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VIA EMAIL AND U.S. MAIL

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Re: Government Claim by Solar Point Resources, Inc.

Dear Committee Members:

We are writing on behalf of Solar Point Resources, Inc. ("Solar Point") to inform you of Solar Point's claims arising out of the fraud allegations currently pending against DyoCore, Inc. (the "Fraud Allegations"). As we discussed in our letter to the California Energy Commission ("Commission") on August 10, 2011, the Fraud Allegations have strong potential to adversely affect Solar Point's interests.

Solar Point is an authorized distributor of DyoCore, Inc.'s ("DyoCore") SolAir 800 wind turbine ("DyoCore Turbine"). In 2010, a small group of hardworking Californians founded Solar Point as a legitimate small business seeking to help implement the Emerging Renewables Program ("ERP"), purchasing ERP-eligible equipment to support the deployment of renewable generation systems. Solar Point's customers include school districts, municipal entities, California farms, small businesses, churches and residences. Solar Point also put subcontractors back to work installing ERP-eligible equipment. However, the Fraud Allegations have compromised all of the work Solar Point has done under the ERP.

The fundamental issue as Solar Point sees it is that the Commission made a series of affirmative representations that it would continue to process ERP rebate applications filed before 5 p.m. on March 4, 2011, and pay rebates approved prior to that date. Until July 26, 2011, there were no discernable doubts as to whether the Commission would process and pay rebate reservation

applications filed prior to 5 p.m. on March 4, 2011, and rebate reservations approved prior to that date. Solar Point has expended considerable effort and incurred millions of dollars in reasonable reliance on the Commission's guidance and representations regarding the DyoCore Turbine and the status of the ERP.

This letter outlines Solar Point's claims against the Commission. The claims made herein will serve as Solar Point's claim in accordance with the Government Claims Act. This letter is organized according to the required elements of a claim under the Government Claims Act. We hope this letter will provide the Commission with the information it needs to evaluate Solar Point's claim. We welcome the opportunity to resolve the issues discussed below without resorting to litigation.

I. NAME AND ADDRESS OF CLAIMANT

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II. ADDRESS TO WHICH NOTICES SHOULD BE SENT

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III. DATE, PLACE AND OTHER CIRCUMSTANCES OF THE OCCURRENCE OR TRANSACTION WHICH GAVE RISE TO THE CLAIM ASSERTED

The Commission, in coordination with its consultant KEMA, Inc. ("KEMA)," determined that the DyoCore Turbine is eligible for ERP rebates on or around March 1, 2010. Solar Point is informed and believes that the Commission added the DyoCore Turbine to its list of eligible small wind turbines on or around that date.

Solar Point was founded in 2010 as a legitimate small business seeking to help implement the ERP. When Solar Point became an authorized distributor of the DyoCore Turbine in 2010, it was just entering the business of selling wind turbines. Therefore, Solar Point conducted its own reasonable due diligence on both the Commission's program and DyoCore's product. Before

purchasing any ERP-eligible equipment, Solar Point took the time to discuss the Emerging Renewables Program, the required steps, necessary documentation, and payment schedules and commitments with Staff. In addition, Solar Point reviewed the Emerging Renewables Program Guidebook to understand the requirements of the program and the Commission's website to confirm the DyoCore Turbine was included in the program.

Solar Point did not limit its review to the Commission's program but also investigated DyoCore and its turbine. Solar Point requested and confirmed the warranty for the DyoCore Turbine, visited DyoCore's research lab in San Diego, and later the larger research lab including a wind tunnel in San Diego. Solar Point also checked wiring details and construction details including placing the DyoCore Turbines in series or in parallel.

In addition, Solar Point submitted the appropriate documents with the Commission to be listed as both an installer and a retailer in the Commission's data base. (See Emerging Renewables Program Final Guidebook, Tenth Edition, April 2010, CEC-300-2010-003-F ["Guidebook"], at 8-9; and Emerging Renewables Program Draft Guidebook (with redline), Eleventh Edition, July 2011, CEC-300-2011-004-D ["Draft Eleventh Edition Guidebook"], at 7-8.) Solar Point has sold systems to customers, filed Reservation Request Forms (CEC 1038, "R1") with the Commission, received Rebate Payment Claim Forms (CEC 1038, "R2"), and installed systems all under the reasonable assumption that the equipment met the Emerging Renewables Program requirements and would, if properly documented, obtain the rebates allowed by the program.

On March 4, 2011, the Commission announced a temporary suspension of the entire ERP. Solar Point paid close attention to the temporary suspension of the program in March and the impacts of that suspension on existing R2s. The notice of Temporary Suspension of the Emerging Renewables program stated, "The Energy Commission will, however, continue to process payment claims for rebate reservations approved before this date." (At 1, March 4, 2011.) And, Commission Staff's statement when presenting the suspension of the program to this Commission on March 17, 2011 included the following, "The temporary suspension does not affect applications that were approved prior to the suspension of the program nor does it affect processing of payments for applications that were approved before the suspension." (Commission Business Meeting, March 17, 2011, at 4.) Finally, the Commission Staff reconfirmed their intent to honor the existing reservations filed prior to the temporary suspension at the April 14, 2011 Staff Workshop on Proposed Changes to the Emerging Renewables Program. Based upon these representations, Solar Point continued to purchase DyoCore Turbines, take deposits from customers, seek local government approvals for installations and direct subcontractors to continue to install DyoCore Turbines.

On July 26, 2011, the Commission's Executive Director filed a formal complaint against DyoCore. (See Complaint Against DyoCore, Inc., dated July 26, 2011 (Docket No. 11-CAI-03) [the "Complaint"].) This Complaint alleges that DyoCore violated the intent of the ERP and certain sections of the ERP Guidebook "by submitting grossly overstated information regarding the performance characteristics of the [DyoCore Turbine] in order to have the DyoCore Turbine

listed by the Commission as eligible for use under the ERP." (See Robert P. Oglesby, Complaint Against DyoCore, Inc. [July 26, 2011] at 1.) The filing of the Complaint is the first public indication that there were any doubts whatsoever regarding the future of the DyoCore Turbine's eligibility under the ERP. As of the date of this letter, the DyoCore Turbine is still listed as eligible on the Commission's list of ERP-eligible turbines.[1]

At this time Solar Point has 110 installations at what is referred to as the R2 stage and 266 more R1 applications filed prior to the temporary suspension. The Emerging Renewables Program has several stages. The first stage involves filing a form called an R1, Reservation Request Form, and documentation to support the reservation. According to the guidebook, "[A] funding reservation provides the purchaser assurance that the reserved funds will be available when the payment claim is made." (Guidebook at 13; Draft Eleventh Edition Guidebook at 14.) If the information provided to the Commission on the R1 is complete and meets all program requirements, the Commission will "send a copy of the R2, Payment Claim Form (CEC-1038 R2) to the purchaser and designated payee to confirm the amount of funding reserved on the purchaser's behalf." (Guidebook at 19; Draft Eleventh Edition Guidebook at 20.) The guidebook notes, "[T]he available rebate amount may change during the term of the program. Therefore, the Energy Commission recommends that applicants wait to install system equipment until after they receive a confirmation indicating the amount of funding that has been reserved for their rebate." (Guidebook at 18; Draft Eleventh Edition Guidebook at 19.) Solar Point followed the guidebook instructions and did not install any equipment until it received an R2 for that installation. Once Solar Point obtained an R2 for an installation, it carefully followed the program requirements outlined in the guidebook to obtain rebate payments including installing the systems in an orderly fashion to ensure it met the deadlines contained in the R2s. "To receive rebate payment, all program requirements must be in compliance and a complete claim for payment must be made before the expiration of the reservation." (Guidebook at 19; Draft Eleventh Edition Guidebook at 20.)

As currently implemented, the ERP has essentially no standards for rating eligible small wind systems. To qualify for listing, the Commission's eligibility criteria require either certification by a small wind turbine-specific safety and/or performance standard <u>or</u> monthly data of average energy produced and average wind speed for one consecutive year. The ERP statute simply provides that "[i]ncentives shall be issued on the basis of the rated electrical generating capacity of the system measured in watts, or the amount of electricity production of the system, measured in kilowatt hours." (Pub. Resources Code § 25744[b][2].) There is no guidance as to how the turbine's rating is determined. Solar Point inquired of the Commission Staff about the method used by KEMA to review and rate the wind turbines. Solar Point was informed by Commission Staff that there was not a published standard method for rating these small wind turbines. Furthermore, there is no requirement that a given piece of equipment must remain installed for any period of time.

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[1] List available at http://www.consumerenergycenter.org/cgi-bin/eligible_smallwind.cgi.

Additionally, the ERP allows rebates up to 100% of the cost of the eligible wind turbine. The ERP Statute provides that "[i]ncentives shall be limited to a maximum percentage of the system price, as determined by the commission." (Pub. Resources Code § 25744[b][2].) The Guidebook states that "[u]nder no circumstance will the incentive from the ERP exceed the net purchase price of the system to the final consumer (before ERP incentives)." (Guidebook at 11.) However, there are no other maximum percentage limits on rebates under the ERP.

IV. GENERAL DESCRIPTION OF THE INDEBTEDNESS, OBLIGATION, INJURY, DAMAGE OR LOSS INCURRED (SO FAR AS KNOWN AT TIME OF PRESENTATION OF CLAIM)

As discussed below in Section IV(C), prior to the time the Complaint was filed, Solar Point performed a great deal of work and incurred millions of dollars in liabilities in reasonable reliance on the Commission's determination that the DyoCore Turbine was eligible for ERP funding. Even after the temporary suspension of the ERP on March 4, 2011, the Commission made a series of affirmative representations that it would continue to process applications, and pay rebates granted, for purchases and installations of eligible equipment. Until July 26, 2011, there were no discernable doubts as to whether the Commission would continue to process rebate reservation applications filed prior to 5 p.m. on March 4, 2011, and rebate reservations approved prior to that date.

This section first explains why the Commission is responsible for determining the eligibility of a given wind turbine model under the ERP. Second, it lists the Commission's representations regarding the eligibility of that turbine. Third, it explains Solar Point's reasonable detrimental reliance on the Commission's representations. Finally, this section lists potential theories under which Solar Point may recover against the Commission.

A. The Energy Commission Is Legally Responsible for Determining and Communicating Eligibility Under the ERP.

Solar Point is at a loss as to how the Commission could possibly deny responsibility for determining the eligibility of small wind systems under the ERP. The record in this proceeding is replete with evidence that the Commission is ultimately responsible for evaluating and listing equipment as eligible for ERP funding. The Commission is statutorily responsible for developing and implementing the ERP's rebate program. The Commission's own Guidebook provides additional detail regarding how the Commission determines turbine eligibility. The Commission's contractual agreements with KEMA also plainly demonstrate the level of responsibility that the Commission holds with regard to evaluating and communicating eligibility under the ERP. The Commission's ultimate responsibility for evaluating and listing wind turbines is simply undeniable from the relevant statutory, regulatory, contractual and guidance provisions, as discussed below.

1. Emerging Renewables Program Statute

The ERP statute requires the Commission to "develop and implement eligibility criteria and a system that provides preference to systems based upon system performance, taking into account factors, including . . . installation orientation." (Pub. Resources Code Section 25744[b][6].) Thus it is clear on the face of the statute that the Commission is responsible for determining the eligibility of small wind turbines for rebates under the ERP. However, the evidence that the Commission is responsible for eligibility determinations goes far beyond the statute.

2. Emerging Renewables Program Guidebook

The Commission's own Guidebook further demonstrates the Energy Commission's sole responsibility for determining which equipment is eligible for ERP funding, and for maintaining a list of such eligible equipment. As a threshold matter, the Energy Commission must determine whether or not to list equipment as eligible. The Guidebook indicates that "[t]he major system components must be certified or approved as described in Appendix 3. Approved major components are on the Energy Commission's lists of eligible equipment and are available at [www.consumerenergycenter.org/erprebate/equipment]." (Guidebook at 6.)

Appendix 3 includes the criteria for listing components as eligible. These criteria are plainly those that the Commission uses in its own determination of whether or not to list a given piece of equipment. Appendix 3 provides that "[u]ntil the equipment is listed, it is not eligible and no funding will be reserved or paid. Equipment that has not met the aforementioned requirements will not be placed on the lists." (Guidebook at 49.) "Generating equipment (e.g. wind turbines), inverters, and performance meters are periodically added and removed from the lists of eligible equipment." (Guidebook at 49.) Therefore, it would be apparent to anyone reading the Guidebook that the Commission is responsible for determining the eligibility of small wind turbines under the ERP and for communicating this eligibility to the public.

The Guidebook also demonstrates that the Commission has ongoing obligations in the event that new information comes to light. For example, the Guidebook provides detailed provisions regarding audits and inspections. (See Guidebook at 9-10.) This section of the Guidebook indicates that "[t]he Energy Commission will conduct audits of the applications it receives to verify that the information provided in the applications is true and correct. The Energy Commission may also conduct field inspections to verify systems are operating properly and installed as specified in the reservation request and payment claim applications." (Guidebook at 9.) Therefore, it is evident that the Commission viewed itself as responsible for determining the eligibility of small wind turbines.

3. Agreements with KEMA, Inc.

The Commission's agreements with KEMA demonstrate that the Commission delegated to KEMA a large part of its responsibility for listing eligible turbines. The prime contract between

the Commission and KEMA, Commission Agreement No. 400-07-030, assigns KEMA with various tasks pertaining to the various renewables programs, including the broad Task 5 pertaining specifically to the Renewable Rebate Programs.

The specific work under Task 5 for which KEMA is responsible are assigned via Work Authorizations. Work Authorization 13, effective May 17, 2010, establishes KEMA's responsibilities regarding the ERP. Since the effective date, KEMA has been charged with four broad responsibilities: "(1) "review and provide feedback on draft guidebook language, (2) respond to requests for additions to the eligible equipment lists per certification requirements in the program guidebooks, (3) evaluating new technology requests for determining eligibility under the ERP requirements, and (4) providing updates to the eligible equipment lists to be posted on the Energy Commission's REP websites." (Work Authorization 13 at 1.) Task 1 is titled "Equipment Certification and Power Output Ratings," and it provides as follows:

> [KEMA] will provide ongoing support by responding to requests for additions to the ERP's current equipment eligibility lists including: obtaining information from industry representatives; developing/updating a comprehensive list of inverters, wind turbines, fuel cells and meters, that meet the certification requirements of the current ERP guidebook, Appendix 3.... New information will be obtained from the manufacturers as available. [KEMA] will modify the list based on the updated information received and will submit it electronically to the Energy Commission Project Manager not less than monthly. Staff will have these updated lists posted to the state's Go Solar California website for use by manufacturers, retailers and customers.

Under Task 2, KEMA also is charged with reviewing requests to add non-standard equipment to the Eligible Equipment list.[2] In summary, since May 17, 2010, KEMA (under authority delegated by the Commission) has had broad contractual obligations for evaluating the eligibility of equipment and developing a comprehensive list of such equipment.

On May 25, 2011, the Commission amended Work Authorization 13 to include a new subtask requiring KEMA to "conduct a technical evaluation" of certain data "to determine whether the

[2] Task 2 provides: "Upon request and/or approval of the Energy Commission Project Manager, [KEMA] will review industry representatives' requests to add products to the Eligible Equipment list that are not standard non-concentrating photovoltaic modules, meters/metering providers, inverters, fuel cells, or wind turbines. [KEMA] will initially determine if the information presented by the industry representative addresses all items necessary to meet the current requirements per the ERP Guidebook, Appendix 3, Section E, or SB1 Guidelines on Non-PV Requirements. [KEMA] will then advise the Energy Commission Project Manager on whether or not a detailed evaluation should be done. Upon approval by the Energy Commission Project Manager, [KEMA] will: evaluate the technical merits of the proposal, working with the requesting party to obtain any missing information, and submit an electronic summary of the research results and recommendations to the Energy Commission Project Manager. The Energy Commission will in turn use the recommendation when deciding whether or not the new product is eligible to be added to the Eligible Equipment lists."

data and/or information submitted to KEMA and/or the Energy Commission for specific equipment by equipment manufacturers and/or retailers support the claims of performance, power output, capacity, and/or operational characteristics made by the manufacturers and/or retailers for the specific equipment." This further demonstrates that review of manufacturers' claims is entirely within the scope of the Commission's authority under the ERP.

The budget for KEMA's ERP-related tasks provides further evidence that it is responsible for thoroughly evaluating the eligibility of equipment for which it receives an application. KEMA's total budget under Work Authorization 13 is currently $200,181.58. Taken together, the various factors in KEMA's relationship with the Commission clearly show that the Commission's authority under the ERP encompasses the evaluation and listing of equipment as eligible under the ERP.

4. DyoCore Communications with KEMA, Inc.

Although unknown to Solar Point until recently, the communications between KEMA and DyoCore also demonstrate that KEMA has undertaken its own evaluations of the performance claims made by DyoCore. As recognized in the Complaint, after a DyoCore representative requested that the DyoCore Turbine be listed at 1.6 kW, KEMA began questioning this claim. (See Complaint at 6.) On May 28, 2010, Daria Mashnik of KEMA sent David Raine at DyoCore the following message:

> My question (and what needs to be verified by you) is as follows:
>
> I graphed the data that you sent me below to get the following Performance Curve for your product.... You would like your product to be rated at 1,600 Watts, however based on the curve the output only goes up to 700 Watts which happens at ~26 mph. Please clarify.

(See email from Daria Mashnik [KEMA] to David Raine [DyoCore] Regarding Power Curve Output Data for SolAir – 1.6 kW [May 28, 2010 2:59 p.m.].) Therefore, as of May 2010, KEMA had begun evaluating DyoCore's claims regarding the DyoCore Turbine. Such an evaluation was entirely within the scope of Work Authorization 13, discussed above. KEMA's evaluation obviously did not resolve the current issues regarding the listed output of the DyoCore Turbine. However, it does help demonstrate that KEMA believed it was responsible for evaluating DyoCore's claims regarding the DyoCore Turbine.

5. Rebate Applications and Payment Reservations

The Payment Reservation Request Form (R1) also helps show that equipment eligibility is established by the Commission alone. The instruction sheet accompanying the form instructs applicants to "[p]rovide the quantity, name of the manufacturer and exact model number for the eligible equipment as identified at [222.consumerenergycenter.org/erprebate]." The application

form thus guides applicants directly to the Commission's eligible equipment list. Of course, the DyoCore Turbine is included in the Commission's eligible equipment list.[3] The R1 form also requires applicants to calculate the expected rebate and include it on the R1 form. The R1 form is therefore a highly standardized document that allows easy and efficient applications for ERP funding. The R1 form shows that equipment eligibility under the ERP is to be determined by referencing the Commission's eligibility list, rather than made on an individualized basis by each applicant.

B. The Energy Commission's Representations Have Consistently Affirmed that the DyoCore Turbine Was Eligible for ERP Funding.

Since Solar Point started doing business, it has been extremely cautious in reviewing and following the Commission's information and guidance regarding the ERP. Yet despite Solar Point's diligence in monitoring the ERP, there has simply been no indication prior to the date the Commission filed the Complaint that R1s submitted by 5 p.m. on March 4, 2011 and R2s would be processed any differently than they had before. Despite several opportunities to inform the many companies that rely on the Commission's listing of the DyoCore Turbine, the Commission failed to inform these entities or the general public of any issues regarding this turbine.

In its March 4, 2011 Notice Regarding Temporary Suspension of the Emerging Renewables Program, the Commission indicated that it was temporarily suspending the ERP and would not accept new applications for rebate reservations after March 4. However, the notice also indicated that the Commission would "continue to process payment claims for rebate reservations approved before this date." Unbeknownst to the public, the Commission had been investigating issues with the DyoCore Turbine since "the initial months of 2011." (Complaint at 7.) However, the March 4 notice contained no indication whatsoever that any issues had been raised with the DyoCore Turbine. The DyoCore Turbine continued to be listed as eligible on the Commission's List of Eligible Small Wind Turbines, as it has been at all times relevant to this claim.

When Staff presented the ERP suspension to the Commission on March 17, 2011, it included the following language: "The temporary suspension does not affect applications that were approved prior to the suspension of the program nor does it affect processing of payments for applications that were approved before the suspension." (Commission Business Meeting, March 17, 2011, at 4.) At the April 14, 2011 Staff Workshop on Proposed Changes to the Emerging Renewables Program, Commission Staff reconfirmed their intent to honor the existing reservations filed prior to the temporary suspension.

On July 1, 2011, the Commission posted another notice on its Consumer Energy Center website to update stakeholders and members of the public that its review of the ERP Guidebook

[3] See http://www.consumerenergycenter.org/cgi-bin/eligible_smallwind.cgi.

announced in its March 4 notice was "taking longer than the Energy Commission had anticipated."[4] This notice also indicated that "Energy Commission staff are also still reviewing the applications received prior to the March 4, 2011 program suspension. Applicants will be notified once the Energy Commission completes its review of the applications." Again, the notice made no mention of the Commission's concerns with the DyoCore Turbine. As of the date of this letter, this notice is still posted on the Consumer Energy Center website.[5]

In addition, from September 2010 through July 2011, Solar Point either made or received over 100 calls with the Commission. Solar Point made these calls to discuss and confirm various issues regarding the ERP, including the rebates it sought for the purchase and installation of DyoCore Turbines.

In short, until the filing of the Complaint on July 26, the Commission's communications regarding the ERP all indicated that applications filed prior to 5 p.m. on March 4 would be processed normally.

C. Solar Point Conducted Reasonable Due Diligence and Reasonably Relied on the Commission's Representations that the DyoCore Turbine Is Eligible for ERP Funding.

Solar Point is a small-scale distributorship established to facilitate the sale and installation of renewable energy generating equipment that is eligible for ERP funds. Solar Point is not a wind turbine manufacturer. Small distributors like Solar point therefore look to the Commission for review of the technical aspects of wind turbine eligibility and, indeed, the final word on whether a given solar wind system is eligible for ERP funding.

Nevertheless, Solar Point conducted a reasonable due diligence review of DyoCore and its DyoCore Turbine. Solar Point reviewed the Guidebook to be sure they understood the program. Bob Tablak of Solar Point travelled to meet with David Raine, DyoCore's CTO, and to inspect installations of the DyoCore Turbine. Mr. Tablak also visited the manufacturing facility and received training regarding the DyoCore Turbine. Mr. Tablak talked with Sara Taheri and James Lee on many occasions to fully understand the program and to be sure Solar Point was doing everything correctly. Between June 2010 and August 2011, Mr. Tablak either made or received over 100 calls with Commission staff, as discussed above in Section IV(B).

The Commission's procedure regarding eligibility for rebates is very transparent and predictable: the purchase and installation of eligible equipment in accordance with the Commission's procedures equals a rebate. Since the Commission maintains a list of eligible small wind turbines, the R1 form simply requires identifying which pre-approved turbine will be installed,

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[4] Available at http://www.consumerenergycenter.org/erprebate/2011-07-01_Status_of_ERP_and_Guidebook.pdf.

[5] See http://www.consumerenergycenter.org/erprebate/.

and providing other basic information regarding the buyer and seller. The Commission's review of rebate applications is therefore a ministerial process, since the key discretionary eligibility determinations have already been made before the application is filed.[6]

Based upon the Commission's well-established procedures, Solar Point's due diligence, and the Commission's representations discussed above, Solar Point incurred expenses, liabilities, and project costs as follows:

- Developed a small business to support sales, engineering, permitting, and installation of wind turbines.
- Designed and created a database specifically for tracking customers and processing R1s, R2s, interconnection agreements, customer contracts, deposits, sales commissions, installations and payments.
- Developed form contracts for customers, sub-contractors and sales staff.
- Designed and implemented a sales and marketing program with an initial focus on the April 6, 2011 deadline for the rebate level change.
- Ordered and paid for 540 DyoCore Turbines to support existing R2s.
- Purchased inverters and other equipment required for the installation.
- Procured steel for pole mounted turbines.
- Incurred sales tax on purchases.
- Obtained engineering design for pole mounts and numerous roof mounts.
- Subcontracted installation of equipment.
- Completed independent testing and review by TUV on the electrical interconnection required by San Joaquin County to obtain a master building permit.

[6] The Guidebook does contain provisions regarding audits and inspections that allow the Commission to stop review of rebate applications containing information "that appears to be questionable." (Guidebook at 9.) However, this provision is inapplicable in this case, since it is the Commission's listing of the DyoCore Turbine that is questionable. None of the information provided by Solar Point can be described as "questionable." As discussed above, Solar Point was completely and justifiably unaware of the questionable information DyoCore submitted in support of the DyoCore Turbine listing. In its rebate applications, Solar Point simply identified the name and rating of a turbine that had been pre-approved by the Commission. DyoCore may have provided the Commission with "questionable" information during the time that it sought to have its turbine added to the Commission's list of eligible wind turbines. However, this has no bearing on Solar Point's applications and rebate reservations.

- Incurred liabilities to contract and management staff.
- Incurred legal costs.
- Obtained liability for mechanic's lens and unpaid contract employees.
- Incurred damages to the reputation and goodwill associated with Solar Point and its sales force.
- Sustained overhead expenses, and
- Failed to realize profits.

Solar Point ceased ordering and installing DyoCore Turbines at all locations pending Commission action on the Complaint. Solar Point has existing credit lines secured by personal guarantees that will be maturing in the near future with no source of repayment.

D. The Energy Commission May Be Held Liable Under Several Legal Theories.

Solar Point believes the Commission could be found liable for the damage caused by the Commission's actions and representations on several theories, including but not limited to: breach of contract, promissory estoppel, equitable estoppel, and negligence.

1. Breach of Contract

The elements of a breach of contract action are (1) the existence of a contract (2) the plaintiff's performance or excuse for non-performance; (3) defendant's breach, and (4) resulting damages. (*Lortz v. Connell* (1969) 273 Cal.App.2d 286, 290.)

In this case, the Guidebook and the R1 and R2 forms work together to establish a contract for the purchase and installation of eligible equipment. The Guidebook provides the basic process for obtaining a rebate, which demonstrates the contractual nature of this process:

> In most cases, an applicant submits a Reservation Request Form (CEC-1038 R1) and supporting documentation to reserve a fixed amount of program funds.... Once the Reservation Request Form is reviewed and approved, the Energy Commission sends the applicant a Payment Claim Form (CEC-1038 R2) that identifies the amount of funds reserved and the date upon which the reservation expires. The applicant then proceeds to install an eligible system. When the system is completed and operational, the applicant then submits the Payment Claim Form and supporting documentation to the Energy Commission. If the applicant installs an eligible system, meets all program requirements, and submits a completed Payment Claim Form, with supporting documentation prior to the

> expiration date of the reservation, the Energy Commission reviews the amount reserved and the incentive the applicant is eligible to receive and makes the appropriate payment.

(See Guidebook at 2-3.) Therefore, this process involves a promise to pay a rebate in exchange for the purchase and installation of qualifying equipment in accordance with the applicable guidance. The Commission affirmed this promise repeatedly in the representations it made after it announced its suspension of the ERP, as discussed in Section IV(B) above. Solar Point has upheld its end of the bargain by applying for and obtaining R1s and R2s and purchasing eligible equipment in reliance thereon. If the Commission fails to uphold its end of the bargain, it will breach this contract and therefore be liable for compensatory damages and even lost profits to the extent they can be estimated with reasonable certainty. (See *Fisher v. Hampton* [1975] 44 Cal.App.3d 741, 747.)

2. Promissory Estoppel

If a court finds that a breach of contract action will not lie, the Commission could be held liable under a promissory estoppel theory. The elements of promissory estoppel are (1) a promise clear and unambiguous in its terms; (2) reasonable and foreseeable reliance by the party to whom the promise is made; and (3) the party asserting the estoppel must be injured by his reliance. (See *Garcia v. World Sav., FSB* (2010) 183 Cal.App.4th 1031.)

In this case, the Commission's Guidebook and R1 and R2 forms clearly represent that the purchase and installation of eligible equipment, in accordance with the Guidebook's procedures, entitles the purchaser to a certain rebate. As to the second factor, the Commission also made several clear representations that it would continue processing rebate claims for applications filed before 5 p.m. on March 4, 2011. (See Section IV(B), above.) Solar Point relied on these representations and was injured by this reliance as discussed above.

Therefore, Solar Point would prevail on a promissory estoppel theory, and would be entitled to enforcement of the promise, compensatory damages, and/or lost profits.

3. Equitable Estoppel

Solar Point can also argue that the Commission should be estopped from denying Solar Point's rebate applications under the theory of equitable estoppel. The elements for equitable estoppel are: (1) the party to be estopped must be apprised of the facts; (2) the party must intend that his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the party claiming estoppel must be ignorant of the true state of facts, and (4) the party must rely upon the conduct to his injury. (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 489.)

In this case, the Commission was apprised of the facts. It was (or certainly should have been) aware that Solar Point was continuing to pursue the funding earmarked in the R2s by going forward with purchases and installation of the DyoCore Turbine. It was also aware of concerns regarding the listed specifications for the DyoCore Turbine. Yet it took no action to inform those who rely on its listing status that it was investigating this turbine.

As to the second factor, the Commission also made several clear representations that it would continue processing rebate claims for applications filed before 5 p.m. on March 4, 2011. (See Section IV(B), above.) Solar Point relied on these representations and was injured by this reliance as discussed above.

With regard to the third factor, Solar Point was unaware that the Commission was considering not funding R1s and R2s associated with the DyoCore Turbine. As noted above, the Commission had made representations to the contrary, indicating that the Commission would continue processing payments for applications approved prior to suspension of the ERP.

Finally, Solar Point relied on these representations and was injured by this reliance as discussed above.

4. Negligence

The elements of a negligence claim are (1) duty; (2) breach of duty; (3) causation; and (4) damage. (See *Ahern v. Dillenback* [1991] 1 Cal.App.4th 36.)

The ERP statute requires that "[i]n awarding funding, the commission shall develop and implement eligibility criteria and a system that provides preference to systems based upon system performance, taking into account factors, including . . . installation orientation." (Pub. Resources Code Section 25744[b][6].) Thus it is clear on the face of the statute that the Commission is responsible for determining the eligibility of small wind turbines for rebates under the ERP. Furthermore, "[f]unding for emerging technologies shall be provided through a competitive, market-based process that is in place for a period of not less than five years, and is structured to allow eligible emerging technology manufacturers and suppliers to anticipate and plan for increased sale and installation volumes over the life of the program." (Pub. Resources Code § 25744[b][1].) Therefore, the Commission has a duty to develop and implement its eligibility criteria, and to do so in a way that allows eligible emerging technology suppliers to anticipate and plan for increased sale and installation volumes over the life of the program. The Commission also has a duty to properly evaluate and determine the eligibility of small wind turbines under the ERP. This duty arises from the Commission's ERP Guidebook, as well as the Commission's contractual agreements with KEMA.

The Commission breached these duties by failing to implement the ERP in a way that allows eligible emerging technology suppliers to plan for increased sale and installation volumes over the life of the program. In this case, Solar Point made plans and substantial investments in an

eligible wind turbine in reliance on the Commission's representations. The Complaint now seeks to declare this turbine ineligible despite the Commission's prior representations. The Commission's actions and representations have therefore directly compromised Solar Point's plans for sales and installations of the DyoCore Turbine.

The Commission also failed to uphold its duty to develop a program that "provides preference to systems based upon system performance." As discussed above in Section III, the ERP has essentially no standards for rating eligible small wind systems. There is no guidance as to how the turbine's rating is determined. In fact, Solar Point was informed that there was not a published standard method for rating these small wind turbines. Since rebate amounts are determined based on the turbine's rated output, the Commission developed a program that encouraged optimistic turbine ratings. Furthermore, there is no requirement that a given piece of equipment must remain installed for any period of time. There is simply no guarantee that the equipment will remain in place after installation, and therefore there is no guarantee that funds spent on ERP rebates will benefit ratepayers. Such a program does not "provide preference to systems based upon system performance."

Furthermore, the Commission and its consultant, KEMA, failed to exercise due care in evaluating the DyoCore Turbine's eligibility under the ERP. KEMA's internal emails reveal that as part of its evaluation of the DyoCore Turbine, KEMA raised concerns with DyoCore's 1.6 kW rating, requesting an explanation. (See email from Daria Mashnik [KEMA] to David Raine [DyoCore] Regarding Power Curve Output Data for SolAir – 1.6 kW [May 28, 2010 2:59 p.m.].) Yet it appears that neither KEMA nor the Commission followed through to properly verify DyoCore's performance data submitted to demonstrate eligibility under the ERP.

The Commission's breach caused Solar Point to incur damages, since Solar Point incurred expenses relating to the DyoCore Turbine in reasonable reliance on the ERP statute and the turbine eligibility procedures described in the Guidebook.

V. NAME OR NAMES OF THE PUBLIC EMPLOYEE OR EMPLOYEES CAUSING THE INJURY, DAMAGE, OR LOSS, IF KNOWN

Solar Point does not yet know the names of all individuals who may be responsible for its injuries. However, Solar Point has worked with the following Commission employees in obtaining information pertaining to the ERP and the DyoCore Turbine: James Lee, Sarah Taheri, Stan Blois, and Jennifer Nelson. Solar Point is also aware that the following KEMA employees participated in the listing process for the DyoCore Turbine: Daria Mashnik and Pete Baumstark.

VI. THE AMOUNT CLAIMED

Solar Point has expenses, liabilities, and project costs of $4,480,000.00, plus attorneys' fees, costs and interest. Solar Point's claim against the Commission is in excess of $10,000.00 and the claim would not be a limited civil case.

VII. CONCLUSION

This letter provides the information needed to state a claim under the Government Claims Act. Solar Point respectfully requests that the Commission carefully consider the claims presented in this letter. We look forward to an equitable resolution of these issues.

Very truly yours,

DOWNEY BRAND LLP

Jane E. Luckhardt

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JEL:NHR

cc: Allan Ward, Assistant Chief Counsel (via e-mail)
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