

DOCKET

07-AFC-1

DATE APR 21 2008

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STATE OF CALIFORNIA
BEFORE THE
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION

In the Matter of:
Application for Certification
for the VICTORVILLE 2 HYBRID
POWER PROJECT by
the City of Victorville

Docket No. 07-AFC-1

APPLICANT'S OPENING BRIEF

I. INTRODUCTION

Pursuant to the direction of the Committee at the close of the Evidentiary Hearing on April 3, 2008, the City of Victorville ("Applicant") hereby files its Opening Brief for the Victorville 2 Hybrid Power Project ("Project") Application for Certification ("AFC") in the above-captioned docket. The Committee directed the parties to brief two issues: i) certain issues related to proposed Condition of Certification AQ-SC6; and ii) a legal issue raised by California Unions for Reliable Energy ("CURE") in its Pre-hearing Conference Statement regarding the federal enforceability of the proposed PM10 emission offsets. Subsequent to the Evidentiary Hearing, California Energy Commission ("CEC" or "Commission") staff modified proposed Condition of Certification AQ-SC6.1 In a filing dated April 16, 2008, Applicant stated that, as modified, proposed Condition of Certification AQ-SC6 was acceptable, and that it would not be necessary to brief any issues related thereto. Thus, this Opening Brief addresses only the emission offset issue raised by CURE.

1 Energy Commission Staff's Proposed Construction Schedule Restriction for the Victorville 2 Hybrid Power Project (07-AFC-1), docketed on April 15, 2008.

CURE contends that the Commission cannot approve CEC Staff's recommendation for Applicant to offset the Project's PM10 emissions by paving unpaved roads within the Mojave Desert Air Basin pursuant to the Mojave Desert Air Quality Management District's (the "District") offset generating rule. Specifically, CURE alleges that Rule 1406, which authorizes PM10 emission reduction credits ("ERCs") for new sources from the paving of unpaved roads, does not comply with federal requirements under the Clean Air Act. As discussed below, CURE's arguments are based on an incorrect understanding of federal law. The Project's use of emission offsets generated pursuant to Rule 1406 would comply with all applicable Clean Air Act requirements, and the Commission therefore should reject CURE's arguments and requests to delay the AFC process.

II. DISCUSSION

A new or modified source that is subject to New Source Review ("NSR") under the Clean Air Act must obtain emission offsets to offset increased emissions by an equal or greater reduction in emissions from the same source or other sources in the area.² District Rule 1406, which the District adopted on August 27, 2007, sets forth procedures for generating emission offsets (referred to as "Emission Reduction Credits" or "ERCs") through the reduction of fugitive dust achieved by paving unpaved roads within the District.³

² 42 U.S.C. § 7503(c).

³ Mohave Desert Air Quality Management District, Rule 1406 Draft – Emission Reduction Credits for Paving Unpaved Roads, available at http://www.mdaqmd.ca.gov/rules_plans/documents/Draft1406.pdf (last visited Apr. 16, 2008).

CURE argues that the Project may not offset its PM10 emissions pursuant to Rule 1406 because the Rule has not been approved by the U.S. Environmental Protection Agency (“EPA”).⁴ CURE also argues that the proposed ERCs are not eligible for use by the Project because the District does not have an EPA-approved nonattainment plan or maintenance plan providing for the attainment of the national ambient air quality standards.⁵ CURE therefore urges the Commission to delay the AFC process “[u]ntil EPA receives and approves such plans, and then separately acts upon Rule 1406....”⁶

CURE’s arguments attacking the validity of Rule 1406 overlook the obvious: the plain language of the Clean Air Act states that permits to construct and operate may be issued if, “by the time the source is to commence operation, sufficient offsetting emissions reductions have been attained”⁷ Where the approval of an offset generating rule is forthcoming, it is well-established that permits to construct may be properly issued if the source of the offsets has been identified adequately, so long as the source does not commence operation prior to the rule’s approval by the EPA. Moreover, although section 173(a)(1) of the Clean Air Act states that “emission reductions required as a precondition of the issuance of a permit under paragraph (1) shall be federally enforceable before such permit may be issued,” EPA guidance clarifies that the acquisition of offsets after permit issuance is allowed in cases where the federal enforceability of

⁴ Prehearing Conference Statement of the California Unions for Reliable Energy, Docket No. 07-AFC-1, at 3-4 (Mar. 28, 2008) (“CURE Prehearing Conference Statement”); CURE Comments on the Preliminary Staff Assessment for the Victorville 2 Power Plant Project, Docket No. 07-AFC-1, at 2-5 (Jan. 2, 2008) (“CURE Comments on PSA”); CURE Comments on the District’s Preliminary Determination of Compliance for the Victorville 2 Power Plant Project, Docket No. 07-AFC-1, at 2 (Oct. 2, 2007) (“CURE Comments on PDC”).

⁵ CURE Prehearing Conference Statement at 4; CURE Comments on PSA at 4; CURE Comments on PDC at 4.

⁶ CURE Prehearing Conference Statement at 4.

⁷ 42 U.S.C. § 7503(a)(1)(A) (2008) (emphasis added).

the offset hinges on EPA approval of a State Implementation Plan (“SIP”).⁸ The EPA “understands that in particular circumstances States have been prompted to adopt SIP measures to generate . . . offsets, and that the only step remaining to ensure that EPA can enforce the measures is EPA approval of the SIP submission.”⁹ In such instances, the EPA allows the issuance of a construction permit, provided that the permit contains a federally-enforceable condition prohibiting the commencement of any actual operations pending EPA approval of the SIP measure. In addition, “EPA recognizes that there may be circumstances other than SIP measures awaiting EPA approval where sufficient creditable offsets have been identified and certain administrative obstacles remain to making the offsets federally enforceable” and has found it appropriate “to extend similar treatment to these sources, allowing them to obtain a construction permit that contains an explicit condition prohibiting operations until the offsets are made federally enforceable.”¹⁰

III. CONCLUSION

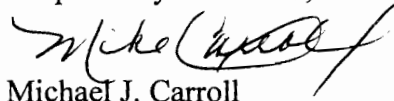
Contrary to CURE’s arguments, federal law does not require final EPA approval of the District’s plan and offset generating rule before Rule 1406 can be used to generate emission offsets for the Project or before the District can issue a permit to construct for the Project. Federal approval need not occur until prior to the commencement of operation of the Project. The District is close to submitting to EPA a revised version of Rule 1406 and the required plan, and it is anticipated that an EPA-approved offset generating rule will be in place long before the Project is ready to commence operation. Accordingly, the Commission should continue moving

⁸ See, e.g., Memorandum Regarding Offsets Required Prior to Permit Issuance, from John S. Seitz, Director, EPA Office of Air Quality Planning and Standards to Regional Directors (June 14, 1994).

⁹ *Id.* at 5.

forward with the AFC process while the District separately completes the administrative process for EPA-approval of Rule 1406.

Respectfully submitted,



Michael J. Carroll
Of LATHAM & WATKINS LLP

Dated: April 21, 2008

¹⁰ *Id.* at 6.

**STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 07-AFC-1
)	
Application for Certification,)	ELECTRONIC PROOF OF SERVICE
for the VICTORVILLE 2)	LIST
HYBRID POWER PROJECT)	
by the City of Victorville)	(revised September 6, 2007)
)	
_____)	

Transmission via electronic mail and by depositing one original signed document with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the following:

DOCKET UNIT

CALIFORNIA ENERGY COMMISSION

Attn: DOCKET NO. 07-AFC-1
1516 Ninth Street, MS-4
Sacramento, California 95814-5512
docket@energy.state.ca.us

Transmission via electronic mail addressed to the following:

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VICTORVILLE II HYBRID POWER PROJECT
CEC Docket No. 07-AFC-1

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DECLARATION OF SERVICE

I, Paul Kihm, declare that on April 21, 2008, I deposited a copy of the attached:

APPLICANT'S OPENING BRIEF

with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the California Energy Commission. I further declare that transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service List above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 21, 2008, at Costa Mesa, California.



Paul Kihm

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File No. 039610-0001

April 21, 2008

VIA FEDEX

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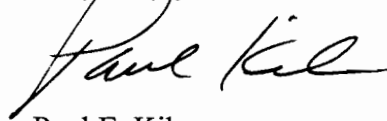
Re: Victorville 2 Hybrid Power Project: Docket No. 07-AFC-1

Dear Sir/Madam:

Pursuant to California Code of Regulations, title 20, sections 1209, 1209.5, and 1210, enclosed herewith for filing please find Applicant's Opening Brief.

Please note that the enclosed submittal was filed today via electronic mail to your attention and to all parties on the CEC's current electronic proof of service list.

Very truly yours,



Paul E. Kihm
Senior Paralegal

Enclosure

cc: CEC 07-AFC-1 Proof of Service List (w/encl. via e-mail)
Michael J. Carroll, Esq. (w/encl.)