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February 9, 2011

California Energy Commission
Docket Unit
1516 Ninth Street
Sacramento, CA 95814-5512

Subject: **PALEN SOLAR I, LLC'S OPPOSITION TO CBD PETITION FOR RECONSIDERATION**
PALEN SOLAR POWER PROJECT
DOCKET NO. (09-AFC-7)

Enclosed for filing with the California Energy Commission is the original of **PALEN SOLAR I, LLC'S OPPOSITION TO CBD PETITION FOR RECONSIDERATION**, for the Palen Solar Power Project (09-AFC-7).

Sincerely,

Ashley Y Garner

Ashley Y Garner

Scott A. Galati
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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of: Application for Certification for the **PALEN SOLAR POWER PROJECT**	**DOCKET NO: 09-AFC-7** **PALEN SOLAR I, LLC'S OPPOSITION TO CBD PETITION FOR RECONSIDERATION**

INTRODUCTION

Palen Solar I, LLC (PSI), a wholly owned subsidiary of Solar Millennium LLC, in accordance with the Commission Order dated January 28, 2011 and revised on February 1, 211, hereby files its Opposition to the Petition For Reconsideration (Petition) filed by Intervener Center For Biological Diversity (CBD) on January 14, 2011 for the Palen Solar Power Project (PSPP). The Commission should deny CBD's Petition for the following reasons:

- The Petition fails to meet the minimum requirements of Title 20, Section 1720; and
- The Petition incorrectly alleges that Public Resources Code (PRC) Section 25527 is applicable to the PSPP

PSI has read Commission Staff's Opposition to the Petition and agrees with its analysis, application of the law, and recommended conclusion. PSI offers the following for consideration.

PETITION FAILS TO MEET MINIMUM THRESHOLDS

The Petition also fails to present new evidence, any error in fact, or any change or error of law. Further, the Petition fails to explain why the matters alleged could not have been

considered during evidentiary hearings. The underlying subject matters where CBD's contentions should have been addressed are Land Use and Biological Resources. CBD filed no testimony and elected to waive cross-examination of any witness in the subject matter of Land Use where the classification of the land in question including Staff's analysis of the underlying BLM planning documents is contained. In addition, although CBD did participate in the Biological Resources evidentiary hearing and filed testimony and cross-examined witnesses, it failed to raise the applicability of PRC Section 25527 at either of those hearings. However, CBD did raise the issue in its Presiding Member's Proposed Decision (PMPD) Comments, argued the same points contained in its Petition at the Committee Hearing on the PMPD and again argued the exact same points at the Commission Business Meeting where the full Commission adopted the PMPD and its errata. In fact, the errata to the PMPD contained an explicit acknowledgement of CBD's arguments and decided against its contentions.

The minimum requirements of the regulation permitting a Petition make it clear that the purpose is to consider ***new*** evidence or ***new*** arguments concerning change or interpretation of law. The purpose is not to unnecessarily prolong the approval process by allowing a party to rehash the same arguments that were fully considered by the Commission. The regulation does not, and the Commission should not, allow a party to Petition merely on the grounds that it disagrees with the Commission's consideration of the same arguments raised earlier in the proceeding. CBD had a full and fair opportunity to present evidence, cross-examine other parties, file comments with legal support and engage in oral argument. CBD elected not to contest the issue in the evidentiary hearings. Notwithstanding that choice to not participate in that manner, the Committee and the full Commission heard and considered the exact same arguments presented in its Petition. The Petition should be denied on these grounds alone. If is not, an unintended consequence could be that parties could continue filing Petitions on the mere grounds that it disagrees.

PRC SECTION 25527 DOES NOT APPLY TO THE PSPP

PSI agrees with the analysis contained in Staff's opposition that PRC 25527 does not apply to federal land. PRC 25527 should also be read in the broader context of the entire Warren-Alquist Act. PRC Section 25500 essentially provides the Commission with exclusive jurisdiction over permitting of a thermal power plant site and related facilities. Specifically,

> The issuance of certificate by the commission shall be in lieu of any permit, certificate, or similar document required by ***any state, local or regional agency, or federal agency to the extent permitted by federal law***, for such use of the site and related facilities, and shall ***supersede any applicable statute, ordinance, or regulation of any state, local , or***

> ***regional agency, or federal agency to the extent permitted by federal law.*** (Emphasis added)

The Commission has the ability to approve a site in areas where a state, local or regional agency could or would not. In fact, the Commission can approve a site that conflicts with the specific land use designations of another state agency, local city or county or regional agency as long as it makes the findings (typically referred to as override findings) required by PRC Section 25525. PRC Section 25525 expressly prohibits the Commission from attempting to make an override finding that conflicts with federal law.

> The commission may not make a finding in conflict with applicable federal law or regulation.

It is clear that the Legislature understood that while it could authorize a state agency to supersede state law, it could not authorize a state agency to violate federal law without violating the principles of federal preemption. When the specific language of PRC 25527 is read in this context, along with the points made in Staff's Opposition, it is clear that it cannot be fairly read to apply to federal lands. Palen is situated on federal land administered by the Bureau of Land Management (BLM) in accordance with federal law.

CONCLUSION

PSI respectfully requests that the Commission deny CBD's Petition on the grounds that it does not meet the minimum standards under Title 20, Section 1720. If the Commission believes the Petition should be considered although failing to meet the minimum procedural requirements, PSI requests it be denied on the grounds that PRC Section 25527 is inapplicable to the PSPP.

Dated: February 9, 2011

Respectfully Submitted,

// original signed //

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Scott A. Galati
Counsel to Palen Solar I, LLC

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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APPLICATION FOR CERTIFICATION FOR THE *PALEN SOLAR POWER PLANT PROJECT*

Docket No. 09-AFC-7

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(Revised 8/27/10)

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DECLARATION OF SERVICE

I, Ashley Y Garner, declare that on February 9, 2011, I served and filed copies of the attached **PALEN SOLAR I, LLC'S OPPOSITION TO CBD PETITION FOR RECONSIDERATION**, dated February 9, 2011. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list, located on the web page for this project at:
[http://www.energy.ca.gov/sitingcases/solar_millennium_palen]

The documents have been sent to both the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

(***Check all that Apply***)

FOR SERVICE TO ALL OTHER PARTIES:

__X__ sent electronically to all email addresses on the Proof of Service list;

_____ by personal delivery;

__X__ by delivering on this date, for mailing with the United States Postal Service with first-class postage thereon fully prepaid, to the name and address of the person served, for mailing that same day in the ordinary course of business; that the envelope was sealed and placed for collection and mailing on that date to those addresses **NOT** marked "email preferred."

AND

FOR FILING WITH THE ENERGY COMMISSION:

__X__ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below (***preferred method***);

OR

_____ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 09-AFC-7
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

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

Ashley Y Garner

Ashley Y. Garner

*indicates change