STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:

Application for Certification for the
Rio Mesa Solar Electric Generating Facility

Rio Mesa Solar I and II LLCs

Docket No. 11-AFC-04

RIO MESA SOLAR I, LLC AND RIO MESA SOLAR II, LLC RESPONSE TO CALIFORNIA ENERGY COMMISSION STAFF'S MOTION TO COMPEL PRODUCTION OF INCIDENTAL TAKE PERMIT APPLICATION

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STATE OF CALIFORNIA

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Rio Mesa Solar I, LLC and Rio Mesa Solar II, LLC, collectively referred to as "Applicant", provide this Response to "Energy Commission Staff's Motion to Compel Production of Incidental Take Permit Application ("Staff's Motion"). Staff filed its Motion on December 21, 2012.[1]

INTRODUCTION

Staff's Motion requests that the Committee compel the Applicant to submit an Incidental Take Permit ("ITP") Application. The decision of whether to seek incidental take protection rests with the Applicant, and there is no legal requirement for a developer to seek take protection as a precondition to development. Consequently, an ITP Application is not necessary to a Commission decision in this proceeding. Applicant requests that the Committee reject Staff's Motion to Compel an Incidental Take Permit Application.

[1] Concurrent with Staff's Motion, Staff also filed a Request for Extension of the Final Staff Assessment Filing Deadline. On January 2, 2013, Chief Hearing Officer Kramer extended the deadline to respond to Staff's Request for Extension until January 22, 2013. Applicant intends to file its response to Staff's Request for Extension on January 22, 2013.

DISCUSSION

1. The Decision To Seek Incidental Take Protection Rests With The Applicant.

The California Endangered Species Act ("CESA") prohibits the take of endangered and threatened species.[2] If take occurs, the remedy under CESA is enforcement through criminal and civil penalties.[3] An individual or entity may avoid the risk of these penalties by seeking an ITP,[4] but, nothing in the law requires an individual or entity to seek an ITP as a precondition to development. In other words, the decision of whether to seek take protection is a decision that, as a matter of law, rests entirely with the project owner/operator. Staff cites no authority suggesting that an ITP (or an application for an ITP) is a licensing requirement for this Project. That is because there is no such requirement *regardless of the threat of a take of a listed species*. A project owner/operator that elects to forgo the protection from penalties afforded by an ITP is legally entitled to do so at its own risk.

Under the Warren Alquist Act, if an applicant chooses to seek take protection, the determination of compliance with Fish and Game Code Section 2081(b) (i.e., the statute setting forth the requirements for an ITP) would be made by the Energy Commission. The Commission would determine whether to authorize incidental take of an endangered or threatened species that an applicant chooses to seek take protection. This is consistent with the approach the Commission took for compliance with the federal Endangered Species Act in the Oakley Generating Station siting case. There, Staff's Opening Brief argued that:

> Staff has demonstrated that the potential adverse impact from the small amount of nitrogen deposition that is possible from the operation of Oakley Generating Station does not constitute a "take." Additionally, there is no

[2] Cal. Fish and Game Code Sec. 2080.
[3] Cal. Fish and Game Code Secs. 702, 12002, 12003.1; Cal. Penal Code Secs. 653o – 653r
[4] Cal. Fish and Game Code Sec. 2081

> evidence that any incidence of "take" could be attributable to the project. Second, although the United States Fish and Wildlife Service is *recommending* a take permit under either section 7 or section 10, there is no federal nexus to the project; therefore, the Applicant could not obtain a section 7 permit. Staff notes that the Applicant *may elect* to obtain a section 10(a) permit post-certification of the project, and in the absence of one, it would be the responsibility of the Service to enforce non-compliance with the federal ESA given the position of the Service that a take permit is required."[5] (emphasis added)

The Final Decision for the Oakley Generating Station did not require the applicant to seek an incidental take permit.[6] In sum, an applicant has the sole discretion of whether to seek take protection, and on that basis Staff's Motion should therefore be dismissed.

2. <u>Staff's Motion To Compel Production Of An Incidental Take Permit Application Does Not Meet the Requirements For Obtaining Information From An Applicant.</u>

Section 1716 of the Commission's regulations sets forth the requirements for obtaining information from an applicant:

> Any party may request from the applicant any information reasonably available to the applicant which is relevant to the . . . application proceedings or reasonably necessary to make any decision on the. . . application.[7]

[5] See 09-AFC-04, Energy Commission Staff's Opening Brief, p. 9, available at: http://www.energy.ca.gov/sitingcases/oakley/documents/2011-03-30_Oakley_Generating_Station_Opening_Brief.pdf

[6] See 09-AFC-04, Final Commission Decision, CEC-800-2011-002-CMF, Environmental Assessment, P. 20., available at: http://www.energy.ca.gov/2011publications/CEC-800-2011-002/CEC-800-2011-002-CMF.pdf

[7] 20 C.C.R. § 1716(b).

Pursuant to Section 1716, a party may request from the applicant information that is *reasonably available* to it. Section 1716 does not require that the applicant "perform research or analysis on behalf of the requesting party."[8] In evaluating whether a data request involves "discoverable information" or "undiscoverable analysis or research", the Commission considers four factors: (1) the relevance of the information; (2) whether the information is available to the applicant, or from some other source, or whether the information has been provided in some other form; (3) whether the request is for data, analysis, or research; and (4) the burden on the applicant to provide the data.[9]

An ITP Application is not necessary to make a decision on this application for certification because (as discussed above) seeking an ITP is a voluntary matter within the Applicant's discretion. An ITP Application cannot be required and will not provide any relevant information to a Commission decision in this proceeding that is not otherwise available in the record. In light of the fact that producing an ITP Application is not necessary to a Commission decision, producing an ITP Application will be burdensome. For these reasons, Staff's motion to compel an ITP Application does not meet the requirements of Section 1716 of the Commission's Regulations, and the Commission should reject the Staff's Motion.

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[8] *See* Committee Ruling on Intervenor Center for Biological Diversity's Petition to Compel Data Requests, Docket No. 07-AFC-6 (Dec. 26, 2008).
[9] *See* Committee Ruling on Intervenor Center for Biological Diversity's Petition to Compel Data Requests, Docket No. 07-AFC-6 (Dec. 26, 2008).

CONCLUSION

For the reasons set forth above, Staff's Motion to compel an ITP Application should be denied.

Dated: January 7, 2013

Respectfully submitted,

ELLISON, SCHNEIDER & HARRIS L.L.P.

By _____

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APPLICATION FOR CERTIFICATION
FOR THE *RIO MESA SOLAR*
ELECTRIC GENERATING FACILITY

DOCKET NO. 11-AFC-04
PROOF OF SERVICE
(Revised 11/2/12)

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DECLARATION OF SERVICE

I, Deric J. Wittenborn, declare that on, January 07, 2013, I served and filed copies of the attached "Rio Mesa Solar I, LLC and Rio Mesa Solar II, LLC (11-AFC-04) Response to California Energy Commission Staff's Motion to Compel Production of Incidental Take Permit Application", dated January 7, 2013. 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/riomesa/index.html].

The document has been sent to the other parties in this proceeding (as shown on the attached 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:

_X_ Served electronically to all e-mail addresses on the Proof of Service list;

_X_ 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

For filing with the Docket Unit at the Energy Commission:

_X_ by sending electronic copies to the e-mail address above; *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-04
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.ca.gov

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:

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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.

Deric J. Wittenborn