Date of Issuance
April 15, 2011

Decision 11-04-034 April 14, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of the 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)

ORDER MODIFYING DECISION (D.) 10-12-052, AND DENYING REHEARING OF THE DECISION AS MODIFIED

Decision (D.) 10-12-052 (or "Decision") involves the Eldorado-Ivanpah Transmission project ("EITP"), which is to be located in San Bernardino County, California and Clark County Nevada. This area is often referred to as the Ivanpah Dry Lake Area. D.10-12-052 grants Southern California Edison Company ("SCE") a certificate of public convenience and necessity ("CPCN") for the EITP, using the Environmentally Preferred Route, as identified in the Joint Final Environmental Impact Report/Environmental Impact Statement ("EIR").[1] The EITP will be constructed in order to access renewable generation near the Southern California-Nevada border. Specifically, the project is intended to provide electrical facilities necessary to integrate up to 1,400 megawatts ("MW") of new renewable generation from the Ivanpah Dry Lake Area, and will be configured to allow for future network upgrades to further increase renewable resource integration beyond 1,400 MW. EITP will primarily consist of:

[1] SCE's estimated costs for the proposed construction are approximately $306 million plus contingency and other related expenses. D.10-12-052 found the cost of the line, subject to a reduction in the proposed contingency amount is reasonable. D.10-12-052 adopted a cost cap in the amount of $306.338 plus a 15% contingency. (See D.10-12-052, pp. 45-48.)

(1) the construction of a new 220/115 kV substation, the Ivanpah Substation, in the Ivanpah Dry Lake Area; (2) removal of 35 miles of an existing 115 kV transmission line between the new Ivanpah Substation and the existing Eldorado Substation, and the construction of a double circuit 220 kV line within expanded rights of way; and (3) construction of two separate telecommunication routes to support redundant telecommunications for a Special Protection System.

The Center for Biological Diversity ("CBD") and Western Watersheds Project ("WWP") timely filed applications for rehearing, challenging the lawfulness of D.10-12-052. BrightSource Energy Inc. ("BrightSource") and First Solar, Inc. ("First Solar") jointly filed a response to both rehearing applications, as did SCE.

In its rehearing application, CBD: (1) attempts to introduce new material, that is not in the record, to support a claim that the EIR did not properly address cumulative impacts; (2) alleges that we erred in concluding that the project is needed under Public Utilities Code Section 399.2.5;[2] and (3) asserts, based on a short list of claims, that our Decision was based on inadequate environmental review in violation of the California Environmental Quality Act ("CEQA").

In its rehearing application, WWP, too, attempts to introduce new material in order to challenge the cumulative impacts analysis. WWP also provides a short, four-item list of ways in which it claims EIR failed to properly respond to matters raise by parties in the letters they submitted containing comments on the draft EIR ("Comment Letters").

We have reviewed the allegations raised in the applications for rehearing filed by CBD and WWP, to the extent those allegations are clear and properly supported. We are of the opinion that that these allegations do not demonstrate error, although, for

[2] Hereinafter, all references are to the Public Utilities Code unless otherwise specified.

the purposes of clarification, we will modify pages 26 to 32 of the Decision, and Findings of Fact Nos. 11 and 14. Therefore, rehearing of D.10-12-052, as modified, is denied.

I. DISCUSSION

A. Issues Related to Commission Approval

1. Public Utilities Section 399.2.5

Section 399.2.5 authorizes the Commission to deem a transmission project "necessary to the provisions of electrical service" if the project is "necessary to facilitate the achievement of the [state's] renewable power goals." (Pub. Util. Code, §399.2.5(a).)[3] The State's renewable power goals, described in part, in §399.11, include the goal "to attain a target of generating 20 percent of total retail sales of electricity in California from eligible renewable energy resources by December 31, 2010…."

A project qualifies as "necessary to facilitate" achievement of the State's renewable power goals under section 399.2.5, and thereby qualify for the cost recovery under the statute, if the project proponent demonstrates by a preponderance of the evidence that: (1) a project would bring the grid renewable generation that would otherwise remain unavailable; (2) the area within the line's reach would play a critical role in meeting the [Renewables Portfolio Standard (RPS)] goals; and (3) the cost of the line is appropriately balanced against the certainty of the line's contribution to economically rational RPS compliance." (See *Application of SCE for a CPCN Concerning Antelope-Pardee Project* ("*ATP*") (2007) [D.07-03-012] ___Cal.P.U.C.3d__, p. 16, establishing the three-prong test.)

In its application for rehearing, CBD claims that the findings of fact and conclusions of law regarding the finding of "need" under section 399.2.5 are not

[3] Specifically, Section 399.2.5 states: "Notwithstanding Sections 1001 to 1013, inclusive, an application of an electrical corporation for a certificate authorizing the construction of new transmission facilities is necessary to the provision of electric service if the Commission finds that the new facility is necessary to facilitate achievement of the renewable portfolio standard established in Article in 16…."

supported by the evidence in the record.[4] (See Rehearing App., pp. 4-5.) CBD argues that the Commission unlawfully disregards alterative available transmission to reach its conclusion, and improperly relies on the existence of power purchase agreements ("PPAs") to establish need under section 399.2.5. These claims lack merit.

a) Evidence supports the Commission's determination that EITP meets the first prong - that a project would bring the grid renewable generation that would otherwise remain unavailable.

CBD challenges the sufficiency of the evidence in the record to support the Commission's determination that EITP satisfies prong 1. CBD's challenge lacks merit. The evidence in the record supports our determination that EITP meets the first prong. This evidence provides support for the following: (1) the existing Cool Water-Baker-Dunn Siding-Eldorado-Mountain Pass 115 kV line is inadequate to accommodate more than 80 MW of new generation interconnections, as the existing line conductor is thermally limited to no more that 83 MVQ;[5] (2) given that Cool-Water-Baker-Dunn Siding-Eldorado-Mountain Pass 115 kV transmission line has a maximum thermal rating of 83 MVQ, approximately 640 MW of Commission-approved RPS contracts would otherwise be unavailable if EITP were not constructed;[6] (3) four Commission-approved

[4] Specifically, CBD argues that EITP is not needed to meet reliability needs or increased demand. It asserts that there is insufficient evidence in the record that other transmission alternatives cannot be utilized, the project presents unacceptable costs, and alternatives for renewable generation that would avoid impacts to species and inhabitants. (See CBD Rehrg. App., p. 4.)

[5] See Ex. SCE-3, Section C, pp. 6-7 (Chacon); Ex. SCE-5, Section A, pp. 8-9 (Chacon.). See also Ex. SCE-2, Section A, pp. 1-4 (Chacon), which sates: "The interconnection studies conducted as mandated by the CAISO Large Generator Interconnection Procedures ("LGIP") have determined that the planned additional generation interconnections would result in unacceptable thermal overload conditions of the existing Cool Water-Baker-Dunn Siding-Eldorado-Mountain Pass 115 kV…as well as the existing 220/115 kV transformed bank at Eldorado would load beyond the maximum allowable limits under base conditions. These findings result in the need to construct new 220 kV transmission facilities from the Ivanpah Dry Lake Area to SCE's Eldorado substation, including a new collector substation in the Ivanpah Dry Lake Area to interconnect up to 1,400 MW of new generation resources." See also RT, Vol. 1, pp. 64, 71 (Chacon).

[6] See Ex. SCE-5, Section A, p. 10 (Chacon); see also Ex. SCE-1, p. 7 (Chacon); Ex. SCE-3, Section C, pp. 6-7 (Chacon), which states: "System Impact Studies performed for the three serial generation

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PPAs totaling 717 MW of renewable generating capacity in the Ivanpah Dry Lake Region have filed interconnection requests and are seeking interconnection to CAISO System through EITP;[7] (4) the Commission has found that Commission-approved PPAs for renewable generation exceeding the current capacity of existing transmission is sufficient evidence to satisfy the first prong of the section 399.2.5 test;[8] (5) SCE has two PPAs with Solar Power 1 and Desert Line solar renewable generation projects totaling 400 to 410 MW that would utilize EITP;[9] (6) PG&E has two PPAs with BrightSource 1 and BrightSource 2 solar renewable generation projects totaling 310 MW that would utilize EITP;[10] (7) there is a significant amount of renewable energy potential in the Ivanpah Dry Lake Area that may be delivered economically to the CAISO grid through the transmission upgrades proposed as part of EITP;[11] (8) EITP is intended to provide the electrical facilities necessary to integrate up to 1,400 MW of new renewable generation in the Ivanpah Dry Lake area;[12] (9) RETI has identified the Ivanpah Dry Lake Area to be an area with significant amounts of potential renewable resources, particularly solar;[13] (10) the lists various renewable projects in the Queue totaling approximately 964 MW

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interconnection requests totaling 414 MW have determined that generation interconnections beyond 80 MW will result in congestion on the existing 115 kV line due to the limited capacity available. Such congestion would trigger the need to curtail significant amounts of solar production…."

[7] See Ex. SCE-14; see also Ex. SCE-8; Ex. SCE-2, pp. 1-3. See also evidence cited in SCE's Opening Brief, pp. 7-10; see also Ex. SCE-17, generally.

[8] See *ATP* [D.07-03-013], *supra*, at p. 14. See also *Decision Granting a CPCN for Tehachapi Renewable Transmission Project* ("*TRTP*") (2009) [D.09-12-044] __Cal.P.U.C.3d__, pp. 13-14. See also *TRTP* [D.09-12-044], *supra*, at p. 9 [Finding of Fact No. 9]; see also RT, Vol., 1 p. 81 (Chacon).

[9] See Ex. SCE-5, Section, B, p. 2 (Allen); see also evidence cited in SCE's Opening Brief, pp. 7-10.

[10] See Ex. SCE-5, Section B, pp. 2-3 (Allen), see also SCE Opening Brief, pp. 7-10. See also RT, Vol. 1, p. 134 (Chacon.)

[11] See Ex. SCE-1, p. 9 (Chacon); Ex. SCE-17; see Ex. SCE-5, Section A, p. 5 (Chacon).

[12] See Ex. SCE-1, p. 6 (Chacon).

[13] See Ex. SCE-1, p. 9 (Chacon); Ex. SCE-5, Section A, p. 4 (Chacon); Ex. SCE-17, p. 17, wherein RETI process identified CREZs in California "that hold the greatest potential for cost-effective and environmentally responsible renewable development."

that propose to connect with EITP;[14] (11) Commission-approved BrightSource PPA ISEGS project, which would interconnect to EITP, has received all of its major permits and initiated construction after October 27, 2010;[15] (12) the Commission lacks jurisdiction to compel generators to submit interconnection requests to other utilities in the vicinity of EITP;[16] and (13) EITP is needed to integrate renewable generation so that SCE meets its goal of 20% by 2010 and 33% by 2020.[17]

Therefore, the above-cited record evidence supported our determination in D.10-12-052 that EITP satisfies the first prong - that the project would bring the grid renewable generation that would otherwise remain available. Moreover, the Commission has recognized it is often necessary to approve new transmission projects in anticipation of future renewable energy projects. (See *ATP* [D.07-03-012], *supra*, at p. 14.) Here, we have already approved four renewable PPAs anticipated to generate over 700 MW of renewable energy from the area accessed by the EITP. (See Ex. SCE-8). The current transmission infrastructure cannot accommodate this amount of generation. Nor does the Commission have jurisdiction over the other utilities in the area, and there is no other CAISO controlled PTO (Participating Transmission Owner) transmission entity that can accommodate. When completed, EITP will be able to carry approximately 1,400 MW of renewable power from this renewable area to the grid, and the area has been estimated to have even greater renewable potential.[18] This renewable

[14] See D.10-12-052, p. 28. See also Ex. SCE-9; see Ex. SCE-10; Ex. SCE-11; see Ex. SCE-17, p. 1-10 to 1-12, which identified the region as having substantial renewable potential. See also evidence cited in SCE's Opening Brief, pp. 10-11, and SCE Reply Brief, pp. 14-15. See also RT, Vol. 1, pp. 40, 91, 93 (Chacon).

[15] See http://www.brightsourceenergy.com/images/uploads/press_releases/Ivanpah_Groundbreaking_Press_Release.pdf. See also Exhs. SCE-9, 10, 11.

[16] See RT, Vol. 1, p. 91, which states: "…there are other utilities in the vicinity such as Los Angeles Department of Water and Power who own transmission…so when generation decides to submit an interconnection request, they will make a business decision as to where to go…."

[17] See evidence cited in SCE's Opening Brief and Reply Brief, respectively. See also Resolutions E-4261, 4347 and 4266.

[18] See Exhs. SCE-1, pp. 9-11 and 13 (Chacon), Ex. SCE-3, Section C, pp. 9-11 (Chacon); see also evidence cited in SCE's Opening and Reply Briefs, generally.

generation potential, over half of which is under contract and already in the development stage, may therefore otherwise be unavailable if the EITP project is not constructed, thus satisfying the first prong under section 399.2.5.

CBD fails to support its allegation by identifying any actual evidence in the record that the Decision fails to consider, or improperly considers. At best, CBD demonstrates that the record contains conflicting evidence that support denial of the line. However, as discussed in detail in Section I B, conflicting evidence is not controlling. The Commission properly weighed the evidence and reached its determination that EITP meets prong 1 of the three-part test under section 399.2.5. As discussed above, the record supports this determination.

It is the responsibility of the Commission to weigh the evidence, not the parties, and the fact that the Commission disagreed with CBD does not constitute legal error. Nor does the fact that the Decision "strays from the Proposed Decision" have any bearing on the lawfulness of D.10-12-052. Specifically, a proposed decision (or alternate) is not binding or controlling unless or until adopted by the Commission. Any reliance on a proposed decision by CBD is therefore wrong. (See Pub. Util. Code, § 310.)

In sum, D.10-12-052 is lawful because there is both record support and a rational basis for the determination to approve EITP. CBD failed to establish that there was no record evidence for the Decision's findings and conclusions, or that we exceeded our authority, and thus, there is no legal error.

b) Evidence supports the Commissions determination that EITP meets the second prong - that the area within the line's reach would play a critical role in meeting the RPS goals.

In making our determination in D.10-12-052, we reviewed the evidence before us. Contrary to CBD's allegations, we looked at all the evidence and did not unlawfully disregard information or alternatives to reach our conclusion that EITP meets prong 2.

In a review of the record, there is legally adequate evidence to support the determination that EITP meets the second prong. This evidence demonstrates: (1) RETI estimated the potential renewable resources in the area to be about 2,878 MW reflecting about 2,000 MW of solar and 878 MW of wind potential in the area;[19] (2) RETI has estimated that to meet a 33% RPS target as currently contemplated by legislature would require an additional 59,710 gigawatt hours of renewable energy that will need to be generated and delivered;[20] (3) EITP is estimated to support up to 1,400 MW, all of which are from renewable resources; (4) EITP was developed to provide interconnection to the numerous potential renewable generation in the Ivanpah area;[21] (5) delay of the EITP decision will impede the interconnection of renewable generating resources which will contribute to achievement of California's renewable portfolio standard goals;[22] (6) PPAs have been executed with generation resources from this area;[23] (7) SCE has executed two renewable generating resources contracts in the Ivanpah area which total between 400 and 410 MW;[24] (8) PG&E has executed 2 PPAs in the area totaling approximately 310 MW;[25] and (9) the projects (PPAs) were approved in part because of the contribution they are expected to make to California's 20% RPS goals.[26]

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[19] See Ex. SCE-3, Section C, p. 9 (Chacon).

[20] See Ex. SCE-5, Section B, p. 3 (Allen); see also SCE's Opening Brief, p. 14; see also *DPV2* [D.09-11-007], *supra*, at p. 17, which states: "… in order to reach the 33% goal, California will likely need to construct significant new transmission resources in SCE's service territory…."

[21] See Ex. SCE-3, Section C, p. 3 (Chacon).

[22] See Ex. SCE-5, Section A, p. 3 (Chacon).

[23] See Ex. SCE-5, Section A, pp. 7-9 (Chacon).

[24] See Ex. SCE-1, p. 7 (Allen); see Ex. SCE-3, Section C, p. 8 (Chacon); See also SCE AL No. 2339-E.

[25] See Ex. SCE-3, Section C, p. 8 (Chacon); see also PG&E AL No. 3458; see also Resolution E-4266, p. 9.

[26] The 717 MW of capacity, as reflected in Ex. SCE-8 are represented by 4 PPAs, two with SCE, Solar Partners 1 and Desert Stateline, and two with PG&E, BrightSource PPA 1 and BrightSource PPA 2. These projects were approved via Resolution E-4261, E-4347 and E-4266. Each resolution contains language expressly recognizing the role these projects are anticipated to play in meeting the 20% RPS goal. (See Resolutions E-4261 at 8, E-4347 at 7, and E-4266 at 9.)

Thus, there is evidence in the record supporting our determination in the Decision that the area within the EITPs reach will play a critical role in meeting the states RPS goals. Therefore, we properly reasoned based on the record evidence that EITP will play a critical role in timely progress towards the state's ambitious RPS goals, thus satisfying the second prong of the section 399.2.5 three-part test. Here again, the Commission has the responsibility to weigh the evidence, and CBD's disagreement as to how the Commission has weighed the evidence does not demonstrate legal error.[27]

c) Evidence supports the Commissions determination that EITP meets the third prong - that the cost of the line is appropriately balanced against the certainty of the line's contribution to economically rational RPS compliance.

CBD claims that there is insufficient evidence to support the Commission's determination that the cost of the EITP line is appropriately balanced against the certainty of the line's contribution to economically rational RPS compliance, and thus satisfying prong 3 of the Commission's three-part test. This claim lacks merit.

Contrary to CBD's allegations, the following record evidence supports our determination in D.10-12-052 that EITP satisfies the third prong. This evidence shows: (1) that EITP will provide transmission facilities necessary to interconnect up to 1,400 MW of new generation in the Ivanpah area;[28] (2) EITP will avoid short-lived incremental solutions, minimizes environmental impacts, minimizes overall cost exposure to rate payers, and minimizes service interruptions and generation curtailments;[29] (3) voltage

[27] See *Pacific Telephone and Telephone Company v. Public Utilities Commission* (1965) 62 Cal.2d 634, 647.) The fact that we did not agree with CBD's position does not mean that we "unlawfully disregarded available transmission to reach the erroneous conclusion that EITP is needed," nor does CBD offer any support for such claim. See also *Sunrise Decision Denying Rehearing* [D.09-07-024], *supra*, at p. 2.

[28] See Ex. SCE-1, p. 9 (Chacon); see also Ex. SCE-3, Section C, pp. 9-11 and Sections A & D, generally (Chacon).

[29] See Ex. SCE-1, p. 9 (Chacon) citing SCE PEA, Vol. 1, Section 1.0, pp. 1-5. See also Ex. SCE-5, Section A, p. 7 (Chacon), which states: " EITP was developed to provide interconnection to the numerous potential renewable generation projects in the Ivanpah Dry Lake Area in a manner that: (1) addresses the

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class solutions lower than 220 kV do not provide sufficient capacity for the amount of renewable resources requesting interconnection in the Ivanpah area;[30] (4) undertaking lower voltage class solutions to access renewable resources in this area may result in the need for multiple tear down and rebuild activities, which increase environmental impacts and costs of upgrades;[31] (5) the 220 kV transmission plan of service to access renewable resources in the Ivanpah area is the most cost effective means available to interconnect and deliver renewable resources from the region;[32] (6) Mountain Pass region fell within a competitive range with respect to other CREZ resource areas in weighted average rank costs;[33] (7) CAISO has approved the EITP; (8) with four Commission-approved contracts, the area will likely provide access to 717 MW of renewable energy; and (9) it is best to build transmission facilities one time instead of multiple cycles of rebuilding and expansion over a number of years.[34]

In light of this evidence, it was reasonable for us to determine that EITP satisfies the third prong. CBD raises a series of vague allegations with respect to the Commission's application of the three prong test. CBD has failed to support its claim that our decision is erroneous, and thus we can reject CBD's allegations as incomplete. Specifically, CBD lists grievances without any explanation, citation to the record, or

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generation needs; (2) avoids short-lived "piecemeal" solutions, (3) minimizes environmental impacts furthering the goals of CEQA; (4) minimizes overall cost exposure to rate payers; (5) minimizes service interruptions; (6) minimizes the need for generation curtailments while upgrades are implemented and (7) provides the minimum set of facilities as the projects materialize."

[30] See Ex. SCE-1, p. 10 (Chacon).

[31] See Ex. SCE-1, p. 10 (Chacon); see also Ex. SCE-3, Section C, pp. 9-11 (Chacon).

[32] See Ex. SCE-1, p. 10 (Chacon), which states: "…because the 1400 MW limitation is associated with the maximum generation tripping allowed by the CAISO under commission mode double outage contingencies (N-2 Spinning Reserve Limitation), constructing the 220 kV transmission lines to 500 kV standards do not allow for the integration of more than 1,400 MW." See also Ex. SCE-3, Section C, pp. 9-11 (Chacon).

[33] See Ex SCE-17, p. 1-7.

[34] See Ex. SCE-5, Section A, pp. 7-9 (Chacon); see also Ex. SCE-1, p. 10 (Chacon).

other legal or factual support. (See CBD's Rehrg. App., pp. 1-8.) CBD's "claim" that the Decision [or prong 3] is not supported by the evidence on costs, does not cure this deficiency, or satisfy Section 1732. In fact, CBD doesn't dispute anything or make any specific claim with respect to our discussion of the costs being balanced against economically RPS, and does not provide citations to the record or any other factual or legal support for its allegation.

CBD, however, is required, under section 1732, to "set forth specifically the ground or grounds on which the applicant believes the decision or order to be unlawful." (Pub. Util. Code, § 1732). Further, the Commission has ruled that "[s]imply identifying a legal principal or argument, without explaining why it applies in the present circumstances does not meet the requirements of Section 1732." (See *Order Instituting Rulemaking to Consider Adoption of General Order and Procedures to Implement Digital Infrastructure* (2006) [D.10-07-050] __Cal.P.U.C.2d__, p. 19.). An application for rehearing must contain specific claims because the applications purpose is "to alert the Commission to a legal error, so that the Commission may correct it expeditiously." (See Rule 16.1(c) of the Commission Rules of Practice and Procedure (hereinafter, "Rule").) As we have previously explained: "We should not be forced to guess how our decisions might be in error by extrapolating from such claims…If the parties do not explain, with specificity, in their applications for rehearing why a decision is in error, we have no opportunity to correct our decisions." (D.10-07-050, *supra*, at p. 20.) Thus, CBD does not provide any evidence that the line is not economical per section 1732 or provide anything to support its claim.

We have also previously found that building transmission facilities in key regions at one time is preferable in the renewable energy context to multiple cycles of rebuilding and expansion over a number of years.[35] Specifically, as compared to *ATP*,

[35] See *Order Granting CPNC Concerning Antelope-Pardee Project* ("*ATP*") [D.07-03-012], *supra*, at p. 11, which states: "making the line 500 kV capable would avoid the need to construct, tear down, and replace multiple 220 kV facilities with 500 kV facilities in the future.…It also determined that

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[D.07-03-013], *supra*, at p. 19, the Commission found that it is desirable for utilities to undertake proactive planning to avoid a situation where a line is constructed, torn down, and replaced with larger transmission line.

In *Order Instituting Investigation to Facilitate Procedure Development of Transmission Infrastructure to Access Renewable Energy in Resources in California* (2006) [D.06-06-034] __Cal.P.U.C.3d__, p. 10, we observed that "building surplus capacity from the outset may offer economies to scale to the extent that it is reasonable to assume that additional renewable projects will come online at a later date, filling the capacity." This is consistent with our approval of EITP.

As such, we based our finding that the costs were appropriately balanced on the evidence listed above. It was within our discretion to base our finding with respect to the third prong on this evidence, and CBD has failed to provide any evidence to refute this determination. In fact, CBD has failed to raise any legitimate argument that the Commission cannot rely on this evidence or factors as we have in the past.[36] Consistent with past Commission practice, for a third-pong analysis, it was proper for us to look at factors like ease of construction, avoidance of future costs, and to give some weight to the potential for facilities to develop as indicated by the aggregate number of interconnection requests in the CAISO Queue. And, while CBD demonstrates that the record may contain conflicting evidence regarding certain issues, the existence of conflicting evidence is not controlling. The Commission properly weighed the evidence and reached its determination that EITP meets prong 3. As discussed above, the record supports this determination. To make this abundantly clear we will modify p. 32, paragraph 2 of the Decision to make the basis of our decision explicit.

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constructing the facility to 500 kV standards and energizing at 220 kV was necessary considering the potential magnitude of additional renewable resources that may develop in the Tehachapi area."

[36] See *TRTP* [D.09-12-044], *supra*, at p. 9-20; see also *DPV2* [D.09-11-007], *supra*, at p. 15-18.

B. CBD's request that the Commission reweigh the evidence is improper.

As demonstrated above, we acted lawfully in our consideration of the evidence in support of EITP. In its application for rehearing, CBD in effect asks the Commission to reweigh the evidence. The request to have the Commission reweigh the evidence does not constitute an allegation of legal error.

Specifically, CBD attempts to relitigate our determination regarding the "need" for the project under section 399.2.5 by discussing how our determination runs contrary to the record evidence. We reject CBD's demand that we reweigh the evidence. The purpose of a rehearing application is to raise allegations of legal error. (See Rule 6.1, subd.(c), ["[It] is to alert the Commission to legal error]) and it should not be used as a vehicle for relitigation.

CBD further proposes that the Commission ignore certain evidence in the record. This contention is equally without merit. For example, CBD claims the Commission improperly relied on the existence of PPAs to establish need for EITP. Here again, CBD in effect is asking the Commission to reweigh the evidence, which is improper for the reasons discussed above.

The Commission did not improperly rely on the existence of PPAs to establish need under section 399.2.5. Specifically, we recently found that Commission-approved PPAs should be sufficient evidence to establish need for a transmission project of this type. (See *ATP*, [D.07-03-013], *supra*, at p. 14; see also *Decision Granting a CPCN for Tehachapi Renewable Transmission Project* ("TRTP") (2009) [D.09-12-044] __ Cal.P.U.C.3d __, pp. 13-14.) In fact, we found "simple and compelling" DRA's argument that reliance on Commission-approved RPS contracts provide "a far better indicator of the amount of renewable generation that the [project] would bring to the grid." (See ATP [D.07-03-013], *supra*, at p. 14.) See also *Decision Granting a CPCN for Tehachapi Renewable Transmission Project* ("TRTP") (2009) [D.09-12-044] __ Cal.P.U.C.3d __, pp. 13-14, which states: "DRA relies upon Commission-approved RPS contracts which it contends provide a far better indicator of the amount of renewable

generation that the [project] would bring to the grid." See also TRTP [D.09-12-044], supra, at p. 9 [Finding of Fact No. 9], which states: "The Commission has approved 9 RPS contracts that are estimated to produce a maximum of approximately 2300 MW of renewable energy to the grid. 1590 MW of renewable generation would otherwise be unavailable if the project was not constructed." See also RT, Vol., 1 p. 81 (Chacon), which states: "in *TRTP*, DRA suggested the use of PPAs as a better indicator to the certainty of compliance.")

Nor does the Commission improperly or largely rely on the existence of the Interconnection Queue to establish need, as alleged by CBD. As the Decision correctly noted, the CAISO Interconnection Queue provides a gauge for the amount of interest in renewable energy development in a particular area, and how much renewable energy may be unavailable in the absence of transmission upgrades. Our analysis, however, made clear that we "continue to emphasize the amount of generation already under RPS contracts with the investor owned utilities, and in this case only gives "some" weight to the number of interconnection requests in the area as an indicator of future growth." (See D.10-12-052, p. 28). See Ex. SCE-9. Therefore, the Interconnection Queue requests were not a determinative factor in establishing need as alleged by CBD, and instead, were one factor in the Commission's overall analysis of need under section 3992.5.

As such, it was both lawful and reasonable for us to acknowledge the existence of the Interconnection Queue and the Commission-approved PPAs as one factor in our overall assessment of the evidence supporting the EITP project. CBD failed to provide anything which would support its position that the acknowledgement of the Interconnection Queue or the use of the PPA information was unlawful.

C. Section 399.2.5 does not require that a transmission project interconnect renewable electricity projects only.

CBD asserts that EITP is not needed because "EITP's capacity may in the future carry fossil-fuel based generation." (See CBD Rehrg. App, p. 4.) This claim lacks merit.

CBD's allegation is based on a flawed reading of section 399.2.5. As the Commission has held, "the tests under §399.2.5 and under the three-prong test of D.07-03-012, do not preclude non-renewable resources using the new transmission line. (See *TRTP*, [D.09-12-044], *supra*, at p. 14.) Instead, "the key is whether the new transmission line is needed to prudently access new renewable resources that are important to the states RPS needs, and not whether other resources may also be accessed." (Id.)[37] As set forth above, there is evidence demonstrating that EITP will access renewable energy projects in the Ivanpah Dry Lake area, and thus playing a critical role in California's progress toward its renewable goals. CBD's claim regarding fossil fuels is therefore baseless.

D. Issues Related to CEQA

The rehearing applications make one major CEQA claim. CBD and WWP argue that the EIR's cumulative impacts analysis must be revised to take into account newly submitted materials that are not part of the record in A.09-05-027 or the administrative CEQA record. The rehearing applications attach these materials as exhibits, but CBD and WWP make no motion or other request in support of these materials. These two parties also include brief, one-paragraph, lists of residual CEQA claims in the concluding sections of their rehearing applications.

In order to resolve several of these claims, we will refer to the timeline for this proceeding, which we summarize here. SCE filed its initial application for the EITP in May of 2009.[38] The EIR was prepared jointly with the federal Bureau of Land Management ("BLM"), which was responsible for environmental review under federal

[37] Moreover, requiring that only renewable electricity could utilize a specific transmission line violates federal statue and FERC regulations, which obligates SCE to provide adequate transmission to interconnect potential generation sources, and the CAISO tariff, which prohibits discriminatory access to the CAISO-controlled grid. (See 16 U.S.C. §§ 824i, 824k; CAISO Tariff, Section 2.1.)

[38] SCE's application was revised and re-submitted in September 2010. (D.10-12-052, p. 7.)

law.[39] This Commission and BLM began the environmental review process in June, 2010. The formal "scoping" that lead to the development of the EIR took place from June to August of 2009. (D.10-12-052, pp. 6, 10-11.) After scoping, the team preparing the EIR gathered information and established a "development date" of December 31, 2009. (EIR at p. 1-5.) The information that was available on that date was used to determine the scope of the draft EIR, which we released in April, 2010.

Public comments on the draft EIR were received until June 26, 2010. (D.10-12-052, p. 11.) The information in the comments was considered and further research was done to make the EIR more current. For example, the cumulative impacts section was updated to reflect projects that had become know between December 31, 2009 and July 30, 2010. (EIR at p. 5-1.) We held hearings and received evidence on SCE's application in August, 2010. A revised, final, EIR was prepared to include this information, and issued by the Commission on November 5, 2010. (D.10-12-052, p. 12.) The Commission adopted D.10-12-052 on December 16, 2010, relying on the final EIR. That decision was formally issued on December 27, 2010. The Notice of Determination ("NOD") for the EITP was received by the State Clearinghouse on December 23, 2010.[40]

[39] Because CBD and WWP challenge the adequacy of the state-mandated EIR, the environmental review document is referred to as the "EIR" although it is, technically, a Final Joint EIR/EIS.

[40] Under Public Resources Code section 21167, subdivision (c), a party must commence litigation within 30 days of the filing of the NOD, but this requirement is equitably tolled by sections 1731 and 1756 which require that an application for rehearing must be filed and denied before "a cause of action arising out of any order or decision of the commission shall accrue in any court[.]" (Pub. Util. Code, § 1731, subd. (b).) Sections 1733 and 1756 provide that a rehearing application can either: (i) be denied by order of the Commission, or (ii) if such an order does not issue within 60 days, the rehearing application may be deemed denied so that a cause of action can accrue. (Pub. Util. Code, § 1736, subd. (b).) In this instance, the first date on which an action could accrue to CBD and WWP was March 26, 2010, the date on which CBD and WWP's rehearing applications could be deemed denied. Public Resources Code section 21167, subdivision (c) was therefore tolled until March 26, 2010, causing the statutory deadline for filing any petition for review in the California Supreme Court asserting that the EIR prepared for the EITP did not comply with CEQA to occurr on April 25, 2010. (Pub. Resources Code, §§ 21167, subd. (c), 21168.6.) Given these deadlines and BrightSource and First Solar's request that we expedite this matter we have endeavored to issue this order in response to the rehearing applications as quickly as possible.

1. Newly Submitted Documents Re: Gas Pipeline Lateral

The rehearing applications' main CEQA claim is based on documents provided by CBD and WWP that were not submitted during the CEQA phase of this proceeding or made part of the record of A.09-05-027. These documents appear to have been prepared by the Kern River Gas Transportation Company ("Kern River"). They support an application Kern River filed in December 2010 with the Federal Energy Regulatory Commission ("FERC") for approval of the Mountain Pass Lateral (MPL). The MPL is described by the parties as an, 8.6-mile, 8-inch diameter natural gas pipeline lateral that would extend from Kern River's existing, 900-mile and 36-inch diameter transcontinental pipeline to a mine in the vicinity of the EITP. (E.g., SCE Response at p. 13.) CBD claims the EIR must be revised and recirculated so its cumulative impacts analysis can discuss the MPL. (CBD Rehrg. App., p. 3.)

We are extremely reluctant to consider a claim of error that is based on evidentiary material submitted for the first time in a documentary attachment to a rehearing application.[41] The attached documents are relevant to the CEQA review, and CEQA requires project opponents to submit information in their comments on the EIR, or, at the latest, before the hearing stage of a proceeding has ended and the Notice of Determination is issued. (Pub. Resources Code, § 21177, subd. (a).) The NOD was

[41] It is also important to note that the claims derived from this material are vague and speculative. (Cf., Rule 16.1, subd. (c).) For example, the assertion that one of the agencies preparing the EIR "was aware" of the MLP in April 2010 is derived from a statement by Kern River in one of the documents CBD and WWP seek to introduce. (See CBD Rehrg. App., p. 2.) Kern River stated that the BLM's Needles District was contacted regarding access authorization for a survey, and CBD and WWP infer that this contact made BLM "aware" of the MPL. As explained in detail in section I.D.2.a. below, an application for rehearing must specifically set forth a party's claims. (Pub. Util. Code, § 1732.) This requirement is met when a party gives an analysis of relevant authority and then explains how this authority applies to the relevant facts, accompanied by citations to the record and the law. (See Cal. Code Regs., tit. 20, § 16.1, subd. (c).) Here, however, CBD and WWP simply assume that one mention of "contact" regarding the MPL in an extra-record document establishes that the MPL had, in April 2010, developed to the point where CEQA and the Guidelines required it to be discussed as a cumulative impact. The rehearing applications contain no legal analysis to support this claim. Similarly these parties speculate about impacts the MPL, hypothetically, could cause, without referring to the law or the record. This approach fails to meet the section 1732's statutory requirements.

received by the State Clearinghouse on December 23, 2010, over one month before CBD and WWP attempted to submit this information. The hearings in our proceedings to consider the application for the EITP concluded in August 2010, and the subsequent briefing and comment phase was not designed to allow for the introduction of further evidence. (Cal. Code Regs., tit. 20, § 13.14.)

Moreover, CBD and WWP's documents were submitted without any supporting motion, or indeed any formal request or justification explaining why we may consider them, or any attempt to comply with our rules and due process. We have established clear regulations governing the conduct of our proceedings in our Rules of Practice and Procedure. (Cal. Code Regs., tit. 20, §§ 1- 18.1) Rule 13.14 provides that a proceeding is submitted based on the record established at the end of hearings, unless a party formally moves to re-open the record, and permission to do so is granted. (Cal. Code Regs., tit. 20, § 13.14.) There are good reasons for this requirement. Other parties, and the Commission itself, do not, at the rehearing stage, have the opportunity to conduct further discovery or take other steps to verify new information, or to discover or introduce additional relevant material into the record. When no motion or pleading is filed justifying the credibility and relevance of new material (and allowing other parties to have a say on such issues), new material cannot be relied upon.

SCE has taken the proper approach in its response to the rehearing applications. SCE formally requests that we take official notice of FERC's Notice of Application, which CBD and WWP submitted, for the purpose of resolving the rehearing applications. (SCE Response at p. 14, fn. 7.) Our rule on official notice, Rule 13.9, is designed to avoid the legal problems summarized above by specifying that only certain inherently reliable materials may be officially noticed. (Cal. Code Regs., tit. 20, § 13.9; see Evid. Code, §§ 451, 452.) To be noticeable, parties must also have been provided with an opportunity "to meet" the request for official notice. (Cf., Evid. Code, § 453.) In addition, matters officially noticed cannot be relied upon to prove the truth of the matter—for example, to make direct findings about how the MLP will be built, or when Kern River sought approval for this lateral. (E.g., *Application of SCE for Approval of*

Results, etc. [D.07-04-049] (2007) __ Cal.P.U.C.3d __, 2007 Cal. PUC LEXIS 300, at LEXIS *21, fn. 7.)

The requirements of Rule 13.9 are met here for FERC's Notice of Application. CBD, WWP, and SCE all refer us to this document. BrightSource and First Solar appear to have been aware of this document and amenable to our relying on it. (E.g., BrightSource and First Solar Response at pp. 13-14; see *People v. Hardy* (1992) 2 Cal.4th 86, 134.) SCE's request that we take official notice of FERC's Notice of Application for Docket No. CP11-46-000 (Dec. 21 2010) is granted. We will refer to WWP's and CBD's attempt to submit additional information only in order to resolve their applications for rehearing, but the law does not allow this additional material to be considered part of the record on which either the Decision or the EIR were based.

In addition, the rehearing applications fail to show that the EIR's cumulative impacts analysis was in any way lacking. In compliance with CEQA,[42] the EIR contained a cumulative impacts analysis of over 100 pages in length. (EIR at pp. 5-1 to 5-106.) This analysis disclosed the total environmental effects that would be produced when the EITP's impacts were combined with the impacts produced by other activities that: had occurred, were occurring, or potentially could occur in the area near the EITP. The EIR discussed cumulative projects "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." (EIR at p. 5-1.)

The use of the July 30, 2010 "cut-off date" properly allowed those preparing the EIR to establish a definitive cumulative project setting before preparing the cumulative impacts analysis that would be included in the final EIR. (See generally Guidelines, §§ 15125, 15130; D.10-12-052, p. 12.) Without a cut-off date, the EIR could

[42] An EIR studies cumulative impacts to identify and disclose the combined effects of many different activities that can be "greater than the sum of [their] parts." (*Environmental Protection Information Center v. Johnson* (1985) 170 Cal.App.3d 604, 625.) Agencies are given a discretion in developing a cumulative impacts analysis, and should be "guided by standards of practicality and reasonableness[.]" (Guidelines, § 15130, subd. (b).)

have been subject to on-going revision as new projects were continually identified.[43] (See, e.g., *San Franciscans for Reasonable Growth v. City and County of San Francisco* (*"San Franciscans for Reasonable Growth"*) (1984) 151 Cal.App.3d 61, 74, fn. 14.) *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099 determined it was proper for an agency to exercise its discretion by using the date of the application for a project "as the cut-off date for determining which announced projects should be included in a cumulative impacts analysis." (*Id.* at p. 1128.)

CBD and WWP nevertheless attempt to infer from statements made by Kern River that the MPL "was known to the BLM" in April 2010.[44] (CBD Rehrg. App., p. 3; WWP Rehrg. App., p. 4.) As discussed above, the additional materials are not part of the record and cannot be relied upon to draw the inferences that WWP and CBD seek to draw. Moreover, CBD and WWP do not explain why their materials support an inference about BLM's institutional knowledge of this project, or why the factual inference they draw supports their ultimate legal conclusion: that the MPL met CEQA's standards for the inclusion of a project a cumulative impacts analysis. The allegation that "contact" was made, without more, does not establish the MPL as a "reasonably

[43] The footprint of the EITP will be 35 miles long. (See D.10-12-052, pp. 4-5.) Over this length, the EITP will cross areas designated for these uses: commercial, private, recreation, energy/utilities, industrial, mining, transportation, residential, open space/wilderness, and conservation/preserve. (EIR at p. 3.9-1.) Aviation facilities, grazing allotments, areas subject to mining claims, agricultural uses, and potential hazardous materials sites also occur near the route of the EITP. (EIR at pp. 3.7-1, 3.7-6, 3.9-5, 3.9-14.) In any of these areas, new activities could be proposed that would be relevant to a cumulative impacts analysis, and federal policy favors certain types of development on public lands in this area. (EIR at p. 1-13.) If each new activity that was proposed along the route of the EITP were to be added to the EIR as it became know, the EIR might not have been completed in a timely fashion. SCE claims, more dramatically, that allowing consideration of activities that become know late in the process would establish "a dangerous precedent ... allowing project opponents to use a speculative new project ... to delay approval of the unwanted project." (SCE Response at p. 16.)

[44] CBD claims that documents prepared by Kern River state that "BLM Needles District was originally contacted regarding access authorization for environmental surveys in April 2010." (CBD Rehrg. App., p. 3.) WWP incorrectly claims these documents also suggest that the California Department of Fish and Game was involved in a conference call that time, but the document only states that BLM Needles District was "contacted." (Compare WWP Rehrg. App., p. 4 with WPP Exhibit A at p. 36.)

foreseeable probable future project" properly studied as a cumulative impact.[45] (Guidelines, § 15355(b).) CBD and WWP do not explain how they reached this conclusion, or state any reason why alleged "contact" relating to a survey demonstrates that a project has advanced to a stage in its development that it must be considered to be a reasonably foreseeable future project. An agency's mere awareness of an early-stage proposal is also insufficient to demonstrate that the proposal is a probable future project. (*E.g.*, *Gray v. County of Madera*, *supra* at p. 167.) Because the development of projects involves many different components (e.g., financing, property acquisition), agencies may wait for proposals to become firm (as evidenced by the filing of an application) before they are included in a cumulative impacts analysis. (See *San Franciscans for Reasonable Growth v. City and County of San Francisco, supra*, at p. 74.)

CBD alleges, again based on its newly submitted materials, that a right of way application was filed with BLM on October 29, 2010, one week before the EIR was released on November 5, 2010. CBD provides no analysis to support its claim that publication of the EIR should have been delayed by this event, other than claiming, without reference to authority, that any application "filed before the Final EIR/EIS was issued ... should have been included in that document as well." (CBD Rehrg. App., p. 3; cf., Pub. Util. Code, § 1732.) Further, neither CBD nor WWP claim that the Commission—the agency preparing the CEQA document—was aware that the MPL was

[45] Although CDB and WWP draw the inference that the MPL was a firm proposal from the extra-record evidence they rely upon, it is just as easy to reach the opposite conclusion. The surveys referred to in the rehearing applications were allegedly conducted in or after April 2010—before any formal application was filed. This indicates that, had the surveys revealed negative information, the proposal might have been abandoned. It also suggests that in April 2010 the backers of the MPL themselves had no knowledge of the characteristics of the route their proposed lateral pipeline would take, or how its design would take into account those characteristics. Even now, only basic information is publicly available about Kern River's proposal. FERC has not completed an Environmental Assessment or a determination of whether an Environmental Impact Statement is necessary. (FERC Notice of Application (Dec. 21, 2010).) This lack of clarity is illustrated by the fact that the parties here have a basic disagreement about the route of the MPL in relation to the EITP. SCE, and BrightSource and First Solar, dispute WWP's description of the MPL's route, claiming it does not cross the EITP. (Cf., WWP Rehrg. App., p. 3.)

being studied by Kern River. The information CBD and WWP rely on describes contact between BLM and Kern River, and this is not a case where information about the MPL "could easily have been ascertained by the Commission from its own records...." (Cf., *San Franciscans for Reasonable Growth, supra,* at p. 74.)

SCE, and BrightSource and First Solar, claim that the rehearing applications do not demonstrate error for a second reason: the EIR's cumulative impacts analysis would not likely be altered by considering the MPL. The EIR studied a large number of projects and identified significant cumulative impacts that would be caused by increasing capacity on the EITP in conjunction with those projects. The EIR considered the main Kern River pipeline and the mine the MPL proposes to serve. As well, the EIR discussed other pipelines in its "study area" such as Molycorp's 13-mile wastewater pipeline and Calnev's more significant 233-mile, 16-inch-diameter Expansion Project. (EIR at pp. 5-1 to 5-3, 5-17, 5-20 to 5-21.) As a result of this analysis, the EIR found that effects on the desert tortoise would be cumulatively considerable. (EIR at pp. ES-29 to ES-34.) SCE points out that the additional 88 acres of desert tortoise habitat that WWP states will be disturbed by the MPL is so minor compared to the 112,000 acres of disturbance already studied by the cumulative impacts analysis that consideration of the MPL would not alter the EIR's conclusions. (SCE Response at pp. 16-17.)

CBD makes a speculative claim that additional cumulative impacts will occur as a result of the MPL. According to CBD, the MPL's location "may" disturb areas that could be used to relocate tortoises that will be moved as a result of the overall EITP project. (CBD Rehrg. App., p. 2.) This claim is not supported by any citation to the EIR, to the record, or to the additional materials submitted by CBD with its rehearing application. BrightSource and First Solar dispute this claim as a factual matter. Those parties assert that any relocation taking place pursuant to SCE's proposed measures would involve habitat over a mile away from the MPL.[46] In addition, as discussed below,

[46] This is an example of why a rehearing application should not seek to introduce new evidentiary material. We should not be required to make new factual findings, based on untested material, in order to

(*footnote continued on next page*)

the EIR requires that SCE accept the conditions imposed by the United States Fish and Wildlife Service, California Department of Fish and Game and its Nevada equivalent regarding treatment of the desert tortoise. (EIR at p. 3.4-107.) Review of the EIR further shows that the relocation of tortoises resulting from the ISEGS, which is part of the overall EITP project, will take place pursuant to a plan that follows federal guidelines. (E.g., 50 C.F.R. § 401.1-402.16.) This plan must be approved by and "must include all revisions deemed necessary by" BLM, the California Energy Commission, the California Department of Fish and Game, and the. (EIR at p. 3.4-123.) To assume that plans developed pursuant to applicable federal and state requirements will place tortoises in the path of a known pipeline construction project is speculative, and does not demonstrate error. Similarly, WWP asserts, without explanation or citation to the record, that the MPL "will also impact many of the other biological resources that will be impacted by the EITP including rare plants, gila monster, bighorn sheep, and other sensitive wildlife[.]" (WWP Application at p. 4; cf., Pub. Util. Code, § 1732.) This claim, too, is unsubstantiated, and the rehearing application fails to show that the MPL's affect on these species would significantly alter the EIR's conclusions.

If an EIR, "read as a whole, adequately deals with the question of cumulative impacts, it will suffice." (*Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 838.) Here, the EIR reviewed many past, present and reasonably foreseeable possible future projects and identified cumulatively considerable impacts in many different areas, including but not limited to: biological resources, air quality, visual resources, water quality, recreation, and traffic and transportation. (E.g., EIR at pp. ES-27 to ES-49 (Table ES-5).) Not only do CBD and WWP base their claims of error on factual material that cannot, legally, be

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(*footnote continued from previous page*)

determine if one of our decisions complies with the law and relies on the evidence in the record. (Cf., Pub. Util. Code, § 1757.)

made part of the record, the conclusions they draw from this material merely speculate that the MPL, theoretically, might affect certain habitat or species. Such unsubstantiated, speculative, claims, based on extra-record material, do not demonstrate error.

2. Residual CEQA Claims

CBD and WWP both close their rehearing applications by claiming, in summary language, that our environmental review was inadequate. (CBD Rehrg. App., pp. 5-6; WWP Rehrg. App., p. 5.) The majority of these parties' claims simply list broad sections of the EIR (e.g., project description or alternatives analysis) that they allege are in error. CBD makes only one elaboration on its summary claims. It states that "the 'project as a whole' include[es] connected actions represented by PPAs and projects in the CAISO queue that are relied on in the Decision regarding need[.]" (CBD Rehrg. App. p. 6.) WWP makes some specific claims, alleging, for example, that a distributed PV alternative should have been considered, and that the EIR's discussion of the dangers of an infectious disease affecting the desert tortoise should also have addressed whether or not construction dust was a factor related to the disease. The rehearing applications further refer to the other documents filed by these parties in the underlying proceeding and as part of the CEQA process.

a) Conclusory Allegations Made Without Reference to the Record or the Law Fail to Meet Section 1732's Requirements

The rehearing applications' residual claims string together several generic allegations that make no references to the Decision, the final EIR, or to the formal responses to the comments contained in that document. Together, the two rehearing applications refer only once to legal authority, when CBD cites the Legislative intent section of CEQA, Public Resources Code sections 21002 and 21002.1, subdivision (b).

For example, CBD's rehearing application alleges error because: "Specifically, the EIR/EIS failed to adequately address many significant impacts of the EITP as required by CEQA." (CBD Rehrg. App., p. 5.) CBD supports this allegation by listing, at pages five and six, grounds that:

> include, but are not limited to: inaccurately defining the "whole of the action" for purposes of analysis; failure to adequately disclose and analyze the significant impacts to the biological resources of the Ivanpah Valley that will be caused by expansion of transmission capacity in the EITP and by the "project as a whole" including all connected actions; failure to consider the significant growth inducing impacts of the EITP; omission from the analysis of significant cumulative actions; failure to adequately address alternatives to the EITP that would avoid or substantially reduce impacts to the environment; and failure to consider minimization and mitigation measures to reduce impacts that cannot be avoided.

The only elaboration provided for these claims is: (i) a footnote stating that the Mountain Pass Lateral, discussed above, is a "significant cumulative action[,]" and (ii) a claim that the EIR was required to evaluate all of the renewable generation facilities that were factored into the need analysis. (CBD Rehrg. App., pp. 4, 6.)

SCE asserts that such claims do not meet the statutory requirements that apply to rehearing applications because they are impermissibly vague. BrightSource and First Solar make a similar claim. Section 1732 requires a rehearing application:

> to set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not so set forth in the application.

In addition, our Rules also require a rehearing application to state the specific grounds on which it alleges error, and to "make specific references to the record or law." (Cal. Code Regs., tit. 20, § 16.1, subd. (c).)

We interpret these requirements strictly. By giving us an opportunity to correct error before a matter reaches the courts, the statue seeks to avoid unnecessary litigation. "The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. The decisionmaking body is entitled to learn the contentions of interested parties before litigation is instituted." (*Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal. App. 4th 225, 243, quoting *Napa Citizens for Honest Government v.*

Napa County Bd. of Supervisors (2001) 91 Cal.App.4th 342, 384 (internal punctuation and citations omitted).)

Thus, the filing of a rehearing application is not merely a technical requirement that a party must satisfy before it proceeds to file a petition for review in court. A rehearing application must give us an opportunity to correct error and avoid litigation. To do so, it must contain specific allegations (including references to applicable law and the record) so we are not "forced to guess ... what the actual basis for an allegation of error might be." (*Authority to Institute a Rate Stabilization Plan* [D.02-03-063] (2002) __ Cal.P.U.C. 3d __ at p. 4 (slip op.), 2000 Cal. PUC LEXIS 1102 at *6.) "Simply identifying a legal principle or argument, without explaining why it applies in the present circumstances, does not meet the requirements of section 1732." (*Procedures to Implement the Digital Infrastructure and Competition Act* [D.10-07-050] (2010) __ Cal.P.U.C. 3d __ at p. 19 (slip op.), 2010 Cal. PUC LEXIS 298 at *37.) Courts have confirmed the importance of this requirement by finding that matters not raised in a rehearing application "are not properly before th[e] court." (*Northern Cal. Assn. to Preserve Bodega Head v. Public Utilities Com. (*1964) 61 Cal.2d 126, 129, fn. 1a.) Further, CEQA prevents parties from challenging an EIR unless it has presented its concerns to the relevant agency in advance. (Pub. Resources Code § 21177, subd. (a).)

To comply with section 1732, it is therefore not enough to list the aspects of the EIR that CBD believes are in error. For example, the EIR's discussion of biological and cumulative impacts, each of which are identified in CBD's rehearing application are 111 and 103 pages long, respectively. Moreover, when we prepare an EIR, we are entitled to weigh the environmental record, determine how best to disclose environmental information in an EIR, and to reach our own conclusions on environmental issues. In doing so, we are not required to achieve perfection but simply to undertake an adequate and complete environmental review. (Guidelines, § 15151.) Our conclusions on environmental questions are further not in error simply because "a different conclusion would have been equally or more reasonable." (*Marin Municipal*

Water Dist. v. KG Land Cal. Corp. (1991) 235 Cal.App.3d 1652, 1660.) Nor will our conclusions be in error simply because other determinations, that we did not make, can be supported by the record. (Cf., *Karlson v. Camarillo* (1980) 100 Cal.App.3d 789, 805.) An environmental document is legally adequate if there is "*any* substantial evidence in the record to support the findings." (*Smith v. County of Los Angeles* (1989) 211 Cal.App.3d 188, 198 (original emphasis).)

Error is therefore demonstrated by showing that the evidence supporting a specific conclusion in the EIR or the Decision is insufficient, or that we otherwise did not proceed as required by law. To make such a showing a party "must lay out the evidence favorable to the other side and show why it is lacking." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.) By making generic, unsupported allegations of error, the rehearing applications filed by CBD and WWP do none of these things.

It is particularly improper for a party to state in its rehearing application that error is alleged on all of the grounds contained in a list of pleadings incorporated by reference. A cross-reference to another document does not "set forth" its claims in a rehearing application. (Pub. Util. Code, § 1732.) The briefs, reply briefs, and other pleadings filed in this proceeding contain arguments on numerous issues, including policy questions that are no longer at issue in the rehearing phase.[47] At this time the main question before us is not the one addressed in earlier pleadings: how to apply our expertise and discretion to dispose of SCE's application. We are determining whether the particular disposition contained in the Decision is legally correct. We should not be forced to guess which parts of several pleadings written before the Decision was issued might still apply to D.10-12-052. (Cf., *Authority to Institute a Rate Stabilization Plan* [D.02-03-063], *supra*, at p. 4 (slip op.), LEXIS at *6.)

CBD supports its attempt to incorporate documents by reference by claiming that the final EIR and the Decision did not "cure" alleged problems identified by

[47] We note that CBD's rehearing application does not allege error based on the arguments raised in its Comment Letter on the EIR.

CBD. (CBD Application at p. 6.) However, error is demonstrated by showing that the analysis contained in the Decision or the EIR does not meet applicable legal standards, not by looking to whether we adopted CBD's or any other party's position. To simply claim, as CBD does, that any previously-raised issue that was not decided in a party's favor can be incorporated by reference into a rehearing, without any further discussion—and thereby preserved for court review—defeats the purpose of exhaustion statutes like section 1732. CBD is effectively seeking to bypass the required rehearing process and proceed directly to court on every issue on which it did not prevail.

b) The EIR's Project Description is Consistent With the Decision, And With CEQA

The EIR described the scope of the project it would review as including both SCE's "core" proposal—the EITP—and the ISEGS solar project proposed by BrightSource. This project description followed CEQA's requirement that an EIR study "the whole of an action." (Guidelines, § 15378, sub. (a).) The federal environmental review of the EITP, performed by BLM, did not consider ISEGS to be a "connected action" that was studied as part of the project under review. The EIR explained that a variety of reasons led it to determine that that ISEGS fell within the scope of the overall CEQA project including: (i) ISEGS was known to be located directly adjacent the EITP; (ii) at the time of the EIR's development date, ISEGS had already executed PPAs specifying the use of the IETP; and (iii) the proposal to build ISEGS had become definite and well-defined, as evidenced by the fact that it was being permitted and reviewed by the CEC. (E.g., EIR at p. 1-4.) In the proceedings dealing directly with SCE's application, representatives from BrightSource appeared to affirm that their project was in the final stages of development, and stated they were anxious for this Commission to quickly approve the EITP and were "prodding Edison [i.e., SCE] on a regular basis[.]" (Pre-Hearing Conference Transcript at p. 16.)

Nevertheless, CBD asserts the EIR's project description is not broad enough. The rehearing application does not refer to the record describing the EITP or other activity in the Ivanpah Dry Lake Area. Instead, CBD's alleges error on the grounds

that the EIR's approach supposedly differs from the Decision's need analysis. CBD alleges that all the "actions represented by the PPAs and the projects in the CAISO queue that are relied upon in the Decision regarding need" should have been included in the scope of the CEQA "project" reviewed by the EIR. (CBD Rehrg. App., p. 6.) CBD asserts that the Decision's analysis "assumes these projects will likely be developed...." (CBD Rehrg. App., p. 4.)

In fact, both the Decision and the EIR explicitly determined that most proposed renewable facilities, other than ISEGS, were "speculative[.]" (Compare D.10-12-052, p. 27 with EIR at p. 2-36.) The Decision, for its part, directly acknowledged that we were reviewing the EITP at a point in time when—except for ISEGS—we could not determine what renewable generation would ultimately be developed or connected to the EITP. At page 27, the Decision explained:

> In the context of renewable energy development, it is often the case that transmission must be planned and permitted before generation fully commits to an area. This is the situation here.

Because we were uncertain what renewable generation would ultimately be developed, we analyzed SCE's application in a way that recognized the different stages of development that had been reached by the renewable energy proposals discussed in the Decision. At one end of the range, we found the ISEGS project was very likely to be developed, with a projected on-line date as early as 2012. Our analysis could have, but did not, rely on this project alone because of the possibility that it might connect to a different transmission line. (D.10-12-052, p. 30.) At the other end of the range, we found that projects in the CAISO interconnection queue were "more speculative." (D.10-12-052, p. 27.) We noted the length of time needed to develop a project that had obtained a place in the CAISO queue and mentioned the need for a project to obtain financial backing.[48] (D.10-12-052, pp. 26, 59.)

[48] Testimony showed that a proposal to construct a renewable generation plant follows a lengthy development cycle. At the very beginning of this cycle the backers of a proposal make one (or more)

(*footnote continued on next page*)

Because of this fact pattern, the Decision explained that we would not rely on a finding that any particular renewable facility would necessarily transmit power over the EITP in order to approve that transmission line. Instead, we determined to:

> look[] to the renewable potential for the area that the transmission line will serve *as an indicator* of the need for the proposed line. Our analysis continues to emphasize the amount of generation already under RPS contracts [i.e., PPAs] with the investor owned utilities, and, in this case, gives some weight to the number of interconnection requests in the area *as an indicator* of future growth.

(D.10-12-052, pp. 27-28 (emphasis added).) Contrary to CBD's claims, this analysis does not "assume[] these projects will likely be developed...." (Cf., CBD Rehrg. App., p. 4.) In order to resolve SCE's application, we sought to identify "renewable potential" that could "serve and an indicator" of need specifically because the fact pattern here did not allow us to engage in an analysis determining whether any particular facility would in fact be built. (D.10-12-052, p. 27.) By giving different weight to the different information about renewable power sources, our analysis was able to consider early-stage proposals as one factor in our analysis, while at the same time acknowledging that many of those proposals were speculative, and would need to successfully complete a lengthy and challenging development process if they were to be built.

Further, as explained above, we relied on many other factors not related to generation to approve SCE's application. CBD's rehearing application seems to read more into this discussion than we intended. For example, at page 27 we noted that renewable facilities must obtain financing to be successful and that financial backers make their own decisions about the likelihood that a proposal will ultimately be developed. This language should not be characterized as an assumption that early-stage

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(*footnote continued from previous page*)

requests for interconnection without revealing any specific information about their proposal. Later, one (or more) PPAs are signed, and finally an LGIA is entered into an approved by federal regulators. (RT, Vol. 1, pp. 86, 88, 91, 112-113, 115.)

renewable energy proposals "will likely be developed." (Cf., CBD Rehrg. App., p. 4.) To make our meaning clear, we will modify this language to make it more precise, modify other portions of the Decision's discussion to achieve the same effect, and ensure that the Decision's Findings of Fact are consistent with its discussion.

In addition, the claim that every proposal that was considered in the Decision's discussion of SCE's application—no matter what weight it was given—must also be studied in the EIR as part of the EITP project fails to recognize that a CEQA review and the analysis of the EITP we performed pursuant to the Public Utilities Code involved very different rules and criteria. CBD does not provide any explanation for its claim that our acknowledgement of the renewable potential of the Ivanpah Dry Lake Area caused all of the proposals we mentioned to meet the CEQA's criteria determining what should have been studied as part of the overall EITP "project."

A regulatory decision to approve or deny an application for a CPCN applies its own standards, and is ultimately an exercise of this Commission's discretion. (E.g., Pub. Util. Code, § 1001.) For example, as discussed above, the Decision considers PPAs because, in a prior proceeding, after considering the positions of several different parties, we determined to use the existence of PPAs as an "indicator" we would use to determine if the specific requirements of section 399.2.5 were met. (*ATP* (2007) [D.07-03-013], *supra*, at p. 14; see also *TRTP* (2009) [D.09-12-044].) CBD is incorrect to assume that our use of this indicator, for the purpose of evaluating a CPCN application under the Public Utilities Code, must dictate the result of a CEQA inquiry, pursuant to Guidelines section 15378 and relevant case law, into what constitutes "the whole of an action."

When CEQA's criteria are applied, it becomes clear that the EIR properly described the project it would study because it determined what to study. That analysis proceeds from the core requirement that an EIR must be informative, and therefore must study "the whole of an action" including, under some circumstances, reasonably foreseeable future consequences of a proposal. (Guidelines, § 15378, subd. (a); *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 392 ("*Laurel Heights I*").) Case law provides that speculative proposals, proposals that are

not a reasonably foreseeable consequence of the action being studied, and projects with "independent utility" should not be included in the scope of a "project" reviewed by an EIR. (*Laurel Heights I, supra,* at p. 396; *Del Mar Terrace Conservancy v. City of San Diego* ("*Del Mar Terrace*") (1992) 10 Cal.App.4th 712, 798.) Determining what constitutes the "whole of an action" applies these standards to the relevant facts, and requires us to exercise judgment. Claims about the standards we used to evaluate certain facts in order to review the EITP pursuant to section 399.2.5 are not germane to the question of whether or not the EIR's properly applied CEQA's requirements to the facts presented here.

We do not wish to speculate about what facts CBD believes might show that CEQA's criteria require the project description to be expanded, but we note that none of the proposals discussed in the Decision—proposals that have not advanced farther that obtaining a place in the CAISO queue and those that have obtained PPAs—meets CEQA's requirements for inclusion as part of the overall EITP project. Facilities in the CAISO interconnection queue are generally at an early stage of development. Not only is there no public information about these facilities, the information that is known could be inaccurate or duplicative. (RT, Vol. 1, pp. 114-115.) For example a proposed renewable facility might seek several different interconnections, some with the CAISO and some through other means, such as public power. A proposal that has only obtained a queue position has likely not obtained any other development milestones, such as a PPA, financing, or engaging in the process to obtain government permits and approvals. (RT, Vol. 1, at pp. 91-93.) Because there is little public information available about these proposed facilities, and it is unclear how, or if, they will ultimately develop, proposals that have only secured a position in the CAISO interconnection queue must be considered too amorphous to undergo environmental review.

The Decision's analysis also considered four PPAs—three of which involved BrightSource, whose ISEGS project was considered as part of the overall project for EITP. Only one project with a PPA, First Solar Desert Stateline project, was not included in the EIR's overall project description because it did not meet the EIR's

criteria for inclusion. The EIR used two criteria to determine whether proposed renewable energy facilities were properly included in the scope of the EITP project: (i) whether a renewable energy proposal had signed a PPA specifying the use of the EITP and (ii) whether or not that proposal had begun environmental review by the "development date" of December 31, 2009. (EIR at p. 2-36.)

These criteria reflect CEQA's criteria. They look to see if a proposal is related to the EITP, has achieved development milestones, and has become sufficiently definite, with enough public information to allow environmental review. When "future development is unspecified and uncertain, no purpose can be served by requiring an EIR to engage in sheer speculation as to future environmental consequences." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 738.) Further, while reasonably foreseeable future projects should be included in the whole of an action, projects with independent utility may be studied independently. (*Laurel Heights I, supra,* 47 Cal.3d at p. 396; *Del Mar Terrace, supra,* 10 Cal.App.4th at p. 798.) By applying a development date, the EIR ensured that it would work with a "stable and finite" project description. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) CBD does not challenge the use of these criteria or provide any explanation of why it believes the facts about Desert Stateline meet CEQA's criteria for inclusion of an activity within the "whole of an action."

In the case of Desert Stateline, the EIR determined among other things that proposals that had not yet begun environmental review or made their environmental design public as of its development date were so "speculative" (under CEQA's criteria) that the EIR could not properly study their environmental effects. (EIR at p. 2-36.) Desert Stateline attempted a filing with the BLM to trigger environmental review in August 2009, but that filing was rejected. Subsequently, another filing was rejected and the EIR notes that Desert Stateline has not yet begun review, and the timeline for that review is still unknown. (EIR at p. 5-4.)

These facts support the EIR's determination that too little information is available about Desert Stateline to allow for environmental review. CBD does not

address any of these facts in its rehearing application or explain why the inclusion of Desert Stateline's PPA in the Decision's analysis shows that this proposal is well-developed enough to be capable of undergoing environmental review. (Cf., *Defend the Bay v. City of Irvine, supra,* 119 Cal.App.4th at p. 1266.) Nor does CBD explain why the Decision's reliance on this PPA, in combination with a number of other factors, demonstrates that Desert Stateline meets the CEQA criterion of being a reasonably foreseeable future consequence of the EITP.[49] (Cf., Pub. Util. Code, § 1732.)

Finally, CBD also fails to explain why the EIR's analysis of renewable generation, as a whole, is improper. Although the EIR did not analyze these proposals as part of the overall EITP project, the EIR explicitly noted that proposals to develop renewable energy that were not being analyzed at the project level were, instead, identified and discussed in the cumulative impacts section. (EIR at p. 2-36.) The EIR made its approach to describing facilities other than ISEGS clear, and the issue was addressed by groups in their Comment Letters. Yet CBD's rehearing application contains no discussion of the EIR's findings regarding project description, the responses to Comment Letters[50] discussing the scope of the project, or the cumulative impacts analysis. As a result, CBD's rehearing application fails to demonstrate error.

WWP, for its part, alleges that the "segmentation of the EITP project from the ISEGS" contravenes CEQA. It is not clear what is meant by this claim because the

[49] In fact, CBD's Comment Letter states that a PPA should not be considered as a strong indicator that a project will in fact come to fruition. CBD states that "project approvals are not foregone conclusions ...." Specifically addressing PPAs, CBD states: "although this indicates the intention of the project proponent, it does not mean that the project will be approved or constructed as proposed." (EIR, Appendix G, Comment Letter No. 23 at p. 7.)

[50] We note for example, that the Silver State project, which is being proposed for Nevada and which has obtained a PPA to provide capacity to a Nevada utility, using that utility's transmission facilities, was discussed extensively in CBD's Comment Letter but was not mentioned in the rehearing application. (EIR, Appendix G, Comment Letter No. 23 at pp. 5-6.) By way of contrast, Desert Stateline was not mentioned in CBD's Comment Letter. (Cf., Pub. Resources Code, § 21177.) CBD's comments may have been related to the federal environmental review, not California's CEQA process, but because there is no discussion of the matter in the rehearing application we cannot determine why CBD now believes CEQA requires some renewable energy proposals to be included in the "whole of the action" instead of others.

EIR included both the EITP and ISEGS in the "whole of the action" for CEQA purposes. (E.g., EIR at p. 2-36.) WWP may be addressing BLM's NEPA review, which did not consider ISEGS to be part of the NEPA project. However, that claim is not properly raised here.

(1) The EIR Analyzed A Full Range of Alternatives To Determine if the EITP's Effects Could be Avoided

To meet CEQA's requirements, the EIR identified 19 potential alternatives, and subjected them to a screening analysis. This analysis evaluated the potential alternatives according CEQA's criteria. The alternatives considered in an EIR should be designed to avoid or substantially lessen the impacts of a project. (Guidelines, § 15126.6, subd. (b).) Alternatives are to be developed and evaluated by considering: (i) the formal objectives that must be stated in an EIR 's project description; (ii) the alternative's technical, legal and economic feasibility; and (iii) the alternative's ability to avoid a project's impacts. (Guidelines, § 15126.6, subd. (a).)

In order to fully explain its approach to selecting alternatives, the EIR includes an alternatives "Screening Report" as Appendix A-1. That report determined that seven alternatives were feasible and met the project's objectives. Those seven alternatives were analyzed in the EIR. The remaining 12 potential alternatives were not carried forward, and the EIR's conclusions regarding each of these alternatives are contained in the Screening Report.

Both WWP and CBD assert that this approach is not legally proper. According to WWP, the EIR improperly failed "to consider alternative methods of producing renewable energy, for example using distributed P[hoto] V[oltaic]" solar generation. (WWP Rehrg. App., p. 5.) CBD, more generically, alleges error based on a "failure to adequately address alternatives to the EITP that would avoid or substantially reduce impacts" and error "in finding alternatives infeasible." (CBD Rehrg. App., p. 6.)

Although WWP's claim is specific, it is not accurate. The Screening Report identified and analyzed a "Non-Transmission" alternative that directly considered "alternative methods of producing renewable energy[.]" (Compare EIR, Appendix A-1 at

p. Ap.1-14 with WWP Rehrg. App. at p. 5.) This Non Transmission alternative was broken down into two different scenarios: (i) developing renewable energy sources in the Los Angeles Basin, close to electricity customers, and (ii) reducing the demand for electricity and employing small-scale "demand-side generation." WWP's rehearing application does not explain why the two scenarios considered under this alternative failed to properly consider alternative means of producing renewable energy, especially distributed PV. Both scenarios considered alternate renewable generation sources and the demand side alternative specifically included small-scale solar generation.

CBD claims, without providing any explanation, that the EIR improperly determined certain alternatives to be infeasible. We assume this refers to the demand-side scenario, which was found to be infeasible. However, CBD's claim takes this matter out of context. The demand-side alternative was not carried forward for full analysis in the EIR for three distinct reasons. First, the EIR determined that this alternative scenario did not meet one of the objectives of the EITP: to supply renewable power that would allow SCE to meet state-mandated Renewable Portfolio Standard (RPS) objectives. Second, the EIR found that *both* demand-side approaches (including distributed generation) *and* the use of industrial-scale renewable generation would need to be employed if SCE was to meet Legislatively-mandated renewable power goals. The demand-side scenario could not, therefore, be adopted in lieu of the EITP. Third, the EIR found that the demand-side alternative was speculative and technically infeasible. For these three reasons the Screening Report concluded that the demand-side alternative should not be considered in more detail in the EIR. (EIR, Appendix A-1, at p. Ap.1-43.)

These are all valid reasons. As SCE points out, case law supports agency decisions to screen out alternatives that do not achieve a project's fundamental purpose. (See *In Re Bay Delta Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1165.) The EITP is SCE's project, submitted to us for our approval. As discussed above, we evaluated that project by determining whether SCE's proposal had merit and should be carried out—but this proceeding is not being conducted for the purpose of second-guessing SCE's objectives for proposing the project. The EIR was also correct to find

that California utilities will need to rely on both demand-side solutions and the addition of larger-scale renewable energy to a utility's portfolio if they are to achieve the RPS goals. The EIR relies on reports that were available when it was under development to calculate that the EITP and the demand-side scenario will contribute approximately 5% and 10%, respectively, to the RPS goals. (EIR, Appendix A-1, at p. Ap.1-17.) This information shows that these two approaches must be seen as complementary efforts that need to be developed together, rather than alternatives that we may choose between. Neither CBD nor WWP make any attempt to discuss the record or the EIR's explanation of this factor in their rehearing applications.

CBD does, however criticize the EIR because it determined that the demand-side scenario should not be carried forward for further analysis in because it was infeasible. The EIR made this determination by relying on studies available during its development period. The EIR found these materials stated it was speculative whether or not enough locations could be found to house widespread small-scale solar facilities and weather enough trained workers were available to install such facilities. Further it was unclear whether or not the programs designed to facilitate and subsidize small-scale facilities were sufficiently effective, or whether the California grid was sophisticated enough to operate reliably with a large portion of its power coming from numerous, small-scale faculties whose capacity varied based on climate and other factors. The EIR noted that it also could not determine how well small-scale distributed generation would function, because studies indicated that this approach would, preferably, require a "market transformation" to be effective. (EIR, Appendix A-1, at p. Ap.1-17.) Based on this information, the EIR concluded that the demand-side scenario of the Non Transmission alternative was too "speculative and technically infeasible" to be carried forward for further study. (EIR, Appendix G, at p. G-54.)

As a result, the EIR fully explained how it reached its conclusions and what material it relied upon when it evaluated the demand-side alternative. The EIR's findings are based on specific factors, derived from relevant studies and reports. The rehearing applications make no attempt to analyze or refute this data, relying instead on vague

claims of "failure to adequately address alternatives" or failure to consider distributed PV. (CBD Rehrg. App., p. 6; WWP Rehrg. App., p. 5.) When a project opponent "fail[s] to lay out the evidence favorable to the other side and show why it is lacking[,]" its claims do not demonstrate that an EIR's approach is inadequate. (*Environmental Council of Sacramento v. City of Sacramento, supra,* at p. 1028.)

Finally we wish to note that the EIR carried forward seven alternatives for detailed study, all of which were feasible and met SCE's objectives. The rehearing applications do not address any of the alternatives that were actually considered in the EIR or attempt to suggest that those alternatives failed to present us with a reasonable range of options. "The discussion of alternatives need not be exhaustive, and the requirements as to the discussion of alternatives is subject to a standard of reasonableness. The statute does not demand what is not realistically possible given the limitation of time, energy and funds." (*Residents Ad Hoc Stadium Committee v. Board of Trustees* (1979) 89 Cal.App.3d 274, 286.) Because no party claims that the alternatives set forth in the EIR did not represent a reasonable range, and because the demand-side scenario of the Non Transmission alternative was examined and the reasons for screening it out were explained, the rehearing applications allegations are without merit.

(2) The EIR Properly Concluded that Federal and State Officials Should Apply Relevant Laws, Regulations and Guidelines to Determine How Important Species Affected by the EITP Project Will Be Treated

WWP alleges that the EIR is inadequate because its mitigation measures do not specify the amount of "compensation habitat" that will be acquired for the desert tortoise and "other species" that will suffer habitat loss. (WWP Application at p. 5; Cf., Pub. Util. Code § 1732.) With respect to the desert tortoise, the EIR disclosed that:

> the project would cause adverse impacts on the desert tortoise and its habitat. These impacts would be both short term and long term, and both localized and extensive.

The EIR goes on to detail impacts caused by death and injury from contact with project vehicles, vegetation clearance, hazardous material spills, infectious disease,

and increased predation from birds and feral dogs attracted to human activity, among other effects. (EIR at p. 3.4-85.) Additionally, the EIR discussed the extent of habitat loss caused by the project, and the extent of temporary disturbance of land. (EIR at p. 3.4-85.) The EIR considered the measures SCE proposed to take during construction and concluded that even if those measures were taken, the effects on the tortoise would be "adverse and moderate." (EIR at p. 3.4-88.) The EIR then proposed, in addition to the measures put forth by SCE, its own mitigation measures designed to reduce impacts on the tortoise. (See EIR at pp. 3.4-107 to 3.4 108.) However, even with these measures in place, the EIR determined that the impacts to the desert tortoise would be significant. (EIR at p. 3.4-127.) The Decision acknowledged that the EITP would have significant adverse environmental effects, "in particular resulting in unmitigable significant and unavoidable impacts to the desert tortoise." (D.10-12-052, p. 42.)

The mitigation measures proposed in the EIR included many specific requirements detailing how any tortoises encountered during construction would be treated. For example, no tortoise may be moved or captured, or "purposely caused to leave its burrow" when the air temperature is above 95 degrees. Qualified biologists are required to monitor construction activities and prepare daily reports. (EIR at p. 3.4-108.) In addition, construction may not commence until: (i) the United States Fish and Wildlife Service issues a Biological Opinion, (ii) the California Department of Fish and Game issues a 2081 permit, (iii) authorization is issued by the Nevada Department of Wildlife, and (iv) SCE accepts the provisions of those permits. For the ISEGS part of the overall project, a translocation plan is required that is consistent with federal guidelines and meets with the approval of federal and state agencies. (EIR at p. 3.4-123.) The EIR summarizes regulations controlling federal and state agencies that will issue permits at pages 3-67 to 3-74.

The claim that certain elements of "compensation" have not been specified appears to address the permits and approvals that will be drawn up and issued after the EIR was issued. For example, the provisions of the biological opinion required for the EITP have not been developed yet, but could require SCE to provide compensation.

(EIR, Appendix G, at p. G-48.) A Biological Opinion is issued only after a lengthy and detailed consultation and study process, governed by federal law. (See 50 C.F.R. § 402.1-402.16 (2010).) Relying on federal and state officials to develop conditions that will mitigate harm to the tortoise is not contrary to any provision of CEQA, and WWP's rehearing application cites no law to support its claim. (See Guidelines, § 15126.4, subd. (a)(1)(B); *Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359.) WWP's rehearing application further states no reason why the criteria applied by the United States Fish and Wildlife Service, the California Department of Fish and Game and the Nevada Department of Wildlife are not specific enough to meet CEQA's requirements.

In addition, even though the EIR adopted an extensive set of mitigation measures in an attempt to reduce impacts to the desert tortoise, it nevertheless concluded that the effect on the tortoise would be significant, despite the adopted mitigation. The impacts to the desert tortoise were fully disclosed and addressed by the statement of overriding considerations, which determined the EITP should be built despite these effects. (D.10-12-052, p. 42.) The Decision did not rely on mitigation, and particularly not the issuance of the biological opinion, to approve the project. Consequently, the Decision did not approve the EITP on the basis of improperly deferred mitigation. As the court in *Fairview Neighbors et al. v. County of Ventura* (1999) 70 Cal.App.4th 238 pointed out, when mitigation will not reduce the significance of an impact, the disclosure of that impact and the adoption of the project along with a statement of overriding considerations is the correct approach.

It is not clear what WWP means to allege when it claims that the EIR is also inadequate because it does not require compensatory habitat for unidentified "other species[.]" This claim is simply too vague to analyze. Many different mitigation measures are adopted for a variety of species in the EIR. Each measure takes a different approach, specific to the species it affects. For example, measures relating to the burrowing owl establish the amount of compensatory habitat. (EIR at p. 3.4-111.) On the other hand, the measures for the American badger involved re-location of burrows and reduction of night lighting. (EIR at p. 3.4-109.)

These measures are all consistent with the legal authority discussed above, and without any information explaining why WWP believes a particular measure does not properly address the concerns related to a specific species, WWP's rehearing application is impermissibly vague. (Pub. Util. Code, § 1732.) Similarly, CBD's allegation that the EIR fails "to consider minimization and mitigation measures to reduce impacts that cannot be avoided[,]" is both vague and inaccurate. The EIR proposes a large number of mitigation measures, which the Decision adopted. (D.10-12-052, p. 66 (Ordering Paragraph 3).) CBD's allegation provides no information allowing us to determine which particular aspects of the EIR's approach underlie its claim of error.

(3) The EIR Properly Analyzed Growth Inducing Effects

CBD asserts that the EIR did not "consider the growth-inducing impacts of the EITP." The quoted statement consists of CBD's entire argument on this point. The EIR considered growth inducing effects in Section 6.3, following the requirements of Guidelines section 15126.2, subdivision (d). That Guideline requires an EIR to describe the potential for economic or population growth, or the construction of additional housing. If a project would remove an obstacle to growth or, conversely, overburden existing facilities to the point that they would need to be improved, such a result must also be discussed. Finally, an EIR should discuss "the characteristic of some projects which may encourage or facilitate other activities that could significantly affect the environment[.]"

Section 6.3 covers all these points. At page 6-9, the EIR discusses population and housing. Next, at page 6-10, the EIR discusses the potential for the EITP to remove obstacles to growth or increase demands on public facilities and services. The EIR then considers whether the EITP will "encourage or facilitate other activities" describes factors, such as federal law and policy, that support the development of renewable power in the Ivanpah Dry Lake Area independent of the EITP.

Because CBD's allegation is so vague, it is difficult to determine why CBD believes the growth-inducing impacts analysis to be invalid. That analysis is derived

from the review that was performed in order to prepare the EIR, and CBD's summary claim does not address the material the EIR relies upon or refer to other material that might suggest a different approach was warranted.[51] Because CBD's allegation only states a conclusion—the growth inducing effects analysis is invalid—without setting forth "specifically the ground or grounds on which the applicant considers" the EIR to be unlawful, it does not demonstrate error.

(4) The EIR Properly Disclosed Impacts to the Desert Tortoise, Including Respiratory Disease

WWP's rehearing application claims that the EIR did not adequately discuss problems caused by a respiratory disease affecting the desert tortoise. According to WWP, this illness could be affected by changes in air quality or construction dust. (WWP Rehrg. App., p. 5.) In fact, respiratory illness in the desert tortoise is caused by an infections disease that is transmitted from tortoise to tortoise. The EIR address the increased chances of the transmission of this respiratory disease as a result of the EITP at page 3.4-85. The EIR takes the position that the infection itself is the main danger to tortoises, stating "[t]his condition often leads to death...." (EIR at p. 3.4-85.)

In its Comment Letter WWP gave a reference to a paper, claiming this paper showed that respiratory disease in the desert tortoise is also affected by "environmental factors[.]" (EIR, Appendix G, Comment Letter No. 21 (Sept. 7, 2009) at p. 2, fn. 1.) This paper explicitly acknowledges that its theory of environmental factors does not represent the scientific consensus. According to WWP's paper, the view held by the EIR is held as true "in most of the literature on desert tortoise." (Sandmeier, et al., URTD As a Threat to Desert Tortoise Populations: A Reevaluation (2009) 142 Biological Conservation 1255, 1260.) The paper also does not discuss construction dust. The environmental factors it describes are drought and chronic stress. (*Id*. at p. 1260.) The

[51] Neither CBD nor WWP appear to have addressed the question of growth inducing impacts in their comments on the draft EIR.

EIR was not required, by law, to discuss a paper seeking to spark a debate among scientists by challenging the consensus view, and WWP's claim of error has no merit.

II. CONCLUSION

For the reasons discussed in detail above, the rehearing applications fail to demonstrate error warranting the granting of rehearing. To clarify our decision, we will make the modifications set forth below. Rehearing of the Decision, as modified, will be denied.

THEREFORE, IT IS ORDERED that:

1. SCE's request that we take official notice of the Federal Energy Regulatory Commission's Notice of Application in Docket No. CP11-46-000 (Dec. 21 2010) is granted.

2. Except for the Federal Energy Regulatory Commission's Notice of Application addressed in Ordering Paragraph 1, above, the material submitted by CBD and WWP as exhibits to their rehearing applications is excluded from the record on which the Decision or the EIR were based pursuant to Rule 13.14, Rule 13.19, and Public Resources Code section 21177, subdivision (a).

3. The paragraph spanning pages 26 and 27 beginning "The first prong requires..." is restated to read as follows:

> The first prong requires that the Eldorado-Ivanpah Transmission Project bring to the grid renewable generation that would otherwise remain unavailable. Unlike other recent transmission projects, this project is not being developed to meet demand.[77] SCE's current interconnection capability in the Ivanpah Dry Lake Area is limited to approximately 80 MW via the existing line between the Mountain Pass Substation and the Eldorado Substation, on the Eldorado-Baker-Cool Water-Dunn Siding-Mountain Pass 115 kV transmission line.[78] By developing this project SCE will have

[77] The Final EIR/EIS finds that accessing renewable energy is the purpose of the project with "energy demand met by other means." (Final EIR/EIS at 6-9.)

[78] Exhibit SCE-5, Section A at 8:20-26.

> the ability to connect to capacity in an area with an acknowledged potential for renewable energy development.

4. The paragraph spanning pages 27 and 28 beginning "In the context of renewable energy..." is restated to read as follows:

> In the context of renewable energy development, it is often the case that transmission must be planned and permitted before generation fully commits to an area. This is the situation here. While interest in developing renewable energy in this area is demonstrated by the CAISO Interconnection Queue, such projects must achieve a number of objectives in order to develop, not the least of which is obtaining financing. Consequently, in this case, the Commission is looking to the renewable potential for the area that the transmission line will serve as an indicator of the need for the proposed line. Our analysis continues to emphasize the amount of generation already under RPS contracts with the investor owned utilities, especially ISEGS, which is far along in its development and has agreed to PPAs specifying delivery over the EITP. (Res. E4266 at p. 15; Res. E-4261 at p. 5.) We also give some weight to the number of interconnection requests in the area as, collectively, an indicator of potential future growth.

5. The first sentence of full paragraph on page 28 beginning "Based on Commission approved PPAs..." is restated to read as follows:

> Looking to Commission-approved PPAs, the capacity that has undertaken agreements to interconnect to the Eldorado-Ivanpah Transmission Project is considerable.

6. The paragraph spanning pages 28 and 29 beginning "We disagree with DRA's position..." is restated to read as follows:

> We disagree with DRA's position, as presented in briefs, that these projects are not sufficiently mature or certain to justify a need determination for the proposed transmission project.[82] It is appropriate to consider PPAs because, in a prior proceeding, after considering the positions of several different parties including DRA, we determined to use the existence of PPAs as an "indicator" to determine if the specific

[82] DRA Opening Brief at 10-13.

> requirements of section 399.2.5 were met. This is appropriate because our review of a PPA considers a number of factors allowing us to rely on a PPA as an indicator of renewable potential. As such we find that these projects are strongly indicative of a line that if built, will be utilized.

7. A new sentence is added to the end of the partial paragraph at the beginning of page 30, immediately following footnote 85, which reads:

> We need not contend with the question of whether our approval of PPAs currently proposing that capacity provided by BrightSource will utilize the EITP because we can rely on the existence of PPAs for this facility in combination with another factor: the identification of this region as having substantial renewable potential and the level of interest in attempting to develop this potential indicated by the CAISO Interconnection Queue.

8. The first sentence of the first full paragraph on page 30, which sentence begins, "While other transmission options..." is restated to read:

> That is, while other transmission options may exist, we find that the substantial amount of renewable capacity represented not only by BrightSource's ISEGS project, but also by the overall potential of this region (as evidenced by that fact that capacity associated with the other Commission-approved renewable PPA also intends to utilize the EITP) results in the need for additional transmission capacity.

9. The last full paragraph on page 32, which begins "We now turn to the third prong..." modified to read as follows:

> Based on the evidence in the record, we find that EITP satisfies the third prong regarding whether the cost of the line is appropriately balanced against the certainty of the lines contribution to economically rational RPS compliance. As discussed above, we have four solar projects with Commission approved PPAs totaling 717 MW of renewable generating capacity, which are intended to interconnect renewable generation in furtherance of the state's RPS goals. These projects were approved, in part, because of their cost reasonableness and the contribution they are expected to make towards California's 20% RPS goals, and they exceed the available capacity of the line located in the EITP right of

way, thus necessitating upgrades to bring their power to California load centers. Further, construction has already begun for the project contemplated in at least one of these PPAs, representing a total of 365 MW.

Additionally, the RETI reports reflect that there is substantial resource potential in the area potentially serviced by EITP, and strong commercial interest in the region. We find that the RETI-identified resource potential and developer interest support the 220kV plan of service proposed for EITP. Anything less will likely may result in the need for future tear downs and rebuild activities, which may unnecessarily increase the environmental impacts and the cost of upgrades. Thus, the 220 kV transmission plan of service, with the expansion potential proposed by SCE, is the most cost effective means available to interconnect and deliver the renewable resources from this region. Given all of these factors, we find that the cost of the proposed project, as modified herein, is appropriately balanced against the line's contribution to economically rational RPS compliance, thus satisfying the third prong. In light of the foregoing discussion, we find that the project meets the requirements of the three-prong test, and is thus, "necessary" to facilitate achievement of the renewable power goals established in Article 16."

10. Finding of Fact 11 on page 58 is modified to read:

    Once an interconnection request is submitted to the CAISO, numerous studies are required before an interconnection agreement can reasonable be executed.

11. Finding of Fact 12 on page 59 is modified to read:

    A proposal for renewable energy must obtain financial backing if it is to proceed.

12. Finding of Fact 14 on page 59 is modified to read:

    Nevertheless the number of existing proposals, in the aggregate, serves, along with additional factors, to show that there is adequate justification for the cost of the Eldorado Ivanpah Transmission Project.

13. Rehearing of D.10-12-052, as modified herein, is denied.

14. Application 09-05-027 is closed.

This order is effective today.

Dated April 14, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK FERRON
Commissioners