



FILED

02-10-11
04:59 PM

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Southern California Edison
Company (U 338-E) For A Certificate of Public
Convenience and Necessity for the Eldorado-
Ivanpah Transmission Project

Application 09-05-027

(Filed May 28, 2009)

**RESPONSE OF BRIGHTSOURCE ENERGY, INC. AND
FIRST SOLAR, INC. TO APPLICATIONS FOR REHEARING
OF DECISION 10-12-052 OF WESTERN WATERSHEDS PROJECT
AND CENTER FOR BIOLOGICAL DIVERSITY**

Christian L. Marsh
David M. Ivester
Briscoe Ivester & Bazel LLP
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Telephone: (415) 402-2700
Facsimile: (415) 398-5630
Email: cmarsh@briscoelaw.net

Joseph M. Karp
Thomas W. Solomon
Winston & Strawn LLP
101 California Street, 39th Floor
San Francisco, California 94111-5894
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
Email: jkarp@winston.com
tsolomon@winston.com

*Attorneys for BrightSource Energy, Inc.
and First Solar, Inc.*

*Attorneys for BrightSource Energy, Inc. and
First Solar, Inc.*

February 10, 2011

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of Southern California Edison
Company (U 338-E) For A Certificate of Public
Convenience and Necessity for the Eldorado-
Ivanpah Transmission Project

Application 09-05-027

(Filed May 28, 2009)

**RESPONSE OF BRIGHTSOURCE ENERGY, INC. AND
FIRST SOLAR, INC. TO APPLICATIONS FOR REHEARING
OF DECISION 10-12-052 OF WESTERN WATERSHEDS PROJECT
AND CENTER FOR BIOLOGICAL DIVERSITY**

I. INTRODUCTION

Pursuant to Rule 16.1(d) of the Rules of Practice and Procedure (“Rules”) of the California Public Utilities Commission (“CPUC” or “Commission”), BrightSource Energy, Inc. (“BrightSource”) and First Solar, Inc. (“First Solar”) (collectively, the “Solar Developers”) respectfully submit this response to the Applications for Rehearing of Decision 10-12-052 (“Decision”) filed by Western Watersheds Project (“WWP”) and Center for Biological Diversity (“CBD”) in this proceeding.

The combination of California’s ambitious Renewables Portfolio Standard (“RPS”) goals¹ and the strict timing for completion of development milestones established for projects seeking federal stimulus funds² has created an environment for renewable energy project

¹ Pursuant to California Public Utilities Code Section 399.11, *et seq.*, the State’s investor owned utilities have a procurement target of twenty percent (20%) of their retail load by 2010. Pursuant to Executive Order S-21-09, this procurement target has been increased to thirty-three percent (33%) by 2020.

² Renewable energy projects seeking federal stimulus funds are subject to strict timelines for achieving development milestones. For example, eligibility for the United States Department of Energy loan guarantee program (“DOE Loan Guarantee”) requires that projects commence construction by September 30, 2011. Energy Policy Act Section 1705; *see also* http://lpo.energy.gov/?page_id=41. Similarly, to be eligible for the cash grant in lieu of tax credits, a project must be placed in service prior to the end of 2011, or commence construction prior to the end of 2011 and be placed in service prior to the expiration of the underlying tax credit applicable to the specified energy property utilized by the project. *See* U.S. Treasury Department, “Payments for Specified Energy in Lieu of Tax Credits under the American Recovery and Reinvestment Act of 2009” § IV.A (available at <http://www.treasury.gov/initiatives/recovery/Documents/guidance.pdf>).

development in which time is of the essence. BrightSource’s Ivanpah projects (“ISEGS”), which are expected to interconnect to the Eldorado-Ivanpah Transmission project (“EITP”) pursuant to executed and approved Large Generator Interconnection Agreements (“LGIA”), are subject to these new stimulus fund timing constraints.³ Given these constraints, it is imperative that the Commission review and rule upon the Applications for Rehearing filed by CBD and WWP on an expedited basis to avoid exacerbating already significant impediments to project development.

The standards applicable to the Commission’s review of an application for rehearing are straight-forward. California Public Utilities Code Section 1732⁴ and Commission Rule 16.1(c) make clear that applications for rehearing are a means to remedy a specific legal error on the part of the Commission.⁵ Applicants for rehearing may not ask the Commission to reweigh evidence,⁶ re-litigate issues resolved in the proceeding,⁷ nor dispute the Commission’s decisions of policy, as the Commission has repeatedly explained that policy arguments have no place in an application for rehearing.⁸ As the Commission recently emphasized, “[t]he fact that there is

³ Transcript, Vol. I., pp. 28:26-30:21.

⁴ All statutory references are to the Public Utilities Code unless otherwise stated.

⁵ Cal. Pub. Util. Code § 1732 (“The application for rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful”); California Public Utilities Commission Rule of Practice and Procedure 16.1(c) (“The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously”).

⁶ See, e.g., Application of Southern California Gas Company for Approval of Advanced Metering Infrastructure, Decision 10-11-036 at 9 (rejecting an application for rehearing in which the applicants argued the evidence “was based on wild speculation” as the Commission explained “[t]his argument constitutes no more than an improper request for us to reweigh the evidence, and thus, a relitigation of a fiercely debated issue”; also quoting Decision 00-11-042 for the proposition that “[t]he Commission need not explain in minute detail why it credits some evidence and discredits others” and ultimately concluding that the applicants’ request neither raised legal error nor met the purpose of an application for rehearing).

⁷ See Re Southern California Edison, Decision 10-03-023, 2010 WL 989921 at *7 (Cal.P.U.C.) (“Transphase merely attempts to relitigate whether its proposal is cost-effective and submit new evidence in its application for rehearing. Neither is proper or permissible in an application for rehearing.”).

⁸ See Application of Ponderosa Telephone Company for Rehearing of Resolution T-17132, Decision 10-05-052 at 9 (rejecting the applicant’s allegation that the Resolution “represents an unfortunate departure from the spirit of employee protection laws and the Commission’s stated policy” on the grounds that “[t]his policy argument as no place in an application for rehearing, which should raise allegations of legal error”); see also Re Review Policies Concerning Intrastate Carrier Access Charges, Decision 08-02-037, 2008 WL 2089430 at *2 (Cal.P.U.C.) (rejecting the request in an application for rehearing that the Commission insert an ordering paragraph providing that “a

disagreement or contrary evidence on a holding does not indicate any legal error in the Decision.”⁹

The Solar Developers have reviewed the Applications for Rehearing filed by CBD and WWP. Contrary to the requirements of Section 1732 and Commission Rule 16.1(c), both Applications for Rehearing ask the Commission to reweigh evidence, revisit policy determinations, or re-litigate issues that have already been presented to the Commission and resolved in the Decision on the basis of substantial evidence in the record, with the exception of a single new issue relating to the newly proposed Mountain Pass Lateral, a natural gas lateral pipeline proposed by the Kern River Gas Transmission Company (“Kern River”).¹⁰ The Commission should expeditiously reject both Applications for Rehearing because:

(A) CBD’s assertion that the Commission erred in finding the EITP to be needed is wrong because (1) CBD fails to specify any legal error committed by the Commission in finding the EITP to be needed, and (2) the Commission’s determination of need is based on existing law and substantial evidence in the record;

competitive local exchange carrier shall charge an interexchange carrier only for functions it provides to the interexchange carrier” on the grounds that “[i]t is obvious that the issue Qwest raises is a policy issue, not an allegation of legal error”); *see also* Re Pacific Bell, Decision 03-02-073, 2003 WL 1338092 at *5 (Cal.P.U.C.) (rejecting an argument posed in an application for rehearing that requiring excess earnings of a directory affiliate to be included in sharing ‘contradicts the essence’ of the New Regulatory Framework on the grounds that this is “entirely a policy argument and appears to be similar to that which [the applicant] pursued during the hearing” and explaining that “[a]pplications for rehearing of Commission decisions specifically provide an opportunity to present the Commission with allegations of legal error within a challenged decision, not with policy arguments”).

⁹ Decision 09-07-024 at 2.

¹⁰ Indeed, CBD readily admits that it is re-litigating earlier positions, stating that “[n]othing in the final Decision adopted by the Commission cured the many shortcomings in the CEQA review identified by [CBD]” and seeking to incorporate by reference earlier pre-Decision briefing and comments rather than identifying specific instances of legal error as required by Section 1732 and Commission Rule 16.1(c). *See* CBD Application for Rehearing at 6.

(B) the Environmental Impact Report/Environmental Impact Statement (“EIR/EIS”) properly excluded the recently proposed Mountain Pass Lateral project from its cumulative impacts analysis; and

(C) the EITP EIR/EIS complies with the California Environmental Quality Act (“CEQA”).

Each of these conclusions is described in greater detail below.

II. BACKGROUND

On May 28, 2009, Southern California Edison Company (“SCE”) submitted Application 09-05-027. In it, SCE requested that the Commission (1) issue a Certificate of Public Convenience and Necessity (“CPCN”) for the EITP and (2) provide an order explicitly establishing that, pursuant to Section 399.2.5, SCE can recover through Commission-jurisdictional rates all prudently-incurred EITP costs that are not recovered in Federal Energy Regulatory Commission (“FERC”) jurisdictional rates.

On June 22, 2009, the Assigned ALJ issued the *Administrative Law Judge's Ruling Requiring Amended Application*, which required SCE to resubmit its application with additional cost detail. SCE submitted the Application on September 22, 2009, in compliance with this ruling.

A prehearing conference was held on December 2, 2009. Hearings were held on August 9-10, 2010. Opening Briefs were filed on August 27, 2010. Reply Briefs were filed on September 10, 2010.

On November 15, 2010, Administrative Law Judge (“ALJ”) DeAngelis issued a *Proposed Decision Denying a Certificate of Public Convenience and Necessity for the Eldorado-Ivanpah Transmission Project* (“Proposed Decision”) and Commissioner Peevey issued an *Alternate Proposed Decision Granting a Certificate of Public Convenience and Necessity for the Eldorado-Ivanpah Transmission Project* (“Alternate Proposed Decision”). Comments on the Proposed Decision and Alternate Proposed Decision were filed on December 6, 2010, and Reply Comments were filed on December 13, 2010.

On December 27, 2010, the Commission issued the Decision, which granted SCE’s application for a CPCN for the EITP.

III. ARGUMENT

A. The Commission Should Reject CBD’s Assertion That The Commission Erred In Finding A Need For The EITP

In its Application for Rehearing, CBD states that “[t]he Commission erred in finding and concluding that the EITP is needed” and that “[t]hese errors could have been avoided had the Commission adopted the ALJ’s Proposed Decision.”¹¹

CBD’s assertion that the Commission erred in finding a need for the EITP is wrong because (1) CBD fails to specify any legal error committed by the Commission in finding the EITP to be needed, and (2) the Commission’s determination of need is based on existing law and substantial evidence in the record.

¹¹ CBD Application for Rehearing at 4.

1. CBD fails to specify any legal error committed by the Commission in finding the EITP to be needed.

The Commission should reject CBD's assertion that the Commission erred in finding the EITP to be needed because CBD fails to specify any legal error committed by the Commission in making this determination. Section 1732 and Rule 16.1(c) require an applicant for rehearing, such as CBD, to "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." Notwithstanding these clear instructions, CBD's assertion that the "[t]he Commission erred in finding and concluding that the EITP is needed" consists of little more than a summary of the Proposed Decision, CBD's opinion that the Proposed Decision reached the correct conclusion, a vague assertion that the Commission "unlawfully disregarded alternative transmission", and a complaint that the Commission viewed projects with RPS contracts and interconnection queue positions differently for purposes of its Section 399.2.5 need analysis and its environmental review.¹² While CBD does close its analysis of the Commission's finding of need for the EITP with a naked statement that the Decision is not supported by the evidence in the record, it makes this bold assertion without a single citation to the record.¹³

Rather than providing "specifically the ground or grounds on which the applicant considers the decision or order to be unlawful," CBD attacks the Decision's finding of need for the EITP because CBD thinks the Proposed Decision reached the "right" result.¹⁴ CBD has already been afforded, and taken advantage of, the opportunity to advocate for adoption of the Proposed Decision on two occasions, through Comments and Reply Comments on the Proposed Decision. The Commission already considered the Proposed Decision and CBD's comments in

¹² CBD Application for Rehearing at 4-5.

¹³ *Id.* at 5.

¹⁴ *Id.* ("These errors could have been avoided had the Commission adopted the ALJ's Proposed Decision").

support thereof, and the Commission addressed and resolved CBD's comments in the Decision.¹⁵ Specifically, the Commission rejected CBD's claims about "alternative transmission," noting that CBD's claims were based on evidence outside the record and that CBD's approach would introduce "substantial uncertainty" in the interconnection process.¹⁶ Likewise, the Commission rejected CBD's claim that the Commission inappropriately viewed projects with RPS contracts and interconnection queue positions differently for purposes of its Section 399.2.5 need analysis and its environmental review, noting that the standard for determining need under Section 399.2.5 is not equivalent to the standard for inclusion in the whole of the action in the environmental context.¹⁷ Because CBD's Application for Rehearing simply seeks to re-litigate these issues, it should be rejected.¹⁸

To be blunt, CBD's continuing disagreement with the result reached by the Decision is not grounds for rehearing. As the Commission has previously explained, "[t]he fact that there is disagreement or contrary evidence on a holding does not indicate any legal error in the Decision."¹⁹ As such, CBD has failed to claim, much less demonstrate, legal error, and the Commission should reject CBD's Application for Rehearing.

2. Contrary To CBD's Claims, The Commission's determination of need is based on existing law and substantial evidence in the record.

Even if CBD had articulated a claim of legal error, such a claim would be without merit because the Commission's determination of need for the EITP is based on existing law and

¹⁵ Decision at 48-57.

¹⁶ *Id.* at 52-53.

¹⁷ *Id.* at 56-57.

¹⁸ *See Re Southern California Edison*, Decision 10-03-023, 2010 WL 989921 at *7 (Cal.P.U.C.) ("Transphase merely attempts to relitigate whether its proposal is cost-effective and submit new evidence in its application for rehearing. Neither is proper or permissible in an application for rehearing.")

¹⁹ Decision 09-07-024 at 2.

substantial evidence in the record. As such, the Commission should reject CBD's argument that the Commission's finding of need constitutes grounds for rehearing.

The Commission's determination of need is based on existing law. Section 399.2.5 provides that an application for a CPCN for new transmission facilities "shall be deemed to be necessary to the provision of electric service . . . if the commission finds that the new facility is necessary to facilitate achievement of the renewable power goals" set forth in the Public Utilities Code.²⁰ In Decision 07-03-012, the Commission established a three-prong test for applying Section 399.2.5 to determine need for a project. Specifically, the proponent:

"must demonstrate: (1) that a project would bring to the grid renewable generation that would otherwise remain unavailable; (2) that the area within the line's reach would play a critical role in meeting the RPS goals; and (3) that the cost of the line is appropriately balanced against the certainty of the line's contribution to economically rational RPS compliance."²¹

The Commission applied this three-prong test for need to the EITP and concluded, based on substantial evidence in the record, that the EITP is needed.²²

(a) The EITP will bring to the grid renewable generation that would otherwise remain unavailable.

The first prong of the Commission's test requires a demonstration "that a project would bring to the grid renewable generation that would otherwise remain unavailable."²³ In this proceeding, the record demonstrates that existing interconnection capability of the California Independent System Operator Corporation ("CAISO") operated transmission system in the

²⁰ Cal. Pub. Util. Code § 399.2.5.

²¹ D. 07-03-12 at 16.

²² Decision at Conclusion of Law 12.

²³ See D.09-12-044.

Ivanpah Dry Lake Area is currently only 80 MW²⁴ and there are RPS contracts representing approximately 727 MW of renewable generation proposing to interconnect to the CAISO grid that have been executed by SCE and Pacific Gas and Electric Company (“PG&E”) and approved by the Commission.²⁵ The record also reflects that the CAISO has confirmed that the EITP is required to deliver these resources to the CAISO grid.²⁶ While CBD continues to suggest that the Commission should consider available capacity on non-CAISO transmission systems, the Commission has already determined that such an analysis would require a level of coordination that exceeds the Commission’s authority and is not required for determining whether a transmission project is “necessary to facilitate” the State’s renewable energy goals under Section 399.2.5.²⁷ This standard for determining need under Section 399.2.5 differs from the standard for determining whether a given project should be included as a related project for environmental review, but, as the Decision notes, “no such equivalency is required.”²⁸ Thus, based on substantial evidence demonstrating the need for expansion of the CAISO grid to deliver renewable energy from projects with Commission-approved contracts, the Commission concluded that EITP meets the first prong of the three-prong test.²⁹

(b) The area within the EITP’s reach will play a critical role in meeting the RPS goals.

The second prong of the Commission’s test requires a demonstration “that the area within the line’s reach would play a critical role in meeting the RPS goals.”³⁰ Here, the record demonstrates that (i) there are Commission-approved RPS contracts for approximately 727 MW

²⁴ Exhibit SCE-005, SCE Rebuttal Testimony in Response to DRA Direct Testimony, at Section A., p. 8:22-24.

²⁵ Exhibit SCE-008, Amendment to SCE Rebuttal Testimony in Response to DRA Direct Testimony, at Table II-1; Resolution E-4261; Resolution E-4266; Resolution E-4347.

²⁶ DRA Exhibit C-302-A.

²⁷ *Id.* at 52-53.

²⁸ *Id.* at 56.

²⁹ Decision at 31.

³⁰ D. 07-03-12 at 16.

of renewable generation proposing to interconnect to the EITP,³¹ (ii) the CAISO interconnection queue includes approximately 964 MW of renewable resources already under development that intend to interconnect to the EITP in addition to the projects with Commission-approved RPS contracts,³² and (iii) the Renewable Energy Transmission Initiative (“RETI”) Phase 2B Final Report shows that there is an estimated 958 MW of potential renewable generation in the Mountain Pass Competitive Renewable Energy Zone (“CREZ”)³³ and an additional 5,042 MW in the Nevada-Southwest area.³⁴ Based on this substantial evidence, the Commission concluded that EITP meets the second prong of the three-prong test.³⁵

(c) The cost of the EITP is appropriately balanced against the certainty of the EITP’s contribution to economically rational RPS compliance.

The third prong of the Commission’s test requires a demonstration “that the cost of the line is appropriately balanced against the certainty of the line’s contribution to economically rational RPS compliance.”³⁶ In this proceeding, the record demonstrates that there is substantial capacity with Commission-approved contracts proposing to interconnect to the EITP and a great deal more capacity either already under development or identified for potential development.³⁷ Based on this substantial evidence, the Commission concluded that EITP meets the third prong of the three-prong test.³⁸

³¹ Exhibit SCE-008, Amendment to SCE Rebuttal Testimony in Response to DRA Direct Testimony, at Table II-1; Resolution E-4261; Resolution E-4266; Resolution E-4347.

³² Exhibit SCE-005, SCE Rebuttal Testimony in Response to DRA Direct Testimony, at Section A., p. 4:1-16; Exhibit SCE-009, CAISO Generation Queue. This includes renewable generation in both California and Nevada. See Exhibit SCE-010, CAISO Queue – San Bernadino; Exhibit SCE-011, CAISO Queue – Nevada.

³³ Exhibit SCE-017, RETI Phase 2B Final Report, at p. 1-12 (Figure 1-5) and .

³⁴ *Id.* at p. 1-7 (Table 1-3).

³⁵ Decision at 31-32.

³⁶ D. 07-03-12 at 16.

³⁷ See Sections III.A.2(a)–(b), *supra*.

³⁸ Decision at 32.

Having found that the EITP met the Commission’s three-prong test, the Commission determined that the EITP was “necessary to facilitate” achievement of the State’s renewable energy procurement goals, and therefore “needed” under Section 399.2.5. Because the Commission applied existing law and based its conclusions on substantial evidence in the record, CBD’s request for rehearing based on the Commission’s finding of need for the EITP should be rejected.

B. The Commission Should Reject The Applications For Rehearing Because The EIR/EIS Properly Excluded The Recently Proposed Mountain Pass Lateral Project From Its Cumulative Impacts Analysis

WWP and CBD contend that the Kern River’s Mountain Pass Lateral proposal should have been included in the list of cumulative projects identified and evaluated in the EITP EIR/EIS. The Mountain Pass Lateral proposal, however, did not materialize in sufficient detail until after the Commission’s cutoff date for consideration of newly proposed projects, and the Commission was therefore not required to reopen the CEQA process to address that project.

“[A] cumulative impact consists of an impact which is created as a result of the combination of the project evaluated in the EIR together with other projects causing related impacts.”³⁹ In determining which projects to include in the cumulative impacts analysis, the CEQA Guidelines outline two alternative approaches—one predicated on a “list” of projects and another on a “summary of projections.”⁴⁰ In the list approach, a discussion of cumulative effects should encompass “past, present, and reasonably anticipated future projects.”⁴¹ “Reasonably probable future projects,” in turn, include those that are currently “undergoing environmental

³⁹ *CEQA Guidelines*, § 15130(a)(1).

⁴⁰ *Id.*, § 15130(b)(1).

⁴¹ *CEQA Guidelines*, § 15130(b)(1)(A).

review.”⁴² The courts have recognized that the need to address the never-ending cycle of projects “being fed into the environmental review process” during the preparation of an EIR warrants lead agencies choosing a “reasonable cutoff date” for the consideration of newly proposed projects in the EIR’s cumulative impacts analysis.⁴³

Here, the Commission concluded that “reasonably foreseeable” projects included those projects within the study area that were “(1) completed, (2) approved and under construction, (3) approved but not yet under construction, or (4) proposed but not approved.”⁴⁴ A project was included in the EIR/EIS’s cumulative impacts analysis if information on the project was “available in the BLM’s database or identified during agency scoping or in another published cumulative analysis as of July 30, 2010.”⁴⁵ Project proposals that failed to appear in the Bureau of Land Management’s (“BLM”) database before July 30, 2010, were thus excluded from review. This cutoff date was reasonable and necessary, as BLM and the Commission needed enough detailed information on any newly proposed projects in time to consider them in the Final EIR/EIS that was then under production.

CBD and WWP do not claim that the July 30, 2010, cutoff date was unreasonable or legally impermissible; rather, they claim only that the Commission and BLM should have been “aware” of the Mountain Pass Lateral before the cutoff date based on habitat surveys conducted by the applicant and a teleconference involving BLM and other agencies in April 2010. “[M]ere awareness does not necessarily require the inclusion of those proposed projects in the EIR.

⁴² *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127, quoting *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 74.

⁴³ *Id.*

⁴⁴ EITP FEIR, at 5-1.

⁴⁵ *Id.*

Rather, these proposed projects must become ‘probable future projects’” by the cutoff date.⁴⁶ CBD and WWP acknowledge that no right of way application was filed for the Mountain Pass Lateral until October 29, 2010, and no FERC application was filed until December 9, 2010—well after the cutoff date and after BLM and the Commission began preparing the Final EIR/EIS.⁴⁷

Because the Commission and BLM chose a “reasonable cutoff date” and because the Mountain Pass Lateral was not sufficiently certain before that cutoff date, it was not a “reasonably foreseeable future project” for purposes of the EIR/EIS, and the Commission was not required to include the Lateral project in their cumulative impacts analysis. To conclude otherwise would subject these sorts of projects to endless rounds of environmental review to address each new project appearing on the horizon during the environmental review process.

CBD and WWP further overstate the potential adverse environmental consequences arising from the proposed Mountain Pass Lateral. For example, WWP incorrectly states that the EITP transmission line will cross the proposed Mountain Pass Lateral and is in the “immediate vicinity” of the EITP. The EITP terminates at the ISEGS, approximately two miles east of the proposed Mountain Pass Lateral alignment.⁴⁸ CBD also states incorrectly that the proposed Mountain Pass Lateral may directly impact the proposed translocation sites for tortoises impacted by the EITP and ISEGS.⁴⁹ The Mountain Pass Lateral is proposed in an area higher on

⁴⁶ *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1127-1128, citing *CEQA Guidelines*, § 15130(b)(1)(A).

⁴⁷ CBD Application for Rehearing, at 2-3.

⁴⁸ Compare EITP, Fig. 1 (“Proposed Route and Alternatives”) with Mountain Pass Lateral Project, Fig. 1.1-2 (“Regional Location”).

⁴⁹ EITP Final EIR/EIS, page 3.4-78, stating that tortoises found during pre-construction surveys would be relocated 1,000 feet away. Since the proposed Mountain Pass Lateral alignment is about two miles away, it would not affect the relocation areas for the tortoise.

the alluvial fan, which is lower quality habitat for the desert tortoise.⁵⁰ The relocation site is planned for points east of the Mountain Pass Lateral alignment, and thus will not be directly impacted. Furthermore, as an 8-inch pipeline buried below the surface, the Mountain Pass Lateral will have minimal if any permanent impacts on the habitat or other surface features cited by CBD and WWP. In any event, in their review of the Mountain Pass Lateral application, BLM and FERC are now obligated to consider any adverse environmental consequences of the Mountain Pass Lateral in conjunction with other past, current, and reasonably foreseeable future projects located in the Ivanpah Valley—including the EITP and ISEGS. But that does not mean that the EITP CEQA process need be reopened at this point to address what is still only a proposed pipeline alignment.

C. The Commission Should Reject The Applications For Rehearing Because The EITP EIR/EIS Complies With CEQA

CBD and WWP cursorily repeat their complaints about CEQA and, with little further elaboration, resort to incorporating by reference their earlier comments on the subject. In doing so, CBD and WWP have failed to identify any legal error with sufficient specificity, and therefore the applications for rehearing should be denied on that ground alone.⁵¹ And as these earlier comments were addressed during the administrative process, little more need be said here.

In repeating their dissatisfaction over the “whole of the action” reviewed in the EIR/EIS, CBD and WWP fail to acknowledge or address that the Commission included the approved ISEGS project in the “whole of the action” it reviewed in the EIR/EIS, as CBD and WWP had

⁵⁰ See, e.g., EITP Final EIR/EIS, Fig. 4 (“Desert Tortoise Designated Critical Habitat and Management Areas”), showing most important habitat for desert tortoise.

⁵¹ Cal. Pub. Util. Code § 1732; California Public Utilities Commission Rule of Practice and Procedure 16.1(c).

earlier urged, even though it need not have done so since the independently justified ISEGS project does not depend on the EITP.

Nor do CBD and WWP acknowledge or address that the Commission properly reviewed other renewable generation projects in the Ivanpah Valley Area in its evaluation of cumulative effects in the EIR/EIS. The Commission reasonably determined that because of the lack of publicly available information on the environmental design or initiation of an environmental review process or a Power Purchase Agreement with respect to those projects when the Draft EIR/EIS was prepared, those projects are not part of the EITP and should instead be considered in reviewing cumulative effects of the project. As outlined in Section III.B, above, CBD and WWP did not question the reasonableness of the Commission's determination in this regard. In any event, since none of those projects is a functional element of the EITP and none depend on the EITP, they are not part of the "whole of the action" and properly are considered in evaluation of the cumulative effects of the EITP together with other projects.⁵²

WWP and CBD also claim that the EITP EIR/EIS failed to consider alternative *methods* for producing renewable energy (e.g., distributed PV) which would avoid or substantially reduce impacts to the environment or avoid the need for a new transmission line. This statement—that the EITP EIR/EIS failed to consider alternative production *methods* as opposed to alternative *transmission* illustrates the fallacy of their claims. The primary and fundamental objective of the EITP is to transmit renewable power from the Ivanpah Valley to points south. It is not, as CBD and WWP would have it, to evaluate methods of producing or generating renewable power. That determination has been made by other agencies in another proceeding, and is not properly asserted as a ground for rehearing before the Commission. Likewise, a review of alternative

⁵² *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70.

production methods would not satisfy a fundamental objective of the EITP—to transmit renewable power from the Ivanpah Valley. Because such an alternative would fail to satisfy a basic, fundamental objective of the EITP, the EIR/EIS properly excluded any consideration of those alternatives.

CEQA requires lead agencies to “describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project.”⁵³ An EIR, however, need not consider “every conceivable alternative” to the proposed action.⁵⁴ Rather, the EIR should focus on alternatives that substantially reduce or avoid environmental effects “while still serving the project’s fundamental objectives.”⁵⁵ An EIR may therefore exclude those alternatives that fail to meet most of the basic project objectives or that are infeasible.⁵⁶

Alternatives and mitigation measures can be rejected as infeasible if they are impractical or undesirable from a land-use policy standpoint.⁵⁷ Alternatives can be rejected as well if they fail to meet particular policy objectives.⁵⁸

⁵³ *CEQA Guidelines* § 15126.6(a); Cal. Pub. Res. Code §§ 21061, 21001(g), 21002, 21002.1(a), 21003(c); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566.

⁵⁴ *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162–1163.

⁵⁵ *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1264, citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 564-566; *Laurel Heights Improvement Ass’n v. Regents of University of California* (1988) 47 Cal.3d 376, 406-407 (additional citations omitted).

⁵⁶ Cal. Pub. Res. Code §§ 21002, 21002.1(a); *CEQA Guidelines* § 15126.6(c).

⁵⁷ *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1269-1270 (mitigation measures rejected as infeasible where they conflicted with the objectives of a city’s general plan and other city policy concerns); *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 44 (alternatives rejected as infeasible based on a conflict with the need for housing); *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 417 (alternatives rejected as infeasible where they conflicted with agency planning goals).

⁵⁸ *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1498-1512 (rejected alternative calling for offsite wastewater disposal since one of the specific project objectives was to irrigate the winery with wastewater onsite); *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 1001-1002 (since a key objective of the project was to develop a master plan for the Arana Gulch, the city was not required to consider alternative pedestrian corridors in other areas of the city).

The California Supreme Court's decision in *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*,⁵⁹ illustrates the interplay between a public agency's legislative prerogatives with CEQA's substantive and procedural mandates surrounding the consideration of alternatives. In that case, opponents to the CalFed Bay-Delta Program argued that the Department of Water Resources should have considered a reduced-export alternative that would have reduced the Department's delivery of water to southern California. The California Supreme Court rejected that claim and held that the lead agency was not required to evaluate a reduced-export alternative because that alternative would have conflicted with the project's "underlying fundamental purpose" of improving water supply reliability and providing water for beneficial uses.⁶⁰

Much like the water supply objectives at issue in *In re Bay-Delta*, the Commission's primary, fundamental objective for the EITP is to "connect renewable energy sources in the Ivanpah Valley area in compliance with Executive Order 13212, the Energy Policy Act of 2005, the Federal Power Act, California Senate Bill 1078, and California Senate Bill 107." This objective sets forth the scope of the project at issue as well as its focus—which is to "connect renewable energy sources in the Ivanpah Valley" rather than to generate or produce renewable power. The state policy concerning whether renewable energy should come from distributed PV rather than solar development in the Ivanpah Valley is not within the purview of the Commission's action, and any such alternatives would have failed to meet the fundamental objectives of the EITP. The Commission was therefore well within its discretion to omit such alternatives from the EIR/EIS's analysis.

⁵⁹ *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* ("In re Bay-Delta") (2008) 43 Cal.4th 1143.

⁶⁰ *Id.*, at 1164-1166.

IV. CONCLUSION

For the reasons set forth above, the Commission should expeditiously reject the Applications for Rehearing filed by CBD and WWP.

Dated: February 10, 2011

Respectfully submitted,

/s/ Joseph M. Karp

Christian L. Marsh
David M. Ivester
Briscoe Ivester & Bazel LLP
155 Sansome Street, Seventh Floor
San Francisco, California 94104
Telephone: (415) 402-2700
Facsimile: (415) 398-5630
Email: cmarsh@briscoelaw.net

Joseph M. Karp
Thomas W. Solomon
Winston & Strawn LLP
101 California Street, 39th Floor
San Francisco, California 94111-5894
Telephone: (415) 591-1000
Facsimile: (415) 591-1400
Email: jkarp@winston.com
tsolomon@winston.com

*Attorneys for BrightSource Energy, Inc.
and First Solar, Inc.*

*Attorneys for BrightSource Energy, Inc. and
First Solar, Inc.*

Certificate of Service

I hereby certify that I have this day served a copy of the:

**RESPONSE OF BRIGHTSOURCE ENERGY, INC. AND
FIRST SOLAR, INC. TO APPLICATIONS FOR REHEARING
OF DECISION 10-12-052 OF WESTERN WATERSHEDS PROJECT
AND CENTER FOR BIOLOGICAL DIVERSITY**

on all known parties to A.09-05-027 by sending a copy via electronic mail and by mailing a properly addressed copy by first-class mail with postage prepaid to each party named in the official service list without an electronic mail address.

Executed on February 10, 2011, at San Francisco, California.

/s/ Marcus Hidalgo
Marcus Hidalgo



California Public
Utilities Commission

CPUC Home

CALIFORNIA PUBLIC UTILITIES COMMISSION Service Lists

**PROCEEDING: A0905027 - EDISON - FOR A CERTI
FILER: SOUTHERN CALIFORNIA EDISON COMPANY
LIST NAME: LIST
LAST CHANGED: JANUARY 6, 2011**

**DOWNLOAD THE COMMA-DELIMITED FILE
ABOUT COMMA-DELIMITED FILES**

[Back to Service Lists Index](#)

Parties

MICHAEL J. CONNOR, PH.D
DIRECTOR
WESTERN WATERSHEDS PROJECT
PO BOX 2364
RESEDA, CA 91337-2364
FOR: WESTERN WATERSHEDS PROJECT

ANGELA WHATLEY
ATTORNEY
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE. / PO BOX 800
ROSEMEAD, CA 91770
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

ADRIANNA KRIPKE
LATHAM & WATKINS, LLP
600 WEST BROADWAY, SUITE 1800
SAN DIEGO, CA 92101
FOR: SOUTHERN CALIFORNIA EDISON COMPANY

MARION PELEO
CALIF PUBLIC UTILITIES COMMISSION
LEGAL DIVISION
ROOM 4107
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214
FOR: DRA

LISA BELENKY
CENTER FOR BIOLOGICAL DIVERSITY
351 CALIFORNIA STREET, SUITE 600
SAN FRANCISCO, CA 94104
FOR: CENTER FOR BIOLOGICAL DIVERSITY

JOSEPH M. KARP
ATTORNEY
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FL
SAN FRANCISCO, CA 94111-5894
FOR: BRIGHTSOURCE ENERGY, INC. /
NEXTLIGHT RENEWABLE POWER, LLC D/B/A
FIRST SOLAR, INC.

RANDOLPH WU
FIRST SOLAR DEVELOPMENT
1111 BROADWAY ST., 4TH FLOOR
OAKLAND, CA 94607
FOR: FIRST SOLAR DEVELOPMENT, INC.

Information Only

CASSANDRA SWEET
DOW JONES NEWSWIRES
EMAIL ONLY
EMAIL ONLY, CA 00000

DONALD C. LIDDELL
DOUGLASS & LIDDELL
EMAIL ONLY
EMAIL ONLY, CA 00000

LAURA B. RENGER
SOUTHERN CALIFORNIA EDISON COMPANY
EMAIL ONLY
EMAIL ONLY, CA 00000

MRW & ASSOCIATES, LLC
EMAIL ONLY
EMAIL ONLY, CA 00000

JOSEPH BETZLER
SOUTHERN CALIFORNIA EDISON COMPANY
EMAIL ONLY
EMAIL ONLY, CA 00000-0000

NANCY RADER
EXECUTIVE DIRECTOR
CALIFORNIA WIND ENERGY ASSOCIATION
EMAIL ONLY
EMAIL ONLY, CA 00000-0000
FOR: CALIFORNIA WIND ENERGY ASSOCIATION

JANICE SCHNEIDER
LATHAM & WATKINS LLP
555 ELEVENTH STREET, N.W., STE. 1000
WASHINGTON, DC 20004-1304

STEVEN D. GARLAND
COLONEL
4430 GRISSOM AVE, STE 101
NELLLIS AFB, NV 89191

PUBLIC PARTNERSHIPS
99 ABW/CCY
4430 GRISSOM AVE, STE 101
NELLLIS AFB, NV 89191

JAMES B. WOODRUFF
VP REGULATORY AND GOVERNMENT AFFAIRS
NEXTLIGHT RENEWABLE POWER, LLC
1055 EAST COLORADO BLVD., 5TH FLOOR
PASADENA, CA 91106
FOR: NEXTLIGHT RENEWABLE POWER,
LLC/FIRST SOLAR, INC.

ANDREA MORENO
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE
ROSEMEAD, CA 91770

CASE ADMINISTRATION
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVENUE, ROOM 370
ROSEMEAD, CA 91770

RICHARD TOM
SOUTHERN CALIFORNIA EDISON COMPANY
2244 WALNUT GROVE AVE., PO BOX 800
ROSEMEAD, CA 91770

ANNE BEAUMONT
LATHAM & WATKINS LLP
600 WEST BROADWAY, STE. 1800
SAN DIEGO, CA 92101-3375

LAURA GODFREY
LATHAM & WATKINS LLP
600 WEST BROADWAY, SUITE 1800
SAN DIEGO, CA 92101-3375

MARC D. JOSEPH
ATTORNEY AT LAW
ADAMS BROADWELL JOSEPH & CARDOZO
601 GATEWAY BLVD. STE 1000
SOUTH SAN FRANCISCO, CA 94080

JENNIFER ROUDA
ECOLOGY AND ENVIRONMENT, INC
130 BATTERY ST, 400
SAN FRANCISCO, CA 94111

THOMAS W. SOLOMON
ATTORNEY AT LAW
WINSTON & STRAWN LLP
101 CALIFORNIA STREET, 39TH FLOOR
SAN FRANCISCO, CA 94111-5894

DIANE I. FELLMAN
DIRECTOR, REGULATORY & MARKET AFFAIRS
NRG WEST & SOLAR
73 DOWNEY STREET
SAN FRANCISCO, CA 94117

CALIFORNIA ENERGY MARKETS
425 DIVISADERO STREET, SUITE 303
SAN FRANCISCO, CA 94117

HILARY CORRIGAN
CALIFORNIA ENERGY MARKETS

KATHLEEN MOODY
FIRST SOLAR DEVELOPMENT

425 DIVISADERO ST. SUITE 303
SAN FRANCISCO, CA 94117-2242

1111 BROADWAY ST., 4TH FLOOR
OAKLAND, CA 94607

LISA BODENSTEINER
ASSIST GENERAL COUNSEL
FIRST SOLAR, INC.
1111 BROADWAY, 4TH FLOOR
OAKLAND, CA 94607

GREGORY MORRIS
GREEN POWER INSTITUTE
2039 SHATTUCK AVE., SUITE 402
BERKELEY, CA 94704
FOR: GREEN POWER INSTITUTE

JUDITH B. SANDERS
SR. COUNSEL
CALIF. INDEPENDENT SYSTEM OPERATOR CORP
151 BLUE RAVINE ROAD
FOLSOM, CA 95630
FOR: CALIFORNIA INDEPENDENT SYSTEM
OPERATOR CORPORATION

SHANNON EDDY
EXECUTIVE DIRECTOR
LARGE SCALE SOLAR ASSOCIATION
2501 PORTOLA WAY
SACRAMENTO, CA 95818
FOR: LARGE-SCALE SOLAR ASSOCIATION

State Service

ANNE GILLETTE
CALIFORNIA PUBLIC UTILITIES COMMISSION
EMAIL ONLY
EMAIL ONLY, CA 00000

ANDREW SCHWARTZ
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5215
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

HENRY "HANK" PIELAGE
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY PLANNING & POLICY BRANCH
ROOM 4102
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

KARL MEEUSEN
CALIF PUBLIC UTILITIES COMMISSION
EXECUTIVE DIVISION
ROOM 5217
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

MONISHA GANGOPADHYAY
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
ROOM 4104
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

REGINA DEANGELIS
CALIF PUBLIC UTILITIES COMMISSION
DIVISION OF ADMINISTRATIVE LAW JUDGES
ROOM 5105
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

SCOTT LOGAN
CALIF PUBLIC UTILITIES COMMISSION
ELECTRICITY PLANNING & POLICY BRANCH
ROOM 4209
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

YULIYA SHMIDT
CALIF PUBLIC UTILITIES COMMISSION
ENERGY PRICING AND CUSTOMER PROGRAMS BRA
ROOM 4104
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3214

TOP OF PAGE
BACK TO INDEX OF SERVICE LISTS