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January 26, 2011

VIA FEDEX

CALIFORNIA ENERGY COMMISSION  
Attn: Docket No. 08-AFC-9  
1516 Ninth Street, MS-4  
Sacramento, California 95814-5512

File No. 039610-0003

<b>DOCKET</b>
<b>08-AFC-9</b>
DATE <u>JAN 26 2011</u>
RECD. <u>JAN 26 2011</u>

Re: City of Palmdale Hybrid Power Plant Project: Docket No. 08-AFC-9

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 Rebuttal to "Opening Testimony and Rebuttal to Applicant's Response to Final Staff Assessment by Center for Biological Diversity."

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

Very truly yours,



Paul E. Kihm  
Senior Paralegal

Enclosure

cc: 08-AFC-9 Proof of Service List (w/encl., via e-mail and U.S. Mail)  
Michael J. Carroll, Esq. (w/encl.)  
Marc T. Campopiano, Esq. (w/encl.)

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STATE OF CALIFORNIA  
ENERGY RESOURCES  
CONSERVATION AND DEVELOPMENT COMMISSION

IN THE MATTER OF: ) DOCKET NO. 08-AFC-9  
)  
APPLICATION FOR CERTIFICATION, ) APPLICANT’S REBUTTAL TO  
FOR THE PALMDALE HYBRID POWER ) “OPENING TESTIMONY AND  
PROJECT BY THE CITY OF PALMDALE ) REBUTTAL TO APPLICANT’S  
) RESPONSE TO FINAL STAFF  
) ASSESSMENT BY CENTER FOR  
BIOLOGICAL DIVERSITY”

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On behalf of the City of Palmdale (“Applicant”) for the Palmdale Hybrid Power Plant Project (08-AFC-9) (“PHPP”), we hereby submit Applicant’s Rebuttal to the “Opening Testimony and Rebuttal to Applicant’s Response to Final Staff Assessment by Center for Biological Diversity” filed in this matter on January 19, 2011 (“CBD Filing”). Issues are addressed in the order they are raised in the CBD Filing.

1. **Applicant’s proposal to pave roads to generate PM10 emission offsets has been analyzed pursuant to the California Environmental Quality Act (“CEQA”).**

Contrary to assertions made in the CBD Filing, Applicant’s proposal to pave roads to generate PM10 emission offsets has been analyzed pursuant to CEQA. Applicant’s PM10 offset strategy is not a recent development, and was fully described in the Application for Certification filed in this matter on August 4, 2008. CEC Staff was fully aware of Applicant’s proposal when it conducted its environmental review of the PHPP. Furthermore, largely in response to CBD’s request for additional analysis, CEC Staff completed additional, detailed analysis of the potential environmental impacts associated with the road paving proposal.

2. **Applicant objects to any requests by CBD as to procedural matters that are contrary to the Orders of the Committee in this matter.**

The CBD Filing attempts to reserve certain vague “rights” with respect to the filing of testimony and conduct of the evidentiary hearings in this matter. To the extent that CBD is seeking extensions of deadlines established by the Committee, or otherwise seeking to proceed in a manner that is inconsistent with the Orders of the Committee and the regulations governing these

proceedings, Applicant objects.

Notwithstanding its late decision to seek intervener status, CBD has been an active participant in these proceedings since at least July of 2010. As stated in the CBD Filing, CBD “provided detailed comments to the Committee for this Project regarding the FDOC on July 22, 2010 (Docket #577440), regarding the generation and use of emission reduction credits (ERCs) from the paving of existing unpaved roads to offset the project’s PM10 emissions.” (CBD Filing, page 2) Thus, at least as far back as seven months ago, CBD had reviewed Applicant’s road paving proposal, had retained a consultant to analyze the proposal, and had developed a detailed written analysis of the proposal. CBD has had the intervening seven months to develop whatever additional analysis it deems appropriate. Under these circumstances, there is no basis for requesting additional time for analysis or submission of testimony.

3. **An EPA-approved rule is not required to generate PM10 offsets from the paving of roads as proposed by Applicant.**

Notwithstanding clear statements to the contrary from both the Antelope Valley Air Quality Management District (“AVAQMD”) and the U.S. Environmental Protection Agency (“EPA”), CBD asserts that Applicant’s proposal to generate PM10 offsets through the paving of unpaved roads would “have to include a regulation that is approved by EPA and incorporated into the state implementation plan (SIP).” (CBD Filing, page 4) As explained in Applicant’s Response to Final Staff Assessment, and elsewhere, because the PHPP is located in a federal attainment area for PM10, a SIP-approved rule is not required for the generation and use of PM10 offsets.

a. **The Antelope Valley AQMD has stated unequivocally that a rule is not required.**

The AVAQMD has determined its existing rules provide for the generation and use of PM10 offsets generated from road-paving activities:

Rule 1305(B)(3) explicitly addresses the use of area and indirect source actual emission reductions as offsets. No additional rulemaking is necessary to allow the use of actual emission reductions from paving of an existing unpaved road as offsets.<sup>1</sup>

District Counsel for the AVAQMD reiterated this position by letter dated September 9, 2010, concluding that “the AVAQMD does not plan to adopt a specific rule regarding the creation of PM10 offsets from road paving at this time but rather to use the existing applicable provisions of Regulation XIII to quantify, verify and allow use of such ERCs.”<sup>2</sup>

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<sup>1</sup> See Exhibit 110, Applicant’s Response to Staff Status Report No. 8, Attachment C (AVAQMD comments on Staff’s Status Report No. 4, dated July 6, 2010).

<sup>2</sup> See Exhibit 110, Applicant’s Response to Staff Status Report No. 8, Attachment E.

- b. The U.S. Environmental Protection Agency has stated unequivocally that a rule is not required.

In a letter to the Executive Officer of the AVAQMD, dated July 27, 2009, U.S. EPA stated the following with respect to this issue:

With respect to PM10 ERCs, we acknowledge that the proposed reductions are to meet the State offset requirements. PHPP is located in an area of the District that is designated attainment for all federal National Ambient Air Quality Standards. We understand that there is no federally required District maintenance plan or other requirement that relies on offsets. Therefore, EPA Region 9 has determined that we will defer to the District and the State to review individual offsets in attainment areas that are required under Antelope Valley AQMD Rule 1305. This letter does not represent EPA concurrence on whether these credits meet federal offset requirements.<sup>3</sup>

In the CBD Filing, CBD makes much of the fact that Applicant did not include the last sentence when it quoted the same paragraph at page 4 of Applicant's Response to Final Staff Assessment filed on January 12, 2011. Calling the omission "inexcusable," CBD suggests that Applicant selectively quoted EPA in an attempt to mislead. Applicant did not include the last sentence because it is irrelevant. The relevant inquiry here is not whether EPA concurs that the road paving credits meet federal requirements; but whether or not such concurrence is even required in the first place. The first three sentences of the paragraph make clear that the answer from EPA's perspective is that EPA concurrence is not required, making the fact that they have not concurred irrelevant - EPA has not concurred because they do not have to. By focusing exclusively on the last sentence of the paragraph, and taking it out of context, it is CBD that attempts to obfuscate the relevant inquiry and mislead.

- c. The ruling in *California Unions for Reliable Energy v. Mojave Desert Air Quality Management District* is irrelevant.

In the CBD Filing, CBD suggests that the decision in *California Unions for Reliable Energy v. Mojave Desert Air Quality Management District*, (October 30, 2009) 178 Cal.App.4<sup>th</sup> 1225, and the subsequent rescission of MDAQMD Rule 1406, is not only relevant to the issues currently before the Committee, but somehow dispositive of the ability of the Applicant and the AVAQMD to proceed with the road paving proposal as planned. Nothing could be further from the truth.

To be clear, neither the AVAQMD or the Applicant is relying on MDAQMD Rule 1406 as the authority for generating or using road paving offsets in connection with the PHPP. MDAQMD Rule 1406 is a Mojave Desert AQMD rule, not an Antelope Valley AQMD rule, and it is not applicable to the PHPP. What the AVAQMD has repeatedly stated is that in implementing its

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<sup>3</sup> See Exhibit 110, Applicant's Response to Staff Status Report No. 8, Attachment F (Letter From EPA to Eldon Heaston, AVAQMD, p. 3, July 27, 2009).

existing AVAQMD Rule 1305(B)(3), which applies to the generation and use of road paving offsets for the PHPP, it intends to rely on the credit generation methodology that was also utilized in MDAQMD Rule 1406. As stated by the AVAQMD in a July 6, 2009 letter to the CEC:

Rule 1305(B)(3) explicitly addresses the use of area and indirect source actual emission reductions as offsets. No additional rulemaking is necessary to allow the use of actual emission reductions from paving of an existing unpaved road as offsets. The District will use the unpaved road paving emission reduction credit methodology adopted by the Mojave Desert Air Quality Management District in conjunction with Rule 1309 [sic].<sup>4</sup>

In the CBD Filing, CBD again accuses Applicant of selectively quoting from this paragraph at page 4 of its Response to Final Staff Assessment, and again CBD's accusation is misplaced. The point that Applicant was making previously was that no additional rulemaking was required, which is why Applicant quoted only the first two sentences of the paragraph. Contrary to CBD's suggestion, the last sentence of the paragraph does not undercut Applicant's position on this issue, but is fully supportive of it. When read in its entirety, this paragraph makes two points: 1) no additional rulemaking is required by the AVAQMD; and 2) AVAQMD intends to rely on the offset calculation methodology that was used by the MDAQMD in its Rule 1406. This methodology, which is based on AP-42, was utilized in a U.S. EPA-approved rule in Maricopa County, Arizona, and was included in MDAQMD Rule 1406 in consultation with U.S. EPA. It remains valid notwithstanding the decision in the above-referenced case, and MDAQMD's subsequent rescission of MDAQMD Rule 1406.

Contrary to the suggestions of CBD, the court decision and rescission of MDAQMD Rule 1406 had nothing to do with the validity of the methodology for calculating emission offsets from road paving. The issue before the court was whether or not the adoption of MDAQMD Rule 1406 was exempt from environmental review under CEQA because the action qualified for a Class 8 categorical exemption.<sup>5</sup> The court held that there was insufficient evidence to support the MDAQMD's finding that the action qualified for the exemption.<sup>6</sup> The decision in no way invalidated, or even criticized, the emission calculation methodology. Thus, CBD's suggestion that the decision of the court, and/or MDAQMD's subsequent rescission of MDAQMD Rule 1406, somehow precludes the ability of another air district from utilizing the same emission calculation methodology used in Rule 1406, or that it must comply with order of the court before doing so, is utterly incorrect. Notwithstanding MDAQMD Rule 1406 or any action related to it, AVAQMD would have been, and is, free to adopt the same calculation methodology used in Rule 1406, which is the generally accepted methodology for calculating offsets from road paving.

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<sup>4</sup> See Exhibit 110, Applicant's Response to Staff Status Report No. 8, Attachment C (AVAQMD comments on Staff's Status Report No. 4, dated July 6, 2010). Reference to Rule 1309 is presumably an error, and should be to Rule 1406.

<sup>5</sup> *California Unions for Reliable Energy v. Mojave Desert Air Quality Management District*, 178 Cal.App.4th 1225 at 1225.

<sup>6</sup> Id.

4. **Applicant's proposal satisfies the requirements of AVAQMD Rule 1305(B)(3)(d).**

As discussed during the CEC Workshop held on February 11, 2010, Applicant will satisfy the requirement in AVAQMD Rule 1305(B)(3)(d) that it exert sufficient control over the source of the emission offsets to ensure that the claimed reductions are real, enforceable, surplus, permanent and quantifiable, by entering into agreements with the owners of the roads committing Applicant to maintain the roads as required by the credit generation protocol.

DATED: January 26, 2011

Respectfully submitted,

*/S/ MICHAEL J. CARROLL*

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Michael J. Carroll  
LATHAM & WATKINS LLP  
Counsel to Applicant

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

In the Matter of:	)	Docket No. 08-AFC-9
	)	
Application for Certification,	)	<b>PROOF OF SERVICE</b>
for the CITY OF PALMDALE HYBRID	)	
POWER PLANT PROJECT	)	(Revised January 14, 2011)
	)	
	)	

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PALMDALE HYBRID POWER PROJECT  
CEC Docket No. 08-AFC-09

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PALMDALE HYBRID POWER PROJECT  
CEC Docket No. 08-AFC-09

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PALMDALE HYBRID POWER PROJECT  
CEC Docket No. 08-AFC-09

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PALMDALE HYBRID POWER PROJECT  
CEC Docket No. 08-AFC-09

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**DECLARATION OF SERVICE**

I, Paul Kihm, declare that on January 26, 2011, I served and filed copies of the attached document to all parties identified on the Proof of Service List above in the following manner:

**APPLICANT'S REBUTTAL TO "OPENING TESTIMONY AND REBUTTAL TO APPLICANT'S RESPONSE TO FINAL STAFF ASSESSMENT BY CENTER FOR BIOLOGICAL DIVERSITY"**

**California Energy Commission**

- Transmission via electronic mail and by depositing a copy with FedEx overnight mail delivery service at Costa Mesa, California, with delivery fees thereon fully prepaid and addressed to the following:

**CALIFORNIA ENERGY COMMISSION**  
Attn: DOCKET NO. 08-AFC-09  
1516 Ninth Street, MS-4  
Sacramento, California 95814-5512  
[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

**For Service to All Other Parties**

- Transmission via electronic mail to all email addresses on the Proof of Service list; and
- by depositing one paper copy with the United States Postal Service via first-class mail at Costa Mesa, California, with postage fees thereon fully prepaid and addressed as provided on the Proof of Service list to those addresses **NOT** marked "email preferred."

I further declare that transmission via electronic mail and U.S. Mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210.

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 26, 2011, at Costa Mesa, California.



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Paul Kihm