies' concerns by employing avian specialists recommended by the REAT agencies. Dr. Pete Bloom is consulting on the Project's 2012 proposed survey effort and is the lead biologist for Phase 1 and 2 golden eagle helicopter surveys and supplemental ground surveys during the 2012 breeding season. In addition, Dr. Pat Brown, a bat expert who has extensively studied bat populations in the project vicinity, will also be consulting on the Project.

C. Whether, and how, the pending litigation challenging the legality of Riverside County's solar facility development fees will affect Commission evaluation of the project's compliance with the county's land use laws, ordinances, regulations, and standards (LORS).

Applicant is neither a party to, nor is funding the pending litigation challenging Riverside County Board of Supervisor Policy B-29. During the preparation of the AFC, and since the siting case began, Applicant has consistently worked towards conforming to Local LORS. On September 16, 2011, Applicant filed a zone change application. On November 8, 2011, in addition to adopting Board Policy B-29, the Board also adopted Ordinance 348.4705, which amended the County's zoning ordinance. The County's zoning ordinance now allows for solar development on land zoned for controlled development (W-2) and natural asset (NA) (the zoning classifications for the Project site). Thus, a zone change is no longer necessary for the Project. In addition, the Applicant has attempted to meet with the County to discuss other applicable local LORS, such as the height restriction in the applicable zones. Applicant has also contacted the County to discuss the County's views regarding impacts on the local fire district resulting from construction and operation of the Project. Despite these efforts, the County has indicated that it will not communicate with solar developers during the pendency of the litigation.

While Applicant cannot comment on the expected timing or outcome of the pending litigation, Applicant believes that regardless of the outcome or status of the litigation, the Commission can provide a decision on the Project, pursuant to its authority under the Warren Alquist Act. Applicant will continue to attempt to work with the County towards ensuring the Project's compliance with local LORS.

D. Whether, and how, recent adverse health impacts to kit foxes in the project vicinity might affect the scope and timeline of Commission review of the AFC.

Potentially significant impacts to desert kit fox need to be considered by the Commission, both under the Commission's CEQA responsibilities and in light of the adverse health impacts to kit foxes noted at the Genesis Solar Energy Project. As noted in the AFC, Applicant observed 193 desert kit fox den complexes.[17] With kit fox ranges varying from 1-2 square miles (Morrell (1972)), the 193 den complexes observed may only represent 8 to 16 home ranges on site. During 2011 surveys, two kit foxes were observed on site. This number of den complexes and survey results does not suggest that the Project will have a unique impact to desert kit fox compared to other projects.

In addition, there are fundamental distinctions between the Genesis and Rio Mesa projects. The environmental setting of the Genesis Project is much more remote than Rio Mesa. Consequently, construction activities at Genesis may have contributed to additional stress on the animals. The Rio Mesa project currently has a graded road through the project site, is utilized by off-road vehicles, and has both electric and gas transmission lines crossing the site that require periodic service and inspection. The Rio Mesa Project is approximately one mile (closest point) from active farming that results in intermittent noise on a year round basis. These activities that are already present on and around the Rio Mesa site suggest that construction activity at Rio Mesa will be a less significant event as compared to the Genesis project.

Even though Applicant expects a relatively low presence of desert kit fox on site, Applicant agrees that adverse health impacts to desert kit foxes need to be fully considered and lessons on feasible mitigation strategies from the Genesis Solar Energy Project, as well as other projects currently under construction should be considered in this siting case. Since parties will have at least a year to learn from projects currently under construction, Applicant does not believe that the consideration of potentially significant impacts to desert kit foxes should affect the scope or timeline of Commission review of the AFC.

E. Any additional matters relating to data adequacy or scheduling that are not identified in this notice.

In response to the Committee's request for additional information or information relating to scheduling, Applicant provides an updated schedule for the Committee's consideration. The schedule is substantially similar to the schedule provided in the Applicant's January 30, 2012

[17] See AFC at p. 5.2-60.

Comments on Staff Issue Identification Report and Proposed Schedule.[18] The updated schedule provides more detail and clarifies the Applicant's January 30, 2012 schedule. Applicant's revisions to its January 30, 2012 schedule are noted in strikethrough and underline. Please see Attachment 2.

Conclusion

Applicant is pleased to provide this Opening Brief, responding to the Committee's February 23, 2012 Notice of Mandatory Status Conference. As discussed above, the AFC is data adequate in all technical areas, and there is no basis for reconsidering the Commission's December 14, 2011 data adequacy determination.

With respect to Avian surveys, no additional survey work is necessary or appropriate for the Project. By discussing the surveys that have already been conducted, the history of approvals for such surveys and subsequent requests for additional surveys, and most fundamentally, the risk that the Rio Mesa technology and site pose to birds and bats, Applicant has demonstrated that the surveys already conducted are sufficient to meet all applicable licensing requirements. Nonetheless, Applicant proposes to conduct extensive additional surveys in the coming year notwithstanding its strongly held view that no such surveys are necessary.

With respect to the pending litigation regarding Riverside County Policy B-29, Applicant notes that it is not a party to or funding that lawsuit. While Applicant cannot comment on the expected timing or outcome of the pending litigation, Applicant believes that regardless of the outcome or status of the litigation, the Commission can provide a decision on the Project pursuant to its authority under the Warren Alquist Act.

With respect to the Committee's questions regarding impacts to Desert Kit Fox, potentially significant impacts to desert kit fox need to be considered by the Commission, both under the Commission's CEQA responsibilities and in light of the adverse health impacts to kit foxes noted at the Genesis Solar Energy Project. Since parties will have at least a year to learn from projects currently under construction, Applicant does not believe that the consideration of potentially significant impacts to desert kit foxes should affect the scope or timeline of Commission review of the AFC.

Finally, in response to the Committee's request for additional information or information relating to scheduling, Applicant provides an updated schedule for the Committee's consideration. The schedule is substantially similar to the schedule provided in the Applicant's

[18] 11-AFC-04, *Comments Regarding Rio Mesa Solar Electric Generating Facility (11-AFC-04) Issues Identification Report and Staff Proposed Schedule*, (Jan. 30, 2012), available at: http://energy.ca.gov/sitingcases/riomesa/documents/applicant/2012-01-30_Applicant_Comments_re_Issues_Identification_Report_and_Staff_Proposed_Schedule_TN-63475.pdf

January 30, 2012 Comments on Staff Issue Identification Report and Proposed Schedule.[2] The updated schedule provides more detail and clarifies the Applicant's January 30, 2012 schedule.

Dated: March 9, 2012

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By 

Christopher T. Ellison
Brian S. Biering
2600 Capitol Avenue, Suite 400
Sacramento, California 95816
Telephone: (916) 447-2166
Facsimile: (916) 447-3512

Attorneys for Rio Mesa Solar I, LLC, Rio Mesa II LLC, and Rio Mesa III, LLC

[2] 11-AFC-04, *Comments Regarding Rio Mesa Solar Electric Generating Facility (11-AFC-04) Issues Identification Report and Staff Proposed Schedule*, (Jan. 30, 2012), available at: http://energy.ca.gov/sitingcases/riomesa/documents/applicant/2012-01-30_Applicant_Comments_re_Issues_Identification_Report_and_Staff_Proposed_Schedule_TN-63475.pdf

ATTACHMENT 1

TO APPLICANT'S MARCH 9, 2012 OPENING BRIEF (11-AFC-04)

Bird/Bat/Raptor Timeline

Feb 21, 2011

Submitted Biological Work Plan to All Agencies

Mar 29, 2011

BLM Approved Work Plan in accordance to Protocols
a. Western Burrowing Owls – California Burrowing Owl Consortium
b. Golden Eagle – Helicopter Survey provided by FWS
c. Migratory Birds- BLM (2009) for Solar Facilities

June 27, 2011

FWS issued recommendations in addition to BLM Approved Protocols for 3/29/2011
Additional Work Includes
a. Passerine, waterfowl, upland bird – August to April weekly surveys, 5-10 migration count location. At least 3 consecutive 8 hour days a week. On the 4th day, collect avian point data.
b. Raptors – August to April weekly surveys, minimum 3 observation points, at least 2 miles apart, within an area 4 air miles of project footprint. At least 4 consecutive days/week at least 8 hours a day.

Dec 1, 2011/Dec 2,2011

FWS issued additional recommendations over and above 3/29/2011 and 6/27/2011
Additional Work Includes
A. Another year of BLM Protocols and additional recommendations
1. Migratory Birds
a. 6 Additional Transects
b. 5-10 Point count observations for 8 hrs a day 3 consecutive days a week
2. Eagle Survey
a. Hawk Migration Association of North America Field survey
b. 3 Point count spaced at least 2 miles apart covering 4 miles of Project area
c. 8hrs per day of observation at each observation point
d Weekly surveys from August-April 8hrs per day/4 consecutive days per week: for 38 weeks and 34 weeks of Point Count Transects

Dec 16, 2011

REAT Agencies issued additional recommendations over and above 3/29/2011, 6/27/2011, 12/1/2011, and 12/2/2011
Additional Work Includes
1. Migratory Birds
a. Collect nocturnal migration data Via Radar
b. Weekly surveys from July-April 8hrs per day/4 consecutive days per week: for 40 weeks and 36 weeks of Point Count Transects
2. Burrowing Owl
a. Nocturnal survey
3. Bat Survey
a. 3 monitoring stations within the project area
b. 2 full year of Monitoring 2 Biologist for 2 days of equipment installation and 2 Biologists for 1 day of data collection and maintenance every 2 weeks

Jan 31, 2012

FWS issues clarifications to recommendations issued on 6/27/ 2011, 12/1/2011, 12/2/ 2011, and 12/16/2011
Additional Work Includes
1. Eagle Survey
a. additional clarification and emphasis on several items: earlier survey timing to note courtship and nest defense, carcass placement with fixed cameras, prey base evaluation, and ground surveys.

Feb 13, 2012

FWS increase scope of surveys
Additional Scope Includes
1. Increases scope for Migratory birds extending spring surveys into the month of May suggesting "missing of Migratory Pulses"

Jun 27, 2011
Dec 1, 2011
Dec 16, 2011
Jan 31, 2012
Feb 13, 2012

ATTACHMENT 2
TO APPLICANT'S MARCH 9, 2012 OPENING BRIEF (11-AFC-04)

	Activity	Applicant's Proposed Schedule	Compromise Schedule
1	AFC Filed	Oct 14, 2011	Oct 14, 2011
2	AFC Data Adequacy Determination	Dec 14, 2011	Dec 14, 2011
3	Workshop on Biological Resources – Bird/Bat Survey Protocol	Jan 6, 2012	Jan 6, 2012
4	Staff files Issues ID Report	Jan 25, 2012	Jan 25, 2012
5	Perfected POD (BLM)	Jan 2012	~~Feb~~ Mar 2012
6	NOI (30-day scoping period) (BLM)	Jan 2012	~~Feb~~ April 2012
7	Staff Files First Round of Data Requests	Jan 2012	Feb 3, 2012
8	CEC Informational Hearing and Site Visit and BLM Scoping Meeting	Jan 2012	Feb 1, 2012
9	Staff Files Subsequent Rounds of Data Requests and Applicant Submits Data Responses Series of Energy Commission Workshops to Discuss/Address Data and Issues.	-	Mar 2012
10	Applicant Conducts and Submits Requested Bird/Bat Survey Information	Feb 2012*	Feb 2012*
11	CEC/BLM Staff Data Request Workshop	Feb 2012	Mar 2012
12	Applicant Provides Data Responses	Mar 2012	Mar 2012
13	Plan Amendment Protest period ends	Mar 2, 2012	Q1 2012
14	Data Response and Issue Resolution Workshop	Apr 1, 2012	Apr 1, 2012
15	Administrative Staff Assessment (SA)/Draft Environmental Impact Statement (DEIS) to staff for review	May 1, 2012	May 1, 2012
16	BLM submits BA to USFWS (Start 135-day consultation)	~~Jul~~ Jun1, 2012	Jul 1, 2012
17	NOA of SA/DEIS in Federal Register	Jun ~~1~~ 8, 2012	Jun 1, 2012
18	PSA/DEIS filed (90-day comment period begins)	Jun ~~1~~ 8, 2012	Q3 2012
19	USFWS issues Draft Biological Opinion	July 1, 2012	
20	PSA Workshop/DEIS Public Meetings	~~Jun/~~July 2012	Q3 2012
21	USFWS issues Biological Opinion	Aug 1 2012	
22	FSA/FEIS distributed	~~Dec 1~~ Aug 8, 2012	Q1 2013
23	Close BLM comment period	Sep 1, 2012	Q4 2012
24	Prehearing Conference	~~Aug~~ Sept 3 2012	Q2 2012
25	Evidentiary Hearings	~~Aug~~ Sept 17 – 21, 2012	Q2 2012
26	Transcripts Released	Sept 28, 2012	
27	Committee files PMPD	~~Dec 1~~ November 19, 2012	Q1 2013

ATTACHMENT 2
TO APPLICANT'S MARCH 9, 2012 OPENING BRIEF (11-AFC-04)

	Activity	Applicant's Proposed Schedule	Compromise Schedule
28	Hearing on the proposed decision	Dec ~~14~~ 9, 2012	Q1 2013
29	Commission Issues Final Decision	Jan ~~14~~ 9, 2013	Q2 2013
30	NOA of FSA/FEIS in Federal Register	Jan 12, 2012	Q1 2013
31	BLM Record of Decision	Apr 12, 2013	Q2 2013

STATE OF CALIFORNIA

Energy Resources Conservation
and Development Commission

APPLICATION FOR CERTIFICATION for the RIO MESA SOLAR ELECTRIC GENERATING FACILITY	))))	Docket No. 11-AFC-04

PROOF OF SERVICE

I, Karen A. Mitchell, declare that on March 9, 2012, I served the attached *OPENING BRIEF OF RIO MESA I, LLC, RIO MESA II, LLC, and RIO MESA III, LLC* 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
11-AFC-04

APPLICANTS' AGENTS

BrightSource Energy, Inc.
Todd Stewart, Senior Director
Project Development
1999 Harrison Street, Suite 2150
Oakland, CA 94612
tstewart@brightsourceenergy.com

BrightSource Energy, Inc.
Michelle Farley
1999 Harrison Street, Suite 2150
Oakland, CA 94612
mfarley@brightsource.com

BrightSource Energy, Inc.
Brad DeJean
1999 Harrison Street, Suite 2150
Oakland, CA 94612
e-mail service preferred
bdejean@brightsourceenergy.com

APPLICANTS' CONSULTANTS

Grenier and Associates, Inc.
Andrea Grenier
1420 E. Roseville Parkway,
Suite 140-377
Roseville, CA 95661
e-mail service preferred
andrea@agrenier.com

URS Corporation
Angela Leiba
4225 Executive Square, Suite 1600
La Jolla, CA 92037
Angela_leiba@urscorp.com

COUNSEL FOR APPLICANTS

Ellison, Schneider, & Harris
Christopher T. Ellison
Brian S. Biering
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816-5905
cte@eslawfirm.com
bsb@eslawfirm.com

INTERESTED AGENCIES

Mojave Desert Air Quality Management District
Chris Anderson, Air Quality Engineer
14306 Park Avenue
Victorville, CA 92392-2310
canderson@mdaqmd.ca.gov

California ISO
e-mail service preferred
e-recipient@caiso.com

Bureau of Land Management
Cedric Perry
Lynnette Elser
22835 Calle San Juan De Los Lagos
Moreno Valley, CA 92553
cperry@blm.gov
lelser@blm.gov

INTERVENORS

Center for Biological Diversity
Lisa T. Belenky, Senior Attorney
351 California Street, Suite 600
San Francisco, CA 94104
e-mail service preferred
lbelenky@biologicaldiversity.org

Center for Biological Diversity
Ileene Anderson
Public Lands Desert Director
PMB 447, 8033 Sunset Boulevard
Los Angeles, CA 90046
e-mail service preferred
ianderson@biologicaldiversity.org

ENERGY COMMISSION – DECISIONMAKERS

Carla Peterman
Commissioner and Presiding Member
CPeterma@energy.state.ca.us

Karen Douglas
Commissioner and Associate Member
e-mail service preferred
kldougla@energy.state.ca.us

Kourtney Vaccaro
Hearing Adviser
e-mail service preferred
kvaccaro@energy.state.ca.us

Galen Lemei
Advisor to Commissioner Douglas
e-mail service preferred
glemei@energy.state.ca.us

Jennifer Nelson
Advisor to Commissioner Douglas
e-mail service preferred
jnelson@energy.state.ca.us

Jim Bartridge
Advisor to Commissioner Peterman
jbartrid@energy.state.ca.us

ENERGY COMMISSION STAFF

Pierre Martinez
Project Manager
pmartine@energy.state.ca.us

Lisa DeCarlo
Staff Counsel
e-mail service preferred
ldecarlo@energy.state.ca.us

Eileen Allen
Commissioners' Technical
Advisor for Facility Siting
e-mail service preferred
eallen@energy.state.ca.us

ENERGY COMMISSION – PUBLIC ADVISER

Jennifer Jennings
Public Adviser's Office
e-mail service preferred
publicadviser@energy.state.ca.us