DOCKET
08-AFC-1
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June 26, 2009

State of California
State Energy Resources Conservation and Development Commission

In the Matter of: Docket No. 08-AFC-1
The Application for Certification for the AVENAL ENERGY PROJECT

To Whom It May Concern:

I have emailed the included documents to everyone on the Docket No. 08-AFC-1 PROOF OF SERVICE list as revised 6/24/2009. The original documents with original signatures are included for your use. I realize that the deadline for sending these documents was Monday, June 22, 2009. My explanation for not sending these documents to you by the deadline follows. When the Tehipite Chapter applied to become an intervenor, the individual that emailed the information to the CEC put our Chapter Chair, John Flaherty, as the contact person. Mr. Flaherty lives in the Sierra Nevada mountains, travels and hikes most of the time, has poor phone/internet service, and very limited computer skills. When I discovered that the "wrong John" had been designated our contact person, I contacted RoseMary Avalos in the Hearing Officer's office and on June 16, 2009 requested that she change the contact person to me. Additionally, in the same email to RoseMary I stated "Please send me any emails or other correspondence that your office has already sent to John Flaherty. He lives in the mountains and has neither dependable phone nor internet service." I did not receive any emails or correspondence from your office for the period before June 16 until today when Ms. Read emailed me. RoseMary called my cell phone on Tuesday June 23, 2009 as I was driving to Avenal for the CEC workshop and informed me that the Pre-Hearing Conference Statement deadline was June 22, 2009. She told me to submit the statement even though it was past due, and I told her that I would not be able to prepare it until Friday, June 26, 2009. I asked her to send me some information by email describing what needed to be included in the statement and where I needed to send it. She immediately sent me an email that stated "Per our conversation, please email me the Pre-Hearing Conference Statement which was due on June 22, 2009. Please email the document in Word Version" and the attachment contained an All Parties Letter and a Proof of Service document, but no Notice of the Pre-Hearing Conference or Evidentiary Hearing. Because I was not able to submit it by the deadline and because I have very limited computer skills, I have worked with Ingrid Brostrom to prepare this statement.

Sincerely,

John Honnette

John Honnette

STATE OF CALIFORNIA

State Energy Resources
Conservation and Development Commission

In the Matter of: The Application for Certification for the AVENAL ENERGY PROJECT	Docket No. 08-AFC-1

JOINT PRE-HEARING CONFERENCE STATEMENT BY SIERRA CLUB, TEHIPITI CHAPTER AND THE CENTER ON RACE, POVERTY & THE ENVIRONMENT

June 26, 2009

John Honnette
Sierra Club, Tehipiti Chapter

Representative for the SIERRA CLUB, TEHIPITI CHAPTER

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STATE OF CALIFORNIA

State Energy Resources
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In the Matter of: The Application for Certification for the AVENAL ENERGY PROJECT	Docket No. 08-AFC-1

JOINT PRE-HEARING CONFERENCE STATEMENT BY SIERRA CLUB, TEHIPITE CHAPTER AND CENTER ON RACE, POVERTY & THE ENVIRONMENT

I. INTRODUCTION

Pursuant to section 1718.5 of Title 20 of the California Code of Regulations, the Sierra Club, Tehipite Chapter ("Sierra Club") and the Center on Race, Poverty & the Environment ("CRPE") hereby jointly file their Prehearing Conference Statements for the Avenal Energy Project.

II. TOPIC AREAS READY TO PROCEED TO EVIDENTIARY HEARING

None of the topics included in the Final Staff Assessment are ready to proceed to evidentiary hearing because the California Energy Commission (CEC) has failed to demonstrate that it has described, analyzed, and avoided or mitigated the proposed project's impacts, as required by Public Resource Code 21000 *et. seq*. Until the CEC staff complies with CEQA and demonstrates that the project complies with all relevant laws, ordinances, regulations and standards (LORS), the evidentiary hearing should not proceed.

III. TOPIC AREAS NOT READY TO PROCEED TO EVIDENTIARY HEARING

Because the Final Staff Assessment fails to comply with CEQA and other LORS including the Clean Air Act, none of the topics contained in the final staff assessment is ready to be heard at the evidentiary hearing.

IV. TOPIC AREAS IN DISPUTE AND REQUIRING ADJUDICATION

There are many issues that remain in dispute between the Interveners, the applicant and the California Energy Commission staff. The following is a summary of issues that remain in dispute:

A. The Proposed Particulate Matter Credits Are Invalid.

The Project proposes to meet 98% of its PM10 offset requirements from SOx offsets at a one-to-one ratio. *See* Final Staff Report, Air Quality Table 19. The CEC has failed to support its findings that this will mitigate **localized** air quality impacts from particulate matter and other air pollutants emitted from the project.

The one-to-one ratio ignores the very different health risks of SOx and PM10. The U.S. EPA has found that particulate matter can cause or contribute to:

- increased respiratory symptoms, such as irritation of the airways, coughing, or difficulty breathing, for example;
- decreased lung function;
- aggravated asthma;
- development of chronic bronchitis;
- irregular heartbeat;
- nonfatal heart attacks; and
- premature death in people with heart or lung disease.

See http://www.epa.gov/particles/health.html. These problems are exacerbated where, as here, most of the PM10 to be emitted by the Project will likely be PM2.5. While SO_2 can also cause health problems, SO_2 particles tend to travel farther from their source than do PM particles. See http://www.epa.gov/air/urbanair/so2/chf1.html ("SO_2 and the pollutants formed from SO_2, such as sulfate particles, can be transported over long distances and deposited far from the point of origin. This means that problems with SO_2 are not confined to areas where it is emitted"). This means that it is not an even trade for people living near the Project to give away local directly emitted PM reductions for SOx reductions far away.

There simply is no reputable science in the record supporting the CEC's use of a one-to-one offset ratio of these pollutants when public health effects are considered. Nor does the final report demonstrate with evidence that removing one ton/year of SOx, a PM precursor, will in fact prevent one ton/year of PM particles from being created.

EPA recognized this when it recommended a 40 to 1 ratio for SOx to PM trading. See 73 Federal Register 28339 (May 16, 2008). In this case, that would mean that the Project

would need to meet its 100 tons/year PM requirement by offsetting against 4,000 tons/year of SOx. That is nearly half the SOx emissions inventory for the District for 2005.[1]

Moreover, the San Joaquin Valley Air Pollution Control District told EPA that the District did not need to control SOx in the District because the SOx levels "[have] been reduced to a level that makes further control measures ineffectual and unnecessary with respect to attainment of the PM10 NAAQS."[2] They can not have it both ways. If the nearly 8,000 tons/year of SOx emitted in the Valley in 2005 is not a problem as a PM precursor, then there is no reason for the District to allow SOx as a PM precursor to offset actual PM emissions. Yet that is what the District proposes to do for the Avenal power plant.

The District also failed to demonstrate that the ERCs claimed by the applicant are in fact valid. The Final Staff Assessment does not disclose sufficient information on the source of the ERCs to make a determination that the ERCs actually will mitigate the air emission impacts at Avenal. The document did not disclose the year which the credits originated. This is critical because early credits have often been found to be invalid.

Because the CEC failed to demonstrate that a one to one ratio properly offsets the localized air quality impacts to nearby communities, the project should not be approved.

B. The CEC's Environmental Justice Assessment Violates Executive Order 12898.

Executive Order 12898 requires state agencies receiving federal funds such as the California Energy Commission to identify and address any disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority and/or low income populations. The CEC staff "determined that the project would not cause significant adverse direct, indirect or cumulative **socioeconomic impacts** . . . and therefore staff concludes that there are no Environmental Justice Impacts for this project." This determination is flawed for numerous reasons.

First, Environmental Justice concerns more than just a project's socioeconomic impacts. The CEC's exclusion of potential health impacts in its EJ assessment, for example, is inexcusable. The increase in localized air emissions alone constitutes a critical health impact for three low-income communities of color adjacent to the project site: Avenal, Kettleman City, and Huron. The CEC's failure to acknowledge the localized environmental impacts of adding many hundreds of tons of air emissions is, in itself, a violation of Executive Order 12898. Indeed, these health impacts have an economic impact on communities as well, and should, therefore, have been factored into the CEC's socioeconomic analysis for the EJ Assessment.

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[1] San Joaquin Valley Air Pollution Control District, 2007 PM10 Maintenance Plan and Request for Redesignation, Appendix E, p. 58.
[2] Id., p. 57.

Finally, the EJ assessment must consider the cumulative impacts from the proposed project as well as existing and proposed projects. The CEC's failure to consider cumulative impacts associated with the existing hazardous waste facility, the pending hazardous waste expansion, the pending PCB permit, the nearby interstate highways, the diesel transfer station, and the pending sludge "farm" also is a violation of Executive Order 12898 and demonstrates the CEC's failure to comprehend basic environmental justice principles.

C. The CEC's Cumulative Impact Analyses Is Inadequate.

Cumulative impacts are "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." 14 Cal. Code Regs. § 15355. However, the CEC failed to consider existing pollution sources as well as proposed new ones. For example, the CEC failed to analyze the cumulative impacts from the nearby Kettleman Hazardous Waste Facility, one of only three such toxic sites in California. The CEC failed to look at cumulative impacts from the existing project or from the proposed expansion. Kings County itself highlights the need for this analysis because the County has recently recirculated an EIR for the project expansion to include a cumulative impacts analysis for the power plant, yet the CEC has failed to do that same analysis. This facility is also in the process of getting a PCB permit for the disposal of a known carcinogen. The CEC has failed to consider the cumulative health impacts from the Chem Waste projects and the Avenal Project. The CEC has also failed to consider cumulative impacts to residents of Kettleman City who are at heightened health risk because of their location at the intersection of two large highways, a diesel transfer station, the ChemWaste facility and a pending sludge "farm" just outside of town. Most importantly, the CEC has been informed of a current health crisis in Kettleman City involving a birth defect cluster. Five babies born within the span of approximately 14 months were born with cleft palate, some also with brain defects, this represents nearly a third of live births in that same period. Three of these babies have died. No one yet knows what has caused these defects, but there occurrence suggests that residents of Kettleman City have been exposed to unsafe environmental pollutants. The Avenal Power Plant must not proceed until the cause of these birth defects has been discovered or at least evaluated by authorities so that these exposures can properly be weighed in the approval of additional polluting sources.

D. The CEC's Alternatives Analysis is Invalid.

The CEC found that the alternative sites would not reduce or eliminate environmental effects of the proposed project. However, under CEQA the CEC is required to describe a reasonable range of alternatives to the proposed project, or to its location, **that would reduce or avoid its significant effects**. 20 Cal. Code Reg. § 1765. The alternatives discussed in a CEQA document should be ones that offer substantial environmental alternatives over the proposed project. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553. Therefore, the CEC can not analyze inferior projects in order to determine that the proposed project is the environmentally superior project. If the CEC was unable to find a location that would reduce environmental impacts of the proposed

project, then at the least it should have considered alternatives to the project such as solar or other alternative energy projects. The CEC does not have sufficient basis to exclude consideration of these projects, nor does it have a sufficient basis for excluding the Morro Creek Alternative.

Moreover, the CEC's finding that the proposed project is environmentally superior to no project at all demonstrates the CEC's complete failure to recognize the localized impacts of air emissions. It is undisputed that the project will emit hundreds of tons of air pollutants and that offsets for all these emissions occur more than 15 miles away and as far as 160 miles away. These impacts are ignored throughout the Final Staff Assessment, but nowhere is this more clear than in the CEC's conclusion that the proposed project will have less impact than no project at all. Apparently, impacts to local community residents are not considered "real" impacts by the CEC. The CEC's failure to consider localized air impacts and its failure to assess alternatives that actually reduce the project's impacts render its alternatives analysis invalid.

E. CEC Used Incorrect Baseline in Analyzing Greenhouse Gas Impacts.

The CEC concluded that the project, despite emitting over 2 billion pounds of CO2 equivalent per year, actually has a greenhouse gas benefit. The CEC's reasoning appears to be that the Avenal Power Plant will eventually displace more polluting facilities and therefore one should subtract those emissions from the project and thereby end up with a positive impact. This novel approach violates CEQA's straight-forward approach for determining the baseline upon which to assess the extent of a project's impacts. Moreover, because the replacement of these older, more polluting facilities is entirely speculative and unenforceable, the CEC can not count those emissions as offsetting the 2 billion pounds of pollutants that will be emitted from this project.

CEQA Guidelines specify that the physical environmental conditions at the time the notice of preparation is published will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant." 14 Cal. Code Regs 15125(a). Therefore, the impacts should have been measured as an addition of 2 billion pounds of CO2 equivalent per year to the baseline of emissions that existed at the time the project was proposed.

In addition, mitigation must be enforceable. The retirement of older, more polluting plants is not a condition of approval and therefore impacts associated with those closures are entirely speculative. In any event, the closure of those older plants may happen without the approval of the Avenal Power Plant because current energy supply is greater than current energy demand.

F. The Construction Emission Analysis Is Flawed.

The CEC states that the construction emission assessment is qualitative. However, since the CEC can quantify the emissions from constructing the project, it must. In addition, CEC staff states that "[m]itigation consists of controlling construction equipment tailpipe

emissions and fugitive dust emissions to the maximum extent feasible." This is not the correct mitigation standard. Instead, the applicant must mitigate construction impacts to reduce impacts to an insignificant level. If the applicant mitigates emissions to the extent feasible but the emissions remain significant, the CEC can not approve the project unless it also adopts a statement of overriding considerations. In the case of air emissions, further mitigation is always a possibility so long as emission credits remain on the market. Therefore, the CEC failed to fully mitigate the construction emissions associated with the project.

G. The Final Staff Assessment Fails to Describe the CEC's Thresholds of Significance.

The CEC's failure to describe its thresholds of significance for the various project impacts makes it impossible for the public to evaluate the sufficiency of the document. The CEC must demonstrate that project impacts will not be significant, but because the CEC failed to describe at what level it considers these impacts to be significant, the document fails as an informational document. The CEC's mere assertion that a project impact is not significant does not make the statement true. The CEC must provide additional information on its thresholds of significance in order to satisfy CEQA's informational and mitigation requirements.

H. The CEC Failed to Provide Sufficient Public Notice.

The CEC failed to provide notice to the residents of Avenal and Kettleman City who would be directly impacted by the proposed project if it is built. Not only were Kettleman City residents not informed by the CEC of the workshop and hearing, but also the limited notice you published was in English only. A notice in English for a power plant proposed in Spanish-speaking communities is inadequate and has a discriminatory and disproportionate impact on the low-income and people of color residents who would be most affected. The CEC's failure to provide notice to residents violates the CEC's obligation to comply with environmental justice mandates.

The CEC's failure to translate permit documents into Spanish is discriminatory and improper: the CEC should be well aware that at least significant parts of environmental review documents should be translated into Spanish due to the large number of monolingual Spanish-speaking residents in Avenal and Kettleman City, the communities closest to the proposed project.

In 1991, the Superior Court of California ruled in *El Pueblo Para El Aire y Agua Limpio vs. Kings County Board of Supervisors* that the county erred by failing to translate at least some of the environmental review document into Spanish due to the large number of Spanish-speaking residents. The Superior Court invalidated the Environmental Impact Report for the project that was the subject of that lawsuit, a proposed hazardous waste incinerator. The CEC is similarly improperly attempting to approve a giant polluting project without the required translation. The CEC's English-only process and documents fails to meet the requirements of the public participation requirements of CEQA.

Finally, the July 7, 2009 Evidentiary Hearing Between the Parties is Improper and Premature because the CEC set the date, time and place of the July 7th Evidentiary Hearing prior to the parties being finalized and before some of the parties even became parties. The CEC should have waited for their own deadline for entities to intervene as parties before setting a hearing date binding all parties. Therefore, the July 7th hearing date needs to be rescheduled.

Dated: June 26, 2009. Respectfully submitted,

_____

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Issue and Witness Identification

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STATE OF CALIFORNIA

State Energy Resources Conservation and Development Commission

In the Matter of: **DOCKET NO. 08-AFC-1**

AVENAL ENERGY PROJECT **ISSUE AND WITNESS IDENTIFICATION**

ISSUE	PROPOSED TESTIMONY	WITNESS
Alternative energy producing Technologies (Disputed)	Alternative energy producing technologies are able to efficiently provide electricity with much less GHG	Bill Powers, E. Director Powers Engineering
Alternative energy producing Technologies (Disputed)	Alternative energy producing technologies are able to efficiently provide electricity with much less GHG	V. John White, E. Director CEERT
Alternative energy producing Technologies (Disputed)	Alternative energy producing technologies are able to efficiently provide electricity with much less GHG	Robert Freehling Sierra Club
Alternative energy producing Technologies (Disputed)	Alternative energy producing technologies are able to efficiently provide electricity with much less GHG	Faramarz Nabavi Sierra Club
Alternative energy producing Technologies (Disputed)	Alternative energy producing technologies are able to efficiently provide electricity with much less GHG	Angela Tanghetti CEC Staff
Alternative energy producing Technologies (Disputed)	Alternative energy producing technologies are able to efficiently provide electricity with much less GHG	Karen Griffin CEC Staff

June 26, 2009 John Honnette

Date Signature

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION
OF THE STATE OF CALIFORNIA
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1-800-822-6228 – WWW.ENERGY.CA.GOV

APPLICATION FOR CERTIFICATION
For the AVENAL ENERGY PROJECT

Docket No. 08-AFC-1
PROOF OF SERVICE
(Revised 6/24/2009)

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DECLARATION OF SERVICE

I, _John Honnette, declare that on June 26, 2009, I served and filed copies of the attached Pre-Hearing Conference Statement and Issue and Witness form, dated June 26, 2009. 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:
[www.energy.ca.gov/sitingcases/avenal].

The document has 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 or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above 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. 08-AFC-1
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.

John Honnette
Your Signature