

CALIFORNIA ENERGY COMMISSION

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ENERGY COMMISSION STAFF
MOTION FOR SUBPOENA DUCES TECUM
and
MOTION FOR EXTENSION OF TIME FOR REBUTTAL TESTIMONY
or, IN THE ALTERNATIVE,
MOTION TO STRIKE TESTIMONY

California Energy Commission

DOCKETED
11-AFC-02

TN # 69357

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I. SCOPE OF SUBPOENA DUCES TECUM

Energy Commission staff (Staff) requests that the Hidden Hills Presiding Member issue a subpoena duces tecum pursuant to its authority under Title 20 of the California Code of Regulations, Sections 1203(b) and 1204(a). The subpoena should include the following:

1. Attendance and participation at the noticed February 11, 2013, workshop by Mr. Gary Santolo, the purported author of testimony for Brightsource Energy (Brightsource) on experiments conducted on avian impacts from solar flux exposure at Brightsource's SEDC solar energy generating facility in Dimona, Israel in July 2012 (the "SEDC Flux study");
2. All written instructions, directions, or requests from Brightsource regarding the purpose of the SEDC Flux study and any other study conducted at the SEDC facility and the research questions that such studies were intended to address;
3. All notes taken by Mr. Santolo or others who assisted him regarding such studies;
4. All pictures taken of the dead birds that were the subject of such studies;
5. All data regarding temperatures recorded on the dead birds used in such studies at the start of, during, and at the end of flux exposure;
6. All data regarding thermal levels on or in the dead birds used in such studies as they varied over the full time measured by the thermal couples, and;
7. All documents responsive to Energy Commission Staff Data Request Set 3, issued October 26, 2012 (including but not limited to Request Numbers 200, 201, 202(a) – (e) and (s)) that have not been previously produced.

II. NECESSITY FOR THIS SUBPOENA

An important issue in this proceeding is the hazard to birds, and perhaps insects and bats, from “solar flux” generated as a by-product of the “power tower” technology. Brightsource contends in testimony that the hazard is negligible, and the centerpiece of its evidence is the SEDC Flux Study.

Staff has significant questions about that study, both conceptual and practical. The study involved hanging dead birds off a small (in comparison to the proposed facility) power tower in Israel and subjecting them to solar flux from mirrors in this experimental subscale power tower project. The questions for which Staff seeks answers pertain to the research purposes that define the study, the information that it generated, and the specific manner in which the study was conducted. The information in the study itself suggests that not all information regarding the study and the results has been provided. Moreover, Staff has many questions regarding the scientific rigor employed that would be necessary for the study to provide meaningful and reproducible results.

Staff has unsuccessfully pursued answers from Mr. Santolo regarding the study since it was introduced at a workshop on August 28, 2012. Staff did not see the study prior to that workshop, and was therefore unable to ask important questions at that workshop germane to the experiment. Staff filed Data Requests Set 3 on October 26, 2012, and assumed that it would have ample opportunity to follow up such requests with workshop discussions on its questions subsequent to receiving responses.

Brightsource provided responses to these data requests on November 21, 2012. Some of the filed information was responsive to the data requests, but many answers were partial or not responsive, and other answers suggested that data that staff believes is important had not been provided.

Staff prepared its follow-up questions for Mr. Santolo for a December 5, 2012, workshop that followed the data response filing. Staff was told by Brightsource representatives that Mr. Santolo would attend the workshop to answer its questions. However, Mr. Santolo inexplicably did not appear at the workshop. Brightsource offered to produce him at a later workshop, or even at a continuation until later in the week of the December 5 workshop. However, Brightsource representatives stated that Mr. Santolo reportedly had a conflict that prevented him from attending such a continued workshop during the week.

Mr. Santolo’s non-appearance produced much discussion at the December 5 workshop. At one point Brightsource representatives offered to take Staff’s questions back to Mr. Santolo to get responses. Intervenor Center for Biological Diversity told Staff that it wanted a workshop, and Staff suggested a future workshop. Brightsource stated that it would provide Mr. Santolo at a future workshop.

A workshop on solar flux where this might have occurred was tentatively scheduled with Brightsource for January 31, 2013; it was to be a combined workshop for both the Rio Mesa proceeding and the Hidden Hills proceeding regarding solar flux issues. However,

the workshop notice was never issued because of the abrupt and unexpected suspension of the Rio Mesa project.

Staff and other parties still have unanswered questions about the flux experiment, and want Mr. Santolo to answer them in a meeting where follow-up questions can be asked by Staff and other interested parties. This is how workshops provide parties discovery and are useful. This discovery is now being denied to Staff (and other parties). Mr. Santolo has not appeared to discuss his study since the August 28, 2012, workshop at which it was presented for the first time.

Brightsource now states that it may not make Mr. Santolo available for any workshop, and that Staff should be limited to getting its questions answered at the evidentiary hearings. This is objectionable for multiple reasons. First, it makes it impossible for Staff to evaluate the study in its rebuttal testimony. Second, it ignores that the Staff wants actual physical data, including notes, pictures, and study results that it believes have not been produced, and have not been offered as evidence by Brightsource. Staff believes these materials may be critical to determining whether the study is meaningful. Third, it will require the potential waste of hours of precious evidentiary hearing time while Staff seeks to do “discovery” through cross-examination of material that should have been provided well in advance of the hearings. This is a subversion of the discovery and hearing process.

Staff is disappointed in Brightsource’s recalcitrance. Staff has made extra efforts to be transparent with regard to its analysis, even providing information about its solar flux modeling results, and an opportunity for Brightsource to question the authors of the Final Staff Assessment (FSA) on such results, *before* the FSA was produced, and without requiring Brightsource to file a single data request. Staff even scheduled a meeting on or about November 14, 2012, with Brightsource representatives to allow them to ask questions about the staff analysis, because Brightsource wanted such an opportunity more quickly than scheduling a workshop would allow, before Staff published the FSA.

Brightsource’s failure to provide Mr. Santolo at a workshop to answer questions and provide the additional information described above indicates a troubling lack of reciprocity on this matter. For this reason, and with great reluctance, Staff has concluded that it must seek to obtain this important information with the subpoena duces tecum described above.

III. ISSUING THE SUBPOENA WILL PRESERVE THE SCHEDULE AND AVOID WASTED TIME AT THE EVIDENTIARY HEARINGS.

Brightsource’s cooperation with the terms of the requested subpoena should not change the hearing schedule. By this filing Staff requests that it and other parties be granted four additional days to file any rebuttal testimony, restricted only to the information regarding the flux study, with such filings due February 15, 2013. All other rebuttal testimony would continue to be due on February 11, 2013, as currently scheduled. Hearing dates would be unchanged.

The power of agencies to subpoena witnesses is an inherent state agency power in adjudicatory hearings, as reflected in both the Commission's regulations and the California Administrative Procedure Act. (See, e.g. Govt. Code, section 11450.05.) Failure to comply would be defiance of the law and the authority of the adjudicating body. Staff assumes that Brightsource will comply with any Commission subpoena. However, should it fail to do so, Staff moves that the Commission strike the testimony in the SEDC Flux Study and not allow it to be submitted to the evidentiary record.

IV. CONCLUSION

The information identified in this motion is necessary and appropriate under the Energy Commission's mandates to, among other things, obtain information reasonably necessary to make a decision on an application for certification of a proposed facility (Pub. Resources Code section 25519, subd. (b)), evaluate applications for proposed facilities for the public convenience and necessity, and ensure specific provisions are included in decisions on applications for certification relating to the manner in which the proposed facility is designed, sited and operated in order to protect environmental quality and assure public health and safety (Pub. Resources Code section 25523, subd. (a)).

The Hidden Hills Presiding Member should issue an order issuing an administrative subpoena duces tecum directing Brightsource to produce Mr. Santolo and the requested information specified herein at the offices of the Energy Commission at 9:00 a.m. February 11, 2013. The order should also grant Energy Commission Staff and all other parties four additional days to file any rebuttal testimony, restricted only to the information regarding the solar flux studies referenced herein, with such filings due February 15, 2013. The order should also state that if Brightsource does not produce Mr. Santolo or the information requested herein, all Brightsource testimony related to the SEDC Flux Study is stricken and may not be submitted to the evidentiary record herein.

V. DECLARATION

I declare, under penalty of perjury of the laws of the State of California, that the foregoing is true and correct.

Executed on February 1, 2013, in Sacramento, California.



Richard C. Ratliff, Staff Counsel IV
Pippin C. Brehler, Senior Staff Counsel
Kerry Willis, Senior Staff Counsel
California Energy Commission

**[PROPOSED] ORDER ISSUING
SUBPOENA DUCES TECUM
and
EXTENDING TIME FOR REBUTTAL TESTIMONY
or, IN THE ALTERNATIVE,
STRIKING TESTIMONY**

For the reasons stated in the Energy Commission Staff's *Motion for Subpoena Duces Tecum and Motion for Extension of Time for Rebuttal Testimony*, or, in the alternative, *Motion to Strike Testimony*, filed herein February 1, 2013, the Hidden Hills Presiding Member hereby adopts this Order issuing an administrative subpoena duces tecum directing Brightsource to produce Mr. Santolo and the requested information specified herein at the offices of the Energy Commission at 9:00 a.m. on February 11, 2013.

Energy Commission Staff and all other parties are hereby granted four additional days to file any rebuttal testimony, restricted only to the information regarding the flux studies referenced herein, with such filings due February 15, 2013.

If Brightsource does not produce Mr. Santolo or the information requested herein, all Brightsource testimony related to the SEDC Flux Study is stricken and may not be submitted to the evidentiary record herein.

All other aspects of the Notice of Prehearing Conference and Evidentiary Hearing and Order, dated December 21, 2012, remain unchanged.

Dated:

KAREN DOUGLAS
Commissioner and Presiding Member
HHSEGS AFC Committee