

**DOCKET**

**00-AFC-1C**

DATE July 31 2009

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

Subject: **PG&E'S RESPONSE TO COMPLAINT FILED BY ACORN, CARE, AND LOCAL CLEAN ENERGY ALLIANCE DOCKET NO. (00-AFC-1C)**

Enclosed for filing with the California Energy Commission is the original of **PG&E'S RESPONSE TO COMPLAINT FILED BY ACORN, CARE, AND LOCAL CLEAN ENERGY ALLIANCE**, for the Gateway Generating Station Docket No.(00-AFC-1C).

Sincerely,



FOR  
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STATE OF CALIFORNIA

Energy Resources  
Conservation and Development Commission

In the Matter of:

**GATEWAY GENERATING STATION**

**DOCKET NO. 00-AFC-1C**

**PG&E'S RESPONSE TO  
COMPLAINT FILED BY ACORN,  
CARE, AND LOCAL CLEAN  
ENERGY ALLIANCE**

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**INTRODUCTION**

On June 5, 2009, the Contra Costa County Branch of the Association of Community Organizations for Reform Now (ACORN) filed a Complaint with the California Energy Commission (Commission) alleging that PG&E is in non-compliance with the Commission's certification requirements for the Gateway Generating Station (GGS) and that the Commission did not follow the appropriate public process in processing PG&E's amendments. On June 29, 2009 the Local Clean Energy Alliance filed a Complaint that essentially incorporates and adopts the allegations in the ACORN Complaint. Both of these assertions are not supported by the true facts or the law as discussed below. While PG&E answers the allegations in the complaint to assist Staff and the Committee and clarify any potential inconsistencies in the administrative record, the Commission should reject the Complaint as untimely and barred by the Commission's regulations governing Petitions for Reconsideration.

On July 17, 2009, Rob Simpson, CARE and Bob Sarvey jointly filed a Complaint (CARE Complaint) alleging that PG&E constructed and is operating the GGS in a

manner that is inconsistent with the Commission Decision and further alleging PG&E is operating the GGS without the necessary State and Federal air permits. The CARE Complaint also incorporates by reference the allegations contained in the ACORN Complaint. The CARE Complaint makes no additional allegations that are not encompassed directly or indirectly by the ACORN Complaint.

## **RESPONSE TO FACTUAL ALLEGATIONS IN COMPLAINT**

PG&E has organized its answer to address the specific allegations in the ACORN Complaint and generally denies all allegations in the Local Clean Energy Alliance and CARE Complaints that are not specifically addressed in its answers to the ACORN allegations. Since all of the Complaints incorporate by reference the allegations contained in the ACORN Complaint, PG&E will use the term "Complaint" to refer to all Complaints and hereby provides a response to each and every numbered factual allegation as outlined in the ACORN Complaint. For consistency, each of our responses uses the same number as the allegation in the Complaint.

1. The Complaint alleges the facility that PG&E constructed is different from that described in the 2001 certification. PG&E agrees. The GGS was constructed in accordance with the 2001 certification as modified by the amendments approved by the Commission. The Complaint further alleges that the public process was circumvented in some manner. As described above, the amendments to the 2001 certification were publicly noticed; in some cases the Commission Staff responded to public comment, and ACORN or any other member of the public did not timely file the requisite Petition for Reconsideration necessary to challenge the procedural nature of the Commission's process. Notwithstanding that ACORN's allegations are moot due to failure to file a Petition for Reconsideration within the appropriate time frames, the allegation is factually untrue as the Commission followed its regulations concerning amendments and all documents were duly published<sup>1</sup> and parties properly noticed prior to its Decisions on the amendments.

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<sup>1</sup> See Response to Count 4, Page 17

Further, PG&E obtained approval from the CEC to restart construction of the facility in a letter dated January 18, 2007.<sup>2</sup> The letter stated,

“The Energy Commission staff has reviewed the previous and current compliance submittals and has determined that the Gateway Generating Station Project is in compliance with all conditions of certification that are required to be satisfied prior to the restart of construction of the power plant and related facilities. PG&E is approved to resume construction on the Gateway Generating Station Project as modified by the July 19, 2006 Order. However, no ground disturbance or other construction related activities may occur on the modifications to the project currently being reviewed by the Energy Commission as part of the December 19, 2006 petition to change the cooling technology.”

- 2.-11 PG&E agrees with the facts contained in these allegations regarding the current contact information and the timeline of Mirant’s ownership and permitting activities before PG&E became the owner of the plant.
12. PG&E disagrees with this allegation as an inaccurate simplification of the steps involved in PG&E’s acquisition of the license for GGS. The Commission approved addition of PG&E as an owner of the facility on July 19, 2006. PG&E became the sole owner of the facility after closure of its transaction with Mirant on November 28, 2006. PG&E filed a subsequent Petition for Amendment with the Commission clarifying it was the sole owner of the facility, which was approved by the Commission on January 3, 2007.
13. This allegation oversimplifies PG&E’s request for submitting its Petition to Amend Air Quality Conditions, dated January 15, 2008. PG&E disagrees that the basis for any changes were driven solely by PG&E’s change in plans. As discussed in detail in that Petition, “the changes were necessary to reflect new design information and/or standards that were made after ownership of the project was transferred to PG&E in late 2006”<sup>3</sup>.

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<sup>2</sup> See “Approval to Restart Construction on Permitted Project,” Log No. 38968, *available at* [http://www.energy.ca.gov/dockets/docket\\_redesign.php?docketNo=00-AFC-1C.html](http://www.energy.ca.gov/dockets/docket_redesign.php?docketNo=00-AFC-1C.html)

<sup>3</sup> Petition to Amend Air Quality Conditions, date January 15, 2008, page 2

- 14-15. PG&E agrees with these allegations regarding PG&E's application for permit modifications.
16. PG&E did petition the Commission for an amendment to modify air quality conditions of the original Decision in the same manner as it petitioned for prior amendments.
- 17-22. PG&E agrees with these allegations regarding the proposed modifications to certain air quality conditions.
23. PG&E disagrees that the Bay Area Air Quality Management District (BAAQMD or District) has not issued a final air permit to construct for the facility. It is true that the Commission has not held a public hearing on the proposed revisions to air quality conditions identified in PG&E's 2008 Petition to Amend Air Quality Conditions because *PG&E withdrew its Petition*. As stated in PG&E's withdrawal letter dated February 13, 2009, the primary reason for the Petition in the first place was to modify emission limits because PG&E was not sure it could meet the stringent Commissioning and Startup limits. PG&E was, in fact, able to conform to those emission limits during Commissioning and Startups and therefore the bulk of the Petition was no longer needed.
24. PG&E disagrees that it did not have a final Commission certification authorizing the construction and operation of the GGS. See Response to Allegation 1 above. PG&E did not restart construction without first obtaining approval of modifications to the project that were the subject of the December 19, 2006, petition. On August 1, 2007, the California Energy Commission issued an Order Amending the Commission Decision<sup>4</sup>, approving the elimination of the use of San Joaquin River water as the cooling water source for the project and the completion of the following ten associated project design changes at the facility in support of the change in cooling technology:

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<sup>4</sup> See "Order Amending the Energy Commission Decision to Eliminate the Use of San Joaquin River Water as the Cooling Water Source and Complete Ten Associated Project Design Changes," dated August 1, 2007, available at <http://www.energy.ca.gov/sitingcases/contracosta/compliance/index.html>

- Replace the wet cooling tower and surface condenser with an air cooled condenser (ACC)
- Replace the water treatment building with a trailer mounted water treatment system and relocate the system to the south side of the project
- Revise the discharge source for the oil/water separator
- Incorporate a condensate polishing system associated with the ACC
- Eliminate the use of steam power augmentation
- Replace the combustion turbine inlet evaporative cooling system with inlet chilling systems for each combustion turbine
- Incorporate two electric firewater pumps
- Incorporate a 500,000 gallon fire water storage tank
- Incorporate a new fire water tank fill line and potable water supply pipeline
- Incorporate a new wastewater/sewer pipeline

In addition, the CEC license was amended in 2007 to include the wet surface air cooler and other elements of the wet cooling system.<sup>5</sup> Therefore there is no inconsistency between PG&E's construction and operation of the facility and the requirements of the facility license relative to the cooling system.

The new cooling system ("wet surface air cooler") was exempt from District permitting requirements per Regulation 2-1-128.<sup>6</sup>

**2-1-128 Exemption, Miscellaneous Equipment:** The following equipment is exempt from the requirements of Sections 2-1-301 and 302, provided that the source does not require permitting pursuant to Section 2-1-319...

128.4 Water cooling towers and water cooling ponds not used for evaporative cooling of process water, or not used for evaporative cooling of water from barometric jets or from barometric condensers.

Section 2-1-319 requires permitting of sources with emissions in excess of 5 tpy. Emissions from the wet surface air cooler were shown to be less than 1 tpy.

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<sup>5</sup> See *supra* at 2.

None of these changes that were the subject of the August 1, 2007, CEC amendment required approval by the BAAQMD. The CEC Staff's analysis of the PG&E petition for amendment to the certification specifically stated:

"The Bay Area Air Quality Management District believes that the project currently complies with the appropriate rules and requirements of the District and, with the proposed changes to the Conditions of Certification, will not contribute to the degradation of the air quality in the Bay Area Air Quality Management District."<sup>7</sup>

PG&E and the previous project owner, Mirant, had timely renewed the BAAQMD Authorities to Construct for the facility, and as stated above, the facility was in compliance with the applicable rules and requirements of the District.

25. The Complaint consistently states that PG&E constructed a facility different from the facility that was certified in 2001 and that this fact results in violation of the original certification. However, PG&E constructed the facility in accordance with the original 2001 certification as it was amended by approved Petitions for Amendment as discussed above. Regarding the air quality revisions requested by PG&E in the January 15, 2008 Petition to the Commission, many address operational issues and not equipment specific changes. In one example, while PG&E has requested modifications relating to the preheater, PG&E's dewpoint heater will continue to be limited by condition AQ-47 of the CEC license unless and until the condition is amended by the CEC.
26. PG&E generally agrees with this allegation. PG&E submitted and subsequently withdrew its December 2007 application for modifications to the Authority to Construct for the facility because it determined that (1) many of the changes that had been sought in the application for modifications were no longer necessary; and (2) most of the remaining changes that had been sought in the application

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<sup>6</sup> See BAAQMD Rules and Regulations, available at <http://www.baaqmd.gov/Divisions/Planning-and-Research/Rules-and-Regulations.aspx>

<sup>7</sup> See "Staff Analysis of the PG&E Petition to Eliminate the Use of San Joaquin River Water as the Cooling Water Source and Complete Ten Associated Project Design Changes at the Gateway Generating Station," dated July 3, 2007, available at [http://www.energy.ca.gov/sitingcases/contracosta/compliance/2007-07-05\\_STAFF\\_ANALYSIS.PDF](http://www.energy.ca.gov/sitingcases/contracosta/compliance/2007-07-05_STAFF_ANALYSIS.PDF)

for modifications were exempt from permit requirements so did not require an amendment to the ATC prior to being constructed.<sup>8</sup>

27. This allegation is misleading. The allegation implies that PG&E's requested modifications completely change the facility. The facility PG&E constructed was authorized by the appropriate permits. The May 2009 Petition for Amendment includes some minor equipment modifications, but primarily addresses operating parameters and correction of typographic errors. PG&E has and will continue to operate the plant in accordance with the conditions that are in place until the modifications are approved.
- a. Among the changes PG&E requested in the January 2008 Petition to the CEC were changes to the permitted emission limits for commissioning activities. PG&E was able to complete commissioning in compliance with the originally permitted emissions limits. Therefore, these changes were no longer needed. PG&E completed commissioning in compliance with the emissions limitations in the ATC and license issued in 2001<sup>9</sup>
  - b. Among the changes PG&E requested in the January 2008 Petition to the CEC were changes to the permitted emission limits for startups/shutdowns. PG&E subsequently determined that it could satisfactorily operate the plant without changes to the originally permitted emission limits for startups and shutdowns. Therefore, these changes were no longer needed. PG&E is operating the facility in compliance with the emissions limitations in the ATC and license issued in 2001<sup>10</sup>
  - c. Among the changes PG&E requested in the December 2007 application to the BAAQMD were authorities to construct for the dewpoint heater and the wet surface air cooler. However, the BAAQMD subsequently determined that those units were exempt from permitting.<sup>11</sup> Therefore, no ATC was

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<sup>8</sup> See February 13, 2009, letters from PG&E to BAAQMD and CEC, *available at* [http://www.energy.ca.gov/sitingcases/contracosta/compliance/2009-06-01-Withdrawal\\_of\\_Petition\\_to\\_Amend\\_Air\\_Quality\\_Conditions\\_TN-50406.pdf](http://www.energy.ca.gov/sitingcases/contracosta/compliance/2009-06-01-Withdrawal_of_Petition_to_Amend_Air_Quality_Conditions_TN-50406.pdf)

<sup>9</sup> The ATC was renewed by the BAAQMD in 2003, 2005 and 2007.

<sup>10</sup> *ibid*

<sup>11</sup> See Engineering Evaluation For Proposed Amended Authority to Construct And Draft PSD Permit, issued June 2008.



required from the District prior to construction of those units. Therefore, there is no inconsistency between the BAAQMD ATC and the as-built facility relative to the dewpoint heater and the wet surface air cooler.

- d. Among the changes PG&E requested in the January 2008 Petition to the CEC were conforming amendments to the license for the dewpoint heater. The BAAQMD had amended its ATC on May 7, 2002, to limit operation of the heater through a limitation on daily heat input rather than daily hours of operation. Until the CEC changes its condition AQ-47 to conform to the District's Condition 47, PG&E will continue to comply with the current version of condition AQ-47, which limits daily hours of operation for the heater, as well as with District Condition 47, which limits daily heat input. Therefore, there is no inconsistency between PG&E's operation of the facility and the requirements of the facility license relative to the dewpoint heater.
- e. The Gateway facility fire protection system was originally designed to have two electric fire pumps and a jockey pump. However, subsequent to approval of the project by the Commission, the Contra Costa fire marshal determined that this fire protection design was not adequate and required a change to the design that eliminated one electric fire pump and replaced it with an emergency diesel fire pump.

PG&E purchased a John Deere 8.1 L diesel fire pump, which is certified by the California Air Resources Board as meeting Tier 3 emissions standards. PG&E also prepared a permit revision request that included the ATC for the diesel fire pump. That permit revision request was submitted to the district for review and approval on December 18, 2007.

The Diesel fire pump was installed on April 16, 2008 and was started and commissioned on July 1, 2008 and operated intermittently (commissioning, weekly testing) for a total of 21 hours. On October 13, 2008 PG&E personnel recognized that the diesel fire pump did not have an ATC. The pump was immediately shut down and disconnected, and a

permitted portable fire pump engine was brought in to serve in its place. PG&E also reported the situation to the Director of Engineering at the BAAQMD on the next District business day, October 14, 2008. PG&E informed the CEC of the noncompliance issue on the same day (October 14, 2008).

The December 2007 ATC revision request that included the fire pump engine was withdrawn on February 13, 2009. The District issued a Notice of Violation related to the fire pump engine on February 24, 2009. A separate application for an ATC for the fire pump engine was submitted to the District on March 5, 2009. A copy of the application was provided to the CEC on the same day, and approval of the fire pump was requested in the May 2009 Petition for Amendment. The unpermitted fire pump engine will not be reconnected or operated until the required agency approvals have been obtained.

- f. The proposed change to AQ-6 would have made that condition consistent with the BAAQMD's condition related to the monitoring of diluent gas in the CEMS. AQ-6 was a permissive condition and did not prohibit PG&E from monitoring O<sub>2</sub> as well as CO<sub>2</sub> in the exhaust gas during commissioning. As monitoring of either O<sub>2</sub> or CO<sub>2</sub> is allowed by Condition 26(b)/AQ-26(b) of the permit and license currently in effect, the proposed change to AQ-6 will have no effect and is not needed. This correction was proposed merely to clarify the Commission's conditions.
- g. The proposed changes to AQ-20 and AQ-26 are intended to make the permit language conform with the action already taken by the CEC to eliminate the use of steam power augmentation. The "requirement that [the] turbines comply with steam injection power augmentation mode" was eliminated by the CEC in its order dated August 1, 2007.<sup>12</sup> Contrary to the impression left by the ACORN petition, steam power augmentation is a power-increasing system (as its name suggests); it is NOT an emission

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<sup>12</sup> See *supra* at 2.

control system, and it does not result in a decrease in emissions. Consequently, there is NO environmental impact associated with the elimination of this system.

- 28-30. PG&E agrees that with the explanation provided to allegation 27 above, these allegations are essentially accurate.
31. This allegation is misleading. See Response to Allegation 27 above.
32. PG&E agrees with this allegation. GGS meets BACT as determined during the 2001 permitting processes. However, GGS is not subject to current BACT requirements under any District or Commission rule, regulation or order. Although PG&E had voluntarily proposed to reduce emissions of certain pollutants in its December 2007 application for amendment to the District, and its January 2008 Petition to the Commission, both of these requests were withdrawn by PG&E before final action by either agency.

## **OPPOSITION TO ALLEGATIONS OF NON-COMPLIANCE**

### **RESPONSE TO COUNT 1**

#### ***PG&E IS IN FULL COMPLIANCE WITH THE WARREN ALQUIST ACT BECAUSE IT HAD A VALID CERTIFICATION AND SPECIFIC CEC AUTHORIZATION TO BEGIN CONSTRUCTION AND OPERATION OF THE GGS***

A primary factual and legal misunderstanding that pervades the complaint is the notion that GGS must be constructed and operated in accordance with the original 2001 certification. As discussed in Response to Allegation 1 above, the 2001 certification was substantially amended several times. It is the combination of conditions contained in the 2001 certification that were not subsequently amended and any new conditions added by subsequent amendments that constitute the valid certification that ACORN alleges is missing, incomplete or somehow invalid. As discussed in Response to

Allegation 1, the Commission Staff agreed that the original certification was valid when it authorized construction. PG&E agrees.

It is important to note that ACORN's Complaint fails to cite one instance where the project was either constructed or is not operating in compliance with a specific condition of certification.<sup>13</sup> This fact alone should support a determination from the Commission that the entire Complaint, although written like a Complaint alleging noncompliance, amounts to a challenge of either the original certification or a challenge to any of the subsequently approved amendments. As discussed in the affirmative defenses addressed below, such an untimely challenge is barred by the Warren-Alquist Act.

### **RESPONSE TO COUNT 2**

#### **(A) PG&E HAD A FINAL DETERMINATION OF COMPLIANCE AS REQUIRED BY THE WARREN ALQUIST ACT**

PG&E submitted and subsequently withdrew its December 2007 application for modifications to the Authority to Construct for the facility because it determined that (1) many of the changes that had been sought in the application for modifications were no longer necessary; and (2) the remainder of the changes that had been sought in the application for modifications were exempt from permit requirements so did not require an amendment to the ATC prior to being constructed.<sup>14</sup>

Among the changes PG&E requested in the December 2007 application to the BAAQMD and the January 18, 2008 Petition to the CEC were changes to the permitted emission limits for commissioning activities. PG&E was able to complete commissioning in compliance with the originally permitted emissions limits. Therefore, these changes were no longer needed. PG&E completed

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<sup>13</sup> Mere recitation of specific conditions of certification, such as AQ-6, without providing factual evidence of a violation, does not satisfy the Commission's requirements for a complaint.

<sup>14</sup> See February 13, 2009, letters from PG&E to BAAQMD and CEC, *available at* [http://www.energy.ca.gov/sitingcases/contracosta/compliance/2009-06-01-Withdrawal\\_of\\_Petition\\_to\\_Amend\\_Air\\_Quality\\_Conditions\\_TN-50406.pdf](http://www.energy.ca.gov/sitingcases/contracosta/compliance/2009-06-01-Withdrawal_of_Petition_to_Amend_Air_Quality_Conditions_TN-50406.pdf)

commissioning in compliance with the emissions limitations in the ATC and license issued in 2001<sup>15</sup>

Among the changes PG&E requested in the December 2007 application to the BAAQMD and the January 18, 2008 Petition to the CEC were changes to the permitted emission limits for startups/shutdowns. PG&E subsequently determined that it could satisfactorily operate the plant without changes to the originally permitted emission limits for startups and shutdowns. Therefore, these changes were no longer needed. PG&E is operating the facility in compliance with the emissions limitations in the ATC and license issued in 2001.<sup>16</sup>

Among the changes PG&E requested in the December 2007 application to the BAAQMD were authorities to construct for the dewpoint heater and the wet surface air cooler. However, the BAAQMD subsequently determined that those units were exempt from permitting.<sup>17</sup> Therefore, no ATC was required from the District prior to construction of those units. Therefore, there is no inconsistency between the BAAQMD ATC and the as-built facility relative to the dewpoint heater and the wet surface air cooler.

Among the changes PG&E requested in the January 18, 2008 Petition to the CEC were conforming amendments to the license for the dewpoint heater. The BAAQMD had amended its ATC on May 7, 2002, to limit operation of the heater through a limitation on daily heat input rather than daily hours of operation. Until the CEC changes its condition AQ-47 to conform to the District's Condition 47, PG&E will continue to comply with the current version of condition AQ-47, which limits daily hours of operation for the heater, as well as District Condition 47, which limits daily heat input. Therefore, there is no inconsistency between PG&E's operation of the facility and the requirements of the facility license relative to the dewpoint heater.

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<sup>15</sup> The ATC was renewed by the BAAQMD in 2003, 2005 and 2007.

<sup>16</sup> *ibid*

<sup>17</sup> See Engineering Evaluation For Proposed Amended Authority to Construct And Draft PSD Permit, issued June 2008.

The CEC license was amended in 2007 to include the wet surface air cooler and other elements of the wet cooling system.<sup>18</sup> Therefore there is no inconsistency between PG&E's construction and operation of the facility and the requirements of the facility license relative to the cooling system.

Among the changes PG&E requested in the December 2007 application to the BAAQMD and the January 18, 2008 Petition to the CEC was the addition of a 300 hp diesel fire pump engine. As discussed above, PG&E received a Notice of Violation for installation of the diesel fire pump engine without an authority to construct, and the NOV has been resolved with the District enforcement division. A separate application for authority to construct has been filed with the District for the diesel fire pump, and this application is now pending before the District. The unpermitted fire pump engine has been disconnected and is not operational. Therefore, there is no inconsistency between PG&E's operation of the facility and the requirements of the ATC or the CEC license relative to the diesel fire pump engine.

PG&E withdrew its December 2007 air permit application because the permit modifications requested in the application were no longer needed. The determination of compliance issued by the District in 2001 remains valid. Therefore, the 2001 certification and subsequent amendments are also valid.

PG&E has submitted a separate request to the CEC for changes to the Conditions of Certification on May 7, 2009. With the exception of the addition of the diesel fire pump engine, none of these requested changes require any action by the BAAQMD.

The Complaint goes on to allege that GGS does not have a Final Determination of Compliance for the facility it constructed and is operating. For the reasons discussed above, this is incorrect. The Final Determination of Compliance was issued by the BAAQMD on February 2, 2001. There is nothing in the CEC's regulations that requires an additional Determination of Compliance. The

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<sup>18</sup> See *supra* at 2.

Commission was notified of all subsequent applications filed with the BAAQMD by PG&E.

**(B) PG&E DID HAVE AN AUTHORITY TO CONSTRUCT**

The BAAQMD issued an Authority to Construct for the facility on July 24, 2001. The ATC was validly and properly extended in 2003, 2005, and 2007. The Complaint presents no information to contradict this conclusion.

**(C) PG&E HAD, AND CONTINUES TO HAVE, A VALID AIR PERMIT**

As discussed below in the Affirmative Defense entitled "Improper Forum," the PSD Permit is a federal permit under the purview of U.S. EPA, with certain authorities delegated to the BAAQMD. Accordingly, a Commission hearing is not the proper venue for addressing issues pertaining to the PSD permit, including its validity and the proper application of BACT emission control requirements.

Here, the District, pursuant to the PSD permitting authority delegated to it by EPA, issued the PSD permit to the facility on July 24, 2001 as part of a single, comprehensive "Authority to Construct" ("ATC") permit. In delegating to the District the authority to administer the PSD permit program, EPA determined that District Regulation 2, Rule 2 "generally meets the requirements of [40 CFR] 52.21; therefore, District Authorities to Construct (ATCs or permits) will be deemed to meet Federal PSD permit requirements. . . ." The Gateway facility is currently operating pursuant to, and in full compliance with, that validly issued PSD permit, which has not been amended since its issuance in 2001. ACORN argues that "the Clean Air Act and its implementing regulations require that a new analysis of BACT (best available control technology) be conducted every 18 months when construction is delayed." (Complaint, at ¶ 55.) ACORN then cites and quotes a provision of federal regulations regarding phased construction, and references other provisions regarding "commencement of construction." (Complaint, at ¶¶ 56, 57.) However, none of the provisions cited by ACORN apply to the Gateway PSD permit. The facility was not constructed in phases, and even ACORN agrees that the plant commenced construction in 2001, shortly

after it received the PSD permit (Complaint, ¶ 10), thus satisfying the deadline to commence construction.<sup>19</sup> Accordingly, none of those cited provisions apply here. With regard to BACT, a complete BACT analysis was performed before the ATC permit was issued in 2001, and BACT emission control requirements were imposed in the ATC. Since there have been no modifications to the facility that would trigger a re-review of BACT since the permit was issued in 2001, there is no basis to reconsider BACT for the facility.

### **RESPONSE TO COUNT 3**

#### **THE GGS IS IN FULL COMPLIANCE WITH ITS OFFSET REQUIREMENTS**

Again the Complaint makes the mistake of attempting to treat PG&E's current Petition to Amend Various Air Quality Conditions as a new AFC. It is not. The valid certification that conditions approval of the GGS is the combination of the original certification issued in 2001 and subsequent amendments. Prior to Mirant beginning construction in 2001, it obtained an ATC from the District and surrendered all of the required offsets. Mirant demonstrated compliance with the offset requirement in its Monthly Compliance Report to the CEC submitted on July 12, 2001. The District issued the ATC on July 24, 2001 and the CEC subsequently authorized construction acknowledging that all required offsets were in fact surrendered. All subsequent amendments approved by the Commission did not change the offset requirements and the Commission specifically determined that modifications to the facility did not result in any significant air quality impacts that would require additional mitigation beyond the original offsets. Therefore, the GGS was constructed in full compliance with the conditions requiring offsets.

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<sup>19</sup> The PSD regulations define "commence construction" as  
"Commence as applied to construction of a major stationary source . . . means that the owner or operator has all necessary preconstruction approvals or permits and . . . [e]ntered into binding agreements or contractual obligations . . . to undertake a program of actual construction of the source. . . ."  
See 40 C.F.R. Part 52.21(b)(9).



## **RESPONSE TO COUNT 4**

### **THE COMMISSION COMPLIED WITH ALL OF ITS REGULATIONS CONCERNING PUBLIC NOTICE DURING THE PROCESSING OF THE ORIGINAL CERTIFICATION AND APPROVAL OF SUBSEQUENT AMENDMENTS**

The Complaint alleges that the Commission did not hold a public hearing on a petition for an amendment that PG&E later withdrew. Since the petition was withdrawn, common sense would dictate that no public hearing is warranted nor required. With respect to all the previous amendments approved by the Commission, the Complaint is untimely for the reasons articulated in the opening of this answer. However, notwithstanding the untimeliness of the Complaint, PG&E believes that the Commission complied with the regulations pertaining to public notice opportunities relating to approval of amendments as the Staff recommendations and analysis for all major amendments were posted on the website, sent to appropriate notice lists and were ultimately approved at a noticed regular Commission Business Meeting where the public has an opportunity to present oral comments. Therefore, the Complaint's allegations that the Commission denied public participation should be rejected.

### **AFFIRMATIVE DEFENSES**

#### **COMPLAINT IS UNTIMELY**

The Complaint seeks a revocation of the certification of the GGS under Public Resources Code (PRC) Section 25534. The Complaint makes many allegations that the Project is not complying with its Conditions of Certification, but on a close review, it is clear that the Complaint does not contain any factual argument that the project is not complying with any condition. Rather than demonstrate non-compliance with a condition, the Complaint, alleges that: the certification issued by the Commission is invalid because of a change in project description or was not based on appropriate Emission Reduction Credits (ERCs); and that the Final Determination of Compliance (FDOC) and Authority to Construct (ATC) were invalid. Lastly the Complaint alleges that the Commission process denied opportunity for public participation. All of these

allegations challenge the basis for the Certification and any amendment to the Certification and **not non-compliance with any of the Conditions of Certification**. If the certification issued by the Commission in 2001 or any subsequent amendment was invalid, the only remedy would have been to challenge the original Commission Decision and any amendment thereto pursuant to PRC Section 25530 which states:

The commission may order reconsideration of all or part of a decision or order on its own motion or on petition of any party. Any such petition **shall be filed within 30 days after adoption by the commission of a decision or order**. The commission **shall not order** a reconsideration on its own motion **more than 30 days after it has adopted a decision or order**. The commission shall order or deny reconsideration on a petition therefore within 30 days after the petition is filed. (**emphasis added**)

Thus, a challenge by ACORN to the validity of the original Commission certification of the project is untimely, and should be dismissed.

At the same time that ACORN challenges the validity of the original Commission certification, it also alleges that Commission approval of an amendment to the original (purportedly valid) certification was invalid, and that the facility is not operating in compliance with the conditions of (the purportedly valid) certification or approved amendment.

While the Complaint alleges its basis is non-compliance with conditions of (the purportedly valid) certification, it repeatedly attacks the basis for the Commission's Decision approving amendments to the original certification issued in 2001. On December 16, 2006 PG&E filed a comprehensive Petition to Amend the original 2001 certification to eliminate the use of San Joaquin River water for cooling and replace the cooling system with an air cooled condenser (Dry Cooling Amendment). The Petition also requested approval of several design changes to accommodate PG&E's redesign of the facility which was originally designed and partially constructed by Mirant prior to PG&E's acquisition. Commission Staff published an assessment of this amendment, and a recommendation for its approval, on July 3, 2007; errata to that recommendation on July 25, 2007; and responses to public comments on the Petition on July 26, 2007.

The Commission subsequently ordered approval of the Petition on August 1, 2007. Any challenge to the validity of the certification as amended on August 1, 2007 should have been by Petition for Reconsideration pursuant to PRC Section 25530 filed no later than September 1, 2007. No Petition for Reconsideration of that Order was filed.

The Commission approved subsequent minor amendments on May 23, 2007<sup>20</sup>, December 5, 2007<sup>21</sup>; January 2, 2008<sup>22</sup>; and March 10, 2008<sup>23</sup>. No Petitions for Reconsideration were filed for any of these amendments either.

Therefore, the Commission should reject all portions of the Complaint challenging the results or procedures followed in approving any of the amendments to the original certification.

### **COMPLAINT FAILS TO IDENTIFY NONCOMPLIANCE WITH DECISION**

The Complaints have been brought pursuant to the authority of Public Resources Code (PRC) Section 25534 and pursuant to the procedures outlined in Section 1237 of the Commission's Regulations. PRC Section 25534 authorizes the Commission to amend conditions, revoke a certification or impose civil penalties for:

- (1) Any material false statement set forth in the application, presented in proceedings of the commission, or included in supplemental documentation provided by the applicant.
- (2) Any significant failure to comply with the terms or conditions of approval of the application, as specified by the commission in its written decision.
- (3) A violation of this division or any regulation or order issued by the commission under this division.

Section 1237 of the Commission Regulations specify the procedures for a Complaint brought pursuant to PRC Section 25534 and specifically require the Complainant to state facts demonstrating that an Applicant is in non-compliance with the Commission Decision. The CARE Complaint lists specific conditions of certification as "to be most

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<sup>20</sup> Order to allow a change in construction work hours

<sup>21</sup> Order to allow the use of anhydrous ammonia as refrigerant in inlet air chiller

<sup>22</sup> Order to allow the use of two additional water tanks

<sup>23</sup> Insignificant Project Change to reroute sewer line

likely not in conformance"<sup>24</sup>. This is insufficient to support the minimum requirements for a Complaint under Section 1237.

### **IMPROPER FORUM**

All of the Complaints allege that the GGS does not have a valid federal PSD Permit and/or that the facility does not meet current BACT emission control standards. Notwithstanding the fact that the GGS does have a valid PSD Permit, the PSD Permit is a federal permit exclusively within the jurisdiction of the EPA, with certain authorities delegated by EPA to the BAAQMD in accordance with federal regulations. There is no specific Condition of Certification in the Commission Decision as amended requiring the GGS to obtain a PSD Permit, and EPA has not delegated or otherwise conferred any PSD permitting authority on the Commission. Therefore, even if the GGS does not have a valid PSD Permit or does not meet applicable BACT standards, the matter is outside the jurisdiction of any Complaint to the Commission pursuant to Section 1237. Several of the Complainants have also appealed the PSD Permit to EPA's Environmental Appeals Board (EAB), alleging that the PSD permitting process was improper and that the PSD Permit is invalid. By raising similar allegations regarding the PSD permit in their Complaint to the Commission, Complainants are improperly using the Commission Complaint process to circumvent review of those allegations by the EAB and EPA under federal law. For these reasons, the Commission should find that any question regarding the validity of the PSD Permit is not within the jurisdiction of the Commission or within the scope of its complaint process.

### **CONCLUSION**

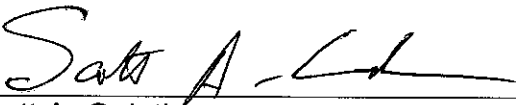
For the reasons articulated within this answer the Commission should reject the Complaint in its entirety as it does not support its allegations that the GGS is in non-compliance with any condition of certification. In fact, the entire Complaint is a de facto

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<sup>24</sup> CARE Complaint, Page 3.

Petition for Reconsideration of the original certification and subsequent amendments and on that basis should be rejected on the procedural grounds that it is untimely in violation of PRC Section 25530. Notwithstanding the procedural grounds for rejection, the Complaint is factually inaccurate and fails to present any proof that the GGS is in noncompliance with any condition of certification or any Commission regulation or statute.

Dated: July 31, 2009

A handwritten signature in black ink, appearing to read "Scott A. Galati", written over a horizontal line.

Scott A. Galati  
Counsel to Pacific Gas and Electric Company



BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT  
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IN THE MATTER OF THE COMPLAINT AGAINST  
**GATEWAY GENERATING STATION**

Docket No. 00-AFC-1C  
PROOF OF SERVICE  
(Revised 7/31/09)

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**DECLARATION OF SERVICE**

I, Ashley Y. Garner, declare that on July 31, 2009, I served and filed copies of the attached **PG&E'S RESPONSE TO COMPLAINT FILED BY ACORN, CARE, AND LOCAL CLEAN ENERGY ALLIANCE**. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list. 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:**

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:**

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**

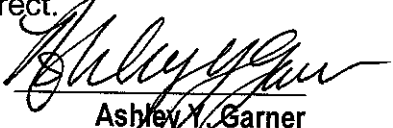
Attn: Docket No. 00-AFC-1C

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.

  
Ashley Y. Garner