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California Energy Commission <b>DOCKETED</b> <b>11-AFC-3</b>
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STATE OF CALIFORNIA  
State Energy Resources  
Conservation and Development Commission

In the matter of:

QUAIL BRUSH GENERATION PROJECT

No. 11-AFC-03

APPLICANT'S OPPOSITION TO  
MOTION BY INTERVENOR HOMEFED  
FANITA RANCHO, LLC TO EXTEND  
DISCOVERY PERIOD

On behalf of Quail Brush Genco, LLC (the "Applicant"), we respectfully submit this Opposition to Intervenor HomeFed Fanita Rancho, LLC's ("HomeFed's") Motion to Extend the Discovery Period (the "Motion") pursuant to California Code of Regulations, title 20, sections 1716 and 1716.5. HomeFed has not demonstrated good cause for needing to seek information from Applicant beyond the previously provided discovery period and accordingly, its motion should be denied. If the Committee believes that additional discovery may be warranted in this proceeding, we respectfully request that the Committee require the requesting Party to demonstrate the specific need for any additional requests it wishes to make and the reason why the request could not have been made previously. Any such future discovery request granted by the Committee should be expressly limited to topics addressed in filings made at or near the discovery period cutoff of October 31, 2012. Additionally, we request that any future extended

discovery period end no later than December 1, 2012, so as to avoid undue delay to the review of the Application for Certification (“AFC”) for the Quail Brush Generation Project (the “Project”).

## **I. BACKGROUND**

On November 16, 2011, the Commission deemed the Quail Brush AFC data adequate and thereby commenced the proceedings on the application. Pursuant to the Commission’s regulations, the first 180 days of the application proceedings constitutes the discovery period, where parties can seek information from the applicant that is reasonably available to the applicant and is relevant to the application proceedings or reasonably necessary to make any decision on the application. 20 CCR §1716. A Committee can allow additional data requests outside of the discovery period where good cause is shown. *Id.* Parties can seek to intervene in an AFC proceedings well beyond the 180-day discovery period. “However, as a general rule, those who choose to intervene after the 180-day period has expired do so at their own peril; they might be precluded from submitting requests for information unless they can show good cause why they should be allowed to submit requests later.” Committee Order on Intervenors’ Motion for Extension of Discovery Period (Docket No. 11-1FC-03).

On May 1, 2012, several Intervenors<sup>1</sup> requested that the Committee extend the discovery period for the Quail Brush proceedings, which was scheduled to close on May 14, 2012, to September 16, 2012. The Applicant objected to this motion because the Intervenors had failed to show good cause as to why the discovery period should be extended to September 16, 2012. Although the reasons presented by Intervenors in their request were inadequate, the Applicant agreed that an extension of the discovery period would be appropriate given that a project reconfiguration was then underway and that a supplement to the AFC, Supplement 3, would be submitted. The Applicant proposed that the discovery period be extended to 60 days following submittal of Supplement 3. *See Applicant’s Response to Motion to extend data request period* Docket No. 11-AFC-3.

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<sup>1</sup> The Motion for an Extension of the Discovery Period was submitted by Kevin Brewster on behalf of himself and intervenors Rosalind Varghese, Rudy Reyese, and Phil Connor/Sunset Greens Home Owners Association. As is noted below, HomeFed was not yet a party to the proceedings when this motion was filed.

The Committee issued an Order on the Intervenors' Motion for Extension of Discovery Period on May 14, 2012. The Committee denied the Intervenors' Motion, finding that the Intervenors had failed to explain the proposed September 16, 2012 deadline and further, had not explained why an extension in the City of San Diego's parallel proceeding, one of the claimed bases for the request, justified a need for additional time to get information from the Applicant in the AFC proceedings. The Committee agreed with Applicant's suggestion that additional discovery was appropriate given the impending submittal of the Supplement 3 to the AFC and ordered that the discovery period be extended until 60 days from the date the Applicant filed the AFC Supplement 3.<sup>2</sup> Following issuance of that Order, on June 14, 2012, HomeFed, filed a Petition to Intervene in the Quail Brush proceedings and were granted Intervenor status on July 5, 2012.

On August 31, 2012, the Applicant filed Supplement 3 to the AFC. Therefore, parties to the AFC proceeding had a right to request information from the applicant pursuant to Section 1716 until October 31, 2012. Pursuant to the Commission's regulations, any extension to this discovery period should only be granted if there is a showing of good cause.

## **II. HOMEFED HAS NOT ESTABLISHED GOOD CAUSE FOR THE REQUESTED EXTENSION**

HomeFed offers four generalized arguments to justify its request for a whole sale extension of the discovery period. As is described in detail below, however, none of these arguments supports a finding of good cause and the motion should therefore be denied in its entirety.

### **A. The Discovery Schedule Was Based on the Submission Date of the AFC Supplement 3**

HomeFed first argues that "the current scheduling order was based on the applicant's representation that it would submit Supplement #3 . . . on or before June 22, 2012" and the fact

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<sup>2</sup> The Applicant had also suggested that during the extended period, discovery should be limited to topics specifically addressed in Supplement 3 or in outstanding data requests. The Committee disagreed with this approach as it found that outstanding data requests and Supplement 3 covered a broad range of topics and that the proposed changes, which were then undefined, could indirectly affect other topics.

that the Applicant did not docket them until late August 2012, “alone, constitutes good cause to extend the discovery period by forty-five days.” Motion at 2. This argument is premised on a fundamental misunderstanding of the referenced scheduling order and is wholly lacking in merit. As is stated *clearly* in the May 14, 2012, Committee Order on Intervenors’ Motion for Extension of Discovery Period, this Committee based the deadline for the extended discovery period on the actual submittal of the AFC Supplement 3, not an anticipated submittal date. Specifically, the May 14th Order provides: “All parties in this matter may submit request for information in compliance with Sections 1716(b) and (d) *until 60 days from the date Applicant files AFC Supplement No. 3.*” Committee Order on Intervenors’ Motion for Extension of Discovery Period, p. 3 (emphasis added). Therefore, the fact that the actual submittal date for the AFC Supplement 3 was filed later than was originally anticipated is completely irrelevant to whether additional discovery time is needed. This factor clearly doesn’t constitute any cause for an extension, much less the good cause required under the Commission’s regulations.

**B. The Recent Filing of the Revised Alternatives Analysis Does Not Justify A Discovery Period Extension**

HomeFed suggests that the City’s denial of the request to consider the Project’s zone change application constitutes good cause to allow for late, unspecified, data requests. They fail, however, to explain the connection between the City’s action and any newly identified information that they believe they need to seek from the Applicant. Since at least September 24, 2012, when the San Diego City Council denied of the Applicant’s appeal of the Planning Commission’s decision not to initiate the Project’s Community Plan Amendment application, it should have been clear to all Parties in this proceeding that the Commission would need to make a LORS override finding in order to approve the Project. This means that all Parties have had nearly six weeks – at a minimum – to draft data requests to the Applicant concerning such issues. HomeFed has not advanced any arguments to suggest that it was unable to participate in the discovery process during this time or explained why it should be granted additional time to issue data requests regarding these issues now.

HomeFed provides no support for its suggestion that the Applicant's submittal of a revised alternatives analysis at the end of the discovery period necessitates additional, broad discovery. Notwithstanding HomeFed's argument to the contrary, the analysis of project alternatives is indeed "limited in scope." Information regarding the Project's specific qualities, impacts, or mitigation has been entered into the record prior to the filing of the revised alternatives analysis. The Intervenors have had ample opportunity to issue data requests regarding these aspects of the proposed Project, and should not use the alternative analysis as an excuse to re-explore these issues. If, after reviewing the revised alternatives analysis, the Intervenors identify specific information they need from the Applicant, they should be required to demonstrate to the Committee why such information is necessary to further develop the record. Unless or until HomeFed demonstrates a need for particular information which it could not have sought earlier, its request for an extension of the discovery period should be denied.

HomeFed's argument that a discovery extension is appropriate in part because "the applicant delayed the decision by the City of San Diego by at least 90-days" is unavailing. *See* Motion at 5. As this Committee has previously held with regard to another Intervenor's motion in this proceeding, the connection between the City's parallel process and the CEC discovery period is not clear. *See* Committee Order on Intervenors Motion for Extension of Discovery Period (noting that Intervenors had failed to explain how the City's process "impacts their ability to request information from the Applicant."). The procedural schedule before the City of San Diego is no more relevant now than it was in May. The issues regarding the necessity of the override have not changed in several months, and HomeFed and the other Intervenors have had ample time to develop the record in this regard.

**C. The Applicant's Responses to Data Requests and Workshop Questions Have Been Appropriate, and Do Not Justify a Discovery Period Extension**

HomeFed makes the novel and unsupported suggestion that because the Applicant has not *immediately* answered all questions posed to it, the discovery period should now be extended. The Applicant has worked diligently to answer all appropriate data requests from Staff and

Intervenors as soon as the Applicant acquires and analyzes the necessary information to answer the questions, and has complied with the regulatory time frames for responding to all data requests. The topics of the existing data requests have been known to all parties since their issuance, and the Intervenors could have requested additional information on these topics before the discovery deadline had such chosen to do so. Moreover, the line must be drawn somewhere. If every data request response could lead to a new round of data request issuances, the Intervenors' discovery process would never end.

HomeFed also seems to misunderstand the point of a public workshop process. As repeatedly explained by Mr. Solorio on October 3 and October 19, the workshops are intended for the Parties to discuss outstanding technical issues and work towards resolution of concerns. The Workshops are not meant to be the forum where the Applicant presents new information, nor is the Applicant required to have immediate answers for all questions posed to it. If HomeFed or another Intervenor wished to seek additional information relating to something discussed by the Applicant at a workshop, it has already had the opportunity to do so. If HomeFed now wishes to inquire further regarding information submitted at the end of the discovery period, it should first be required to demonstrate to the Committee that such additional information would meaningfully support the discovery process. Simply claiming that it will be "certain to have questions and data requests relating to" the information submitted on or about October 31, 2012, simply does not constitute good cause for extending the discovery period.

**D. HomeFed Has Had Sufficient Opportunity to Develop Evidence Regarding Project Economics and Feasibility**

HomeFed argues that the discovery period should be extended because it would like to further develop the record relating to project economics and feasibility. HomeFed avers that the need to research and assess a letter from SDG&E docketed on October 17, 2012 is a reason why the discovery period should be extended. Again, however, HomeFed has not explained what type of information it will need to seek from the Applicant or why it could not have sought that information during the past couple of weeks. HomeFed has not demonstrated a good cause for

needing additional time to seek information from the Applicant in this regard.

### **III. IF THE COMMITTEE ALLOWS FOR ADDITIONAL DISCOVERY, IT SHOULD BE LIMITED IN SCOPE AND IN TIMEFRAME**

If the Committee determines that some additional discovery is necessitated by the recent submittal of information on or near the end of the existing discovery period, the scope of the discovery should be limited. It is important to recognize that most of the materials submitted at the end of the discovery period did not concern entirely new information. Rather, they were expansions upon or updates of information that has already been in the record. Accordingly, the Intervenor has had ample opportunity to make data requests regarding the specific topics addressed in this information. Any additional discovery allowed should be limited to the specific information submitted during the last two weeks.

Further, HomeFed has not offered any explanation as to why the discovery period should be extended for 45 days. Given the limited nature of the new information submitted, the Applicant believes that such an extension could unjustifiably delay the AFC proceedings and could result in unnecessarily burdensome data requests. We therefore request that, in the event that the Committee grants an extension, it require that all requests for information be submitted on or before December 1, 2012.

### **IV. CONCLUSION**

HomeFed has not shown good cause as to why the discovery period in this AFC proceeding should be extended. Accordingly, its motion should be denied in its entirety.

Allowing the requested 45-day, unbounded discovery period extension could cause undue delay to the review of the Project's AFC, and would not meaningfully support the development of the evidentiary record. If HomeFed or another Intervenor wishes to seek further information of the Applicant, it should only be permitted to do so upon showing that the specific information could not have been sought at an earlier point and that the information sought is relevant to the proceedings or necessary for a decision on the AFC. The Intervenor should not be granted free reign to seek information or provide evidence on any topic that was available during the already-

extended discovery period concluding in October. In no instance should the Committee permit discovery to extend beyond December 1, 2012, so as to avoid significant negative impacts to the AFC review proceeding.

DATED: November 6, 2012

Bingham McCutchen LLP



By: \_\_\_\_\_

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**APPLICATION FOR CERTIFICATION FOR THE  
QUAIL BRUSH GENERATION PROJECT**

DOCKET NO. 11-AFC-03  
PROOF OF SERVICE  
(Revised 10/29/2012)

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**DECLARATION OF SERVICE**

I, Margaret Pavao, declare that on November 6, 2012, I served and filed copies of the attached APPLICANT'S OPPOSITION TO MOTION BY INTERVENOR HOMEFED FANITA RANCHO, LLC TO EXTEND DISCOVERY PERIOD, dated November 6, 2012. This document is accompanied by the most recent Proof of Service list, located on the web page for this project at: <http://www.energy.ca.gov/sitingcases/quailbrush/index.html>.

The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit or Chief Counsel, as appropriate, in the following manner:

(Check all that Apply)

For service to all other parties:

- Served electronically to all e-mail addresses on the Proof of Service list;
- Served by delivering on this date, either personally, or for mailing with the U.S. Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses marked \*"**hard copy required**" or where no e-mail address is provided.

AND

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- by sending an electronic copy to the e-mail address below (preferred method); OR
- by depositing an original and 12 paper copies in the mail with the U.S. Postal Service with first class postage thereon fully prepaid, as follows:

**CALIFORNIA ENERGY COMMISSION – DOCKET UNIT**  
Attn: Docket No. 11-AFC-03  
1516 Ninth Street, MS-4  
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OR, if filing a Petition for Reconsideration of Decision or Order pursuant to Title 20, § 1720:

- Served by delivering on this date one electronic copy by e-mail, and an original paper copy to the Chief Counsel at the following address, either personally, or for mailing with the U.S. Postal Service with first class postage thereon fully prepaid:

California Energy Commission  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, that I am employed in the county where this mailing occurred, and that I am over the age of 18 years and not a party to the proceeding.



\_\_\_\_\_  
Margaret Pavao