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

Subject: **PG&E'S REBUTTAL BRIEF**
DOCKET NO. (00-AFC-1C)

Enclosed for filing with the California Energy Commission is the original of **PG&E's REBUTTAL BRIEF**, for the Gateway Generating Station Docket No.(00-AFC-1C).

Sincerely,

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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of: Complaints Against Gateway Generating Station Brought by ACORN, Local Clean Energy Alliance, CARE, et al	**DOCKET NO. 00-AFC-1C** **PG&E'S REBUTTAL BRIEF**

INTRODUCTION

Pacific Gas and Electric Company (PG&E) in accordance with the Siting Committee direction at the August 5, 2009, evidentiary hearing hereby files its Rebuttal Brief to the consolidated complaints against the Gateway Generating Station (GGS) brought by ACORN, Local Clean Energy Alliance and CARE.

In its Answer, PG&E asserted affirmative defenses to the Complaints that would bar it in its entirety or would limit the scope of the Commission's inquiry. Over objection at the August 5, 2009 evidentiary hearing, the Committee did not rule on these affirmative defenses. For that reason and ease of reading, these defenses are reproduced here and PG&E requests affirmative rulings from the Commission.

AFFIRMATIVE DEFENSES

COMPLAINTS ARE UNTIMELY

The Complaints seek a revocation of the certification of the GGS under Public Resources Code (PRC) Section 25534. The Complaints make many allegations that the Project is not complying with its Conditions of Certification, but on a close review, it is clear that the Complaints do not contain any factual evidence that the project is not complying with any condition. Rather than demonstrate non-compliance with a condition, the Complaints allege that: the certification issued by the Commission is invalid because there was a change in project description or because the Commission's certification was not based on appropriate Emission Reduction Credits (ERCs); and that the Final Determination of Compliance (FDOC) and Authority to Construct (ATC) issued by the Bay Area Air Quality Management District (BAAQMD) were invalid. Lastly, the Complaints allege 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, but ***do not provide any evidence of 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 Complaints allege their basis is non-compliance with conditions of (the purportedly valid) certification, they 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).[1] 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.[2] 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[3], December 5, 2007[4]; January 2, 2008[5]; and February 19, 2008[6]. No Petitions for Reconsideration were filed for any of these amendments either.

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[1] Ex. 301
[2] Ex. 304
[3] Ex. 303, related to NOISE-8
[4] Ex. 307, to allow the use of anhydrous ammonia as refrigerant in inlet air chiller
[5] Ex. 308, to allow the use of two additional water tanks
[6] Ex. 311, insignificant Project Change to reroute sewer line

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

COMPLAINTS FAIL 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 Complaints list specific conditions of certification as "to be most likely not in conformance". This is insufficient to support the minimum requirements for a Complaint under Section 1237.

IMPROPER FORUM

Complainants 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 believes it 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 assuming arguendo that the GGS does not have a valid PSD Permit or, as a consequence, does not meet applicable federal BACT standards, the matter is outside the jurisdiction of any Complaint to the Commission pursuant to Section 1237. Some 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. (This appeal was denied by the EAB on September 15, 2009.) By raising similar allegations regarding the PSD permit in their Complaints to the Commission, and without providing any greater specificity than was provided to the EAB, Complainants are improperly using the Commission Complaint process to circumvent review of those allegations by the EAB and EPA under federal law. This position is supported by the District.[7] 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.

CORRECTED CHRONOLOGY

The Complainants' Joint Opening Brief (Complainants' Brief) includes a chronology of events that is inaccurate and appears intended to mislead the Commission. In order for the Commission to evaluate whether any of the allegations amount to actionable activities, it is important for the Commission to understand ***all*** of the facts. In Complainants' chronology, several important agency actions, including renewal of permits and their transfer to PG&E, were conspicuously omitted, thus leaving the impression that PG&E intentionally and willfully failed to comply with the Commission Decision and other permitting requirements. We have included Attachment A to this

[7] See Exhibits 321, 322, and 323.

Reply Brief which is a corrected chronology that tells the entire story. If the Commission had ordered Staff to reopen its inquiry and mediate meetings with Complainants as PG&E requested, it is extremely likely that Staff could have developed an augmented report that contained undisputed facts for the Commission to consider.

LEGAL OVERVIEW

Complainants have organized their brief with an underlying assumption that is not supported by the law. That assumption is that every administrative difference, no matter how large or how small, can be characterized as "noncompliance". Based on this assumption, the Complainants have applied a "strict liability" standard and in many instances have used PG&E's own identification of administrative clean-up items as evidence of this "strict liability noncompliance". The Commission should reject this approach as it is not supported by the law or the facts.

PG&E's position in this proceeding is complicated by the fact that Complainants failed to articulate, in the first instance, precisely which conditions of certification PG&E was supposedly violating. After an extensive discussion at the August 5 hearing, Complainants were still unable to agree among themselves, or with other parties, as to which conditions of certification were at issue, or what evidence there was of noncompliance. This situation is not dissimilar to that faced by the EAB in their review of the PSD permit appeal. In denying the PSD permit appeal, the EAB stated "[i]t is not the Board's job to scour the record to find a supportable basis for jurisdiction." Similarly, it should not be PG&E's job, or the Committee's job, to scour Complainants' filings to determine what conditions they allege are being violated, and what the bases of those allegations are.

Nonetheless, we have, in fact, scoured Complainants' filings, and we believe that Complainants have three main contentions.

First, Complainants allege that PG&E installed equipment that it did not get approval to install. Specifically, Complainants point to the gas preheater and the diesel fire pump in this regard.

Second, the Complainants allege that the Commission should revoke certification because they allege that the facility does not have a valid PSD Permit.

Third, the Complainants allege that any reference in any condition of certification to any piece of equipment that was not constructed or reference to defunct agencies constitutes a violation because PG&E was required to seek an amendment to remove such references prior to construction.

Complainants allege that each of these contentions can support revocation of the GGS License pursuant to Public Resources Code Section 25534. Specifically, Complainants rely on Section 25534 (a) (2) and (a) (3), which state that in order for the relief sought to be granted the Commission must find either

> (2) Any significant failure to comply with the terms and conditions of approval of the application, as specified by the commission in its written decision.
>
> (3) A violation of this division or any regulations or order issued by the commission under this division.

Somehow the Complainants have lumped all allegations into a "catchall provision" that they claim is "noncompliance". This oversimplification leads to characterizing a typographical error or the oversight in removing reference to a cooling tower when the Commission approved its replacement with an air cooled condenser as "noncompliance". For each allegation the Commission should determine whether there is proof that PG&E significantly failed to comply with the terms and conditions of approval contained in the decision or violated any division of the Warren-Alquist Act, its regulations or order of the Commission.

Installation of the Dewpoint Heater Was Not a Violation

The Complainants allege that PG&E's installation of the current dewpoint heater is in and of itself a significant failure to comply with the conditions of certification in the Decision. The Complainants allege violations of Conditions AQ-5, AQ-24 and AQ-47. This allegation is not accurate, because PG&E's installation of the smaller dewpoint heater does not constitute significant failure to comply with any condition of certification, not is a violation of the any provision of the Warren Alquist Act, Commission regulations or any order or decision of the Commission.

In Exhibit 316, the Testimony of Gary Rubenstein and Steve Royall, the witnesses explain that PG&E installed the dewpoint heater which is a smaller version of the gas preheater as described in the original Application For Certification. "Dewpoint heater" is another, more descriptive name for the fuel gas preheater, as the purpose of the fuel gas preheater is to preheat natural gas to keep it above the dewpoint before combustion.

> The license includes a natural gas-fired fuel gas preheater rated at 12 MMBtu/hr (HHV). The license includes a condition limiting the heater to 16 hours per day of operation. PG&E substituted a smaller dewpoint heater rated at approximately 6.5 MMBtu/hr (HHV). Because the heat input rating of the dewpoint heater is less than 10 MMBtu/hr and the unit is fueled exclusively with natural gas, it is exempt from permitting under BAAQMD Rule 2, Section 2-1-114.1.2.2. PG&E has requested written concurrence from the District staff that the dewpoint heater is exempt from the requirement to obtain a permit, and has asked the District to eliminate the permit condition in the facility's current Authority to Construct related to the fuel gas heater, since the fuel gas heater was not installed.

This evidence was uncontradicted. The original Certification by the Commission included a small gas-fired heater to preheat fuel entering the turbine. PG&E constructed a smaller gas-fired heater to preheat fuel entering the turbine. The change in terminology is inconsequential – both devices are small gas-fired heaters designed to preheat fuel entering the turbine. Complainants allege that PG&E is not complying with Condition of Certification AQ-5 on the sole basis that PG&E sought to remove reference

to a "gas fired preheater" in Condition AQ-5 because it was no longer necessary to include it in the condition as the smaller preheater was not subject to District permitting. How can this be significant failure to comply with the condition? The condition does not require the installation of a gas preheater. Complainants have submitted no evidence that PG&E failed to comply with Condition of Certification AQ-5 but instead believe that the installation of a smaller piece of equipment in and of itself is noncompliance with this condition. To hold that the Warren Alquist Act or the Commission regulations require approval of an amendment to install a smaller version of a piece of equipment that was previously approved by the Commission, and that is exempt from District permitting, is not only nonsensical, but adoption of such an interpretation would inundate Staff with needless amendment requests.

Complainants next allege that PG&E has not complied with Condition AQ-24. Condition AQ-24 places a limit on the combined emissions from several pieces of equipment, including the gas preheater. Complainants have provided no evidence that PG&E is not currently including emissions from this unit in its emissions tracking for the facility, or that GGS's combined emissions exceed those identified in this Condition. Complainants have simply itemized every request PG&E has made in its amendment and claimed that the request, per se, evidences significant failure to comply with the conditions.

Complainants claim incorrectly that PG&E also does not comply with Condition AQ-47. However, as explained by Mr. Rubenstein and Mr. Royall in Exhibit 316:

> As a separate matter, the District amended condition 47 in 2002 to limit daily heat input, rather than daily hours of operation, for the fuel gas heater in the original ATC. The CEC license still limits operation of the fuel gas heater to 16 hours per day, and does not contain a daily heat input limit. PG&E may need to operate the dewpoint heater up to 24 hours per day under extreme cold-weather conditions. In May 2009 Petition we propose to change AQ-47 from a limit on daily operating hours to a limit on daily heat input, consistent with the change that was made to the air

> permit in 2002. However, since the heat input rating of the dewpoint heater is only 6.5 MMBtu/hr, the daily limit for AQ-47 will be 6.5 MMBtu/hr * 24 hrs/day = 156 MMBtu/day, lower than the 192 MMBtu/day limit that is equivalent to the operational limit in the current license. The change in size and type of fuel gas heater also affects conditions AQ-5 and AQ-24.
>
> The proposed changes in the May 2009 Petition would make these conforming changes to the CEC license.
>
> *To date, GGS has operated the smaller dewpoint heater in compliance with the current conditions of certification, and will continue to do so unless and until the Commission approves the requested amendment.* [emphasis added]

This evidence is uncontradicted in the record. In fact, a change to Condition AQ-47 to conform the language with the BAAQMD's 2002 revision was requested by PG&E on October 28, 2008. The request was restated in the May 2009 petition out of an abundance of caution.

Complainants have presented no evidence that PG&E has failed to comply with the 16 hour per day limit established by the condition. As stated above, merely requesting a change to a condition does not provide any evidence that the condition has not been complied with and Complainants' argument that PG&E was required to formally amend the Decision to allow installation of a smaller version of a pre-approved piece of equipment should be rejected.

Installation Of The Fire Pump Does Not Warrant Commission Action

Mr. Rubenstein and Mr. Royall provided the following uncontradicted evidence concerning the fire pump. Exhibit 316 provides:

> The original project design called for an electric motor-driven fire water pump. However, PG&E was required by the fire marshal to install a Diesel fire pump engine. A permit application was filed with the District for this engine in December 2007; a corresponding petition for amendment was filed with the Commission in January 2008. When the January 2008

amendment application was withdrawn in January 2009, a second application for the Diesel fire pump engine was filed with the air district in March 2009. Copies of these applications were provided to the CEC. As part of the May 2009 petition, PG&E is requesting that the CEC add the new Diesel fire pump engine to the GGS license.

GGS operated the new Diesel engine for testing, for not more than 21 hours, during initial commissioning activities, prior to receipt of the permit for this engine. Upon discovering this error, GGS reported this violation to the BAAQMD and CEC CPM on October 14, 2008, and removed the engine from service, replacing it with a temporary, compliant engine that is operating under a state/district approved Portable Equipment Registration Program permit. Both the BAAQMD and CEC CPM were notified of this replacement.

PG&E acknowledges that it should not have installed the diesel fire pump without first amending the District and CEC permit. However, since the switch from an electric fire pump to a diesel fire pump was required by the local fire inspector, PG&E had no choice but to comply. PG&E's attempt to gain approval of the diesel fire pump has been complicated by the coordination between the Commission Staff and BAAQMD. As the agencies were coordinated, at one point during the last 12 months, the CEC staff was ready to recommend approval of the Diesel fire pump, but withheld approval at the request of the BAAQMD staff. At another point during the period, the BAAQMD staff was ready to propose approval of the Diesel fire pump, but withheld approval at the request of the CEC staff. PG&E continues to work with both agencies to gain approval for a Diesel fire pump that is acceptable to both agencies, as well as to the fire inspector.

PSD Permit

As discussed above, 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. The PSD permit was validly extended by the BAAQMD in 2003, 2005, and 2007. Explicit evidence of the 2003 extension is contained in Exhibit 314, the June 2004 EPA delegation agreement with the BAAQMD, which states, in relevant part:

> "1. Pursuant to this re-delegation, the District shall have primary responsibility for initial issuance or administrative or minor modification of the PSD permit(s) identified below:
>
> Facility:
>
> a. Delta Energy Center
>
> b. Los Medanos Energy Center
>
> c. Metcalf Energy Center
>
> d. East Altamont Energy Center
>
> e. Tesla Power Plant
>
> f. Russell City Energy Center
>
> g. Delta Power Plant
>
> h. Potrero Power Plant
>
> ...
>
> 8. Permitting History for Della Power Plant (Delta #18, Unit 8). The District issued a FDOC on February 2, 2001. The final PSD permit and Authority to Construct were issued on July 24, 2001. The Permit to Operate has not yet been issued as of May 7, 2004."[8]

[8] Ex. 314

The GGS was known as the Delta Power Plant #18, Unit 8 at one time when it was owned by Mirant.

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. ACORN then cites and quotes a provision of federal regulations regarding phased construction, and references other provisions regarding "commencement of construction." 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.[9] 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.

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 - and that is not

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9 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. . . ."

the case-, 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. As noted above, the EAB denied those appeals on September 15, 2009. By raising similar allegations regarding the PSD permit in their Complaints 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.

Since the time of the evidentiary hearing, the EPA has issued a Notice of Violation (NOV) alleging that the PSD Permit is invalid, notwithstanding the express language in the 2004 delegation agreement. While PG&E strongly disagrees with this conclusion and believes that EPA's position contradicts its and the District's earlier actions and opinions, PG&E is working closely with the EPA to resolve this difference. However, the Committee should be aware that as demonstrated by the Corrected Chronology, PG&E had every reason to believe that GGS had a valid PSD Permit. Moreover, until recently -- and only after operations commenced – every agency agreed. See Exhibit 314 which acknowledges the existence of the valid PSD Permit in 2004. Complainants' claim that this is an intentional and willful violation is not supported by any evidence. As discussed above, PG&E is working diligently and cooperatively with EPA to resolve the NOV. Should that resolution require any modifications to the Commission Decision, PG&E would meet with the Commission Staff to determine if and to what extent an amendment may be required.

See 40 C.F.R. Part 52.21(b)(9).

NONSUBSTANTIVE ISSUES

Proposed Change To Definition of "Commissioning Period" Is Not a Violation

Complainants allege that PG&E's license should be revoked because the definition of "Commissioning Period" in the original license referred to the now defunct Power Exchange. If the Commission were to hold that the fact that Power Exchange ceased to exist is sufficient to require a petition prior to engaging in commissioning activities, the Commission would be inundated with hundreds of similar amendments from applicants. There must be some common sense applied to when a petition is required. For this particular allegation, it is clear that no change in the design or operation of the facility is required because the Power Exchange no longer exists. PG&E included the request for the change only because it was requesting other nonsubstantive changes and wanted to "clean-up" any discrepancies.

CO2 Monitor During Commissioning Was Not A Violation

This claim is similar in nature to Complainants' other claims. Exhibit 316 explains:

> Due to a typographic error, the original license required that the owner use a CO_2 monitor to measure the level of dilution in exhaust gases during the commissioning period, instead of the industry-standard O_2 monitor. The comparable monitoring requirement for post-commissioning emissions allowed the operator the choice of either a CO_2 or O_2 monitor. The previous owner had sought and received approval from the BAAQMD for the O_2 monitor during commissioning in 2002. However, the previous owner failed to obtain a conforming amendment to the Conditions of Certification. The details of the monitoring system, including the use of an O_2 diluent monitor, were submitted to the CEC CPM on August 21, 2008. GGS is operating in compliance with the current conditions of certification, which allow for the use of either an O_2 or CO_2 diluent monitor post-commissioning.

This evidence is uncontradicted and Complainants have presented no evidence that PG&E is not complying with the conditions. The addition of O_2 monitoring to the corresponding condition in the FDOC was approved by the BAAQMD in 2002; due to an

oversight, the previous owner apparently failed to request a conforming change in the CEC decision until PG&E did so – first in October 2008, and again in May 2009.[10]

Elimination of Steam Injection Power Augmentation Was Authorized By CEC

The only evidence in the record that explains Complainants' claim relating to steam augmentation is Exhibit 316. This testimony describes that the Commission did in fact approve the elimination of steam augmentation in its July 2007 order (the "dry cooling amendment", Exhibit 304), and Complainants' only claim is that when the Commission did so it failed to eliminate the reference to steam injection power augmentation from Conditions AQ-20, AQ-26 and AQ-30.

> The previous project owner proposed the use of power augmentation steam injection to increase plant output under certain operating conditions. In its August 2007 order, the Commission approved a design change eliminating the use of power steam augmentation. However, some air quality conditions of certification continue to refer to power steam augmentation. The May 2009 Petition seeks to eliminate these stray references to the power steam augmentation system that was deleted from the project design with the Commission's approval in August 2007. With respect to these amendments, GGS is operating in compliance with the current conditions of certification since the elimination of power steam augmentation did not result in any changes to the plant's allowable emission rates or operating conditions. (Exhibit 316)

This administrative error cannot support a finding of significant failure to comply with the Commission Decision. PG&E sought and the Commission approved the elimination of steam injection- power augmentation in July 2007, well before initial operation of GGS.

[10] It should be noted that PG&E has calculated and recorded CO_2 emissions - as required by EPA acid rain regulations - since the units first synchronized with the grid, and continues to do so. This includes the period of time during which commissioning activities occurred.

Elimination of Cooling Tower Was Specifically Authorized By CEC

Complainants allege that GGS is in violation of Condition AQ-24 because "When GGS began operation, AQ-24 required that PG&E measure emissions from...the cooling tower... PG&E did not build the cooling tower." However, Complainants misrepresent the requirement of Condition AQ-24, as Condition AQ-24 does not require that PG&E measure emissions. Instead, Condition AQ-24 limits cumulative combined emissions from facility equipment, including the cooling tower. Since the cooling tower was not built, its emissions are by definition zero. Complainants have not demonstrated that cumulative combined emissions from plant equipment, including zero emissions from the cooling tower, have exceeded the emission limits of Condition AQ-24.

Similarly, the only evidence in the record that explains Complainants' contention relating to elimination of the cooling tower is Exhibit 316.

> The CEC license was amended in August 2007 to replace the wet cooling tower with a dry cooling system (Order No. 07-0801-2). Although references to the wet cooling tower were deleted and replaced with conditions relating to the wet surface-air cooler that is part of the dry cooling system, the annual facility-wide PM10 emissions limits were not reduced to reflect the elimination of the PM10 emissions attributable to the cooling tower. This proposed change will reduce the allowable annual PM10 emissions from the facility from 112.2 tpy to 105.0 tpy in condition AQ-24, and correspondingly reduces the required offsets in conditions AQ-39 and AQ-40.1. GGS is in compliance with the current PM10 emission limit, which is higher than the limit proposed in the May 2009 Petition.

This evidence is also uncontradicted as Complainants have provided no evidence of any violations regarding the cooling tower. It is unexplainable why the Complainants do not acknowledge that the project was modified to remove the cooling tower and replace it with an air cooled condenser. This change was applauded by the Commission as a responsible and environmentally superior modification to eliminate the use of river water for cooling. Complainants' only contention is that all references to the cooling tower in the Commission's conditions were not removed.

Valid Emission Reduction Credits Were Surrendered

The Complainants' Brief alleges that valid emission reduction credits were not surrendered for the project. This contention, like most of Complainants' contentions, is not supported by any evidence. This baseless claim stems from Complainants' fundamental misunderstanding of the sequence of events that resulted in full surrender of all emission reduction credits required by District Rule and Commission Decision as well as those rules governing such surrender. The Commission's decision approving GGS did not specify the emission reduction credit certificates that were required to be surrendered.[11] However, the underlying Final Staff Assessment identified the following ERC certificates for GGS:

- NOx – 200.5 tons per year of offsets required, to be surrendered from BAAQMD Certificate 693
- POC – 47 tons per year of offsets required, to be surrendered from BAAQMD Certificate 693[12]
- SOx – 337 tons per year of offsets required, to be surrendered from BAAQMD Certificates 693, 694 and 695. These SOx offsets were to mitigate PM10 impacts at a 3:1 ratio.[13]

The BAAQMD DOC[14] and CEC decision[15] both specify that, prior to the issuance of the BAAQMD Authority to Construct, GGS was required to demonstrate that it had, within its control, sufficient offset credits to BAAQMD and CEC requirements.

Exhibit 318 is a computer printout, generated by the BAAQMD and sent to GGS, documenting the history of a number of ERC certificates. The third page of Exhibit 318 presents the history for BAAQMD Banking Certificate 693. This document shows that

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[11] Ex. 300. California Energy Commission Decision. Contra Costa Unit 8 Power Project (00-AFC-1). May 30, 2001. Condition AQ-39. P. 27

[12] The Commission Decision, incorporating requirements of the BAAQMD Determination of Compliance, required the surrender of 53.6 tons per year of POC. Ibid.

[13] Final Staff Assessment. Contra Costa Unit 8 Power Project (00-AFC-1). March 2, 2001. P. 63

[14] Ex. 1. Final Determination of Compliance – Contra Costa Power Plant Unit 8 Project. February 2, 2001. Condition 39. P. 34

53.600 tons of POC emissions, 200.500 tons of NOx emissions, and 321.900 tons of SOx emissions were withdrawn from the certificate in connection with application no. 1000. Application 1000 was the BAAQMD designation for the Contra Costa 8 project, the predecessor name of the Gateway Generating Station.[16]

The fourth page of Exhibit 318 presents the history for BAAQMD Banking Certificate 694. This document shows that 14.521 tons of SOx emissions (158.200 – 143.679 tons) were withdrawn from the certificate in connection with the GGS application (No. 1000).

The fifth page of Exhibit 318 presents the history for BAAQMD Banking Certificate 695. This document shows that 0.179 tons of SOx emissions were withdrawn from the certificate in connection with the GGS application (No. 1000).

The seventh page of Exhibit 318 is a December 18, 2001, letter from Ellen Garvey, the BAAQMD Executive Officer/Air Pollution Control Officer, to Mirant. This letter refers to emission reduction credits from the "certificate that was surrendered to offset the additional increase of 2.37 tons/year PM_{10} of application 1000." Pages 15, 17, and 19 of Exhibit 318 are similar letters, dated July 24, 2001, referring to additional emission reduction credits that were "surrendered to offset the emission increase of application 1000." Finally, pages 22, 24 and 26 of Exhibit 318 are copies of emission reduction certificates with handwritten notes indicating that the certificates were "surrendered" for application no. 1000.

Thus, the BAAQMD's ERC tracking system and related records presented in Exhibit 318 demonstrate that 200.500 tons of NOx ERCs, 53.600 tons of POC ERCs, and (321.900 + 14.521 + 0.179) = 337 tons of SOx ERCs were surrendered, as required by

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[15] Ex. 300. CEC Decision, Condition AQ-39. P. 27.
[16] Ex. 1. FDOC, op cit. Cover page.

the Commission's decision.[17] GGS was, and is, in full compliance with the Commission's conditions regarding the surrender of emission reduction credits to satisfy both BAAQMD regulatory requirements and Commission mitigation requirements under CEQA. There is no contradictory evidence in the record.

PG&E Did Not Violate Conditions Relating The Title IV Acid Rain Permit

ACORN alleges that PG&E violated Condition AQ-42 by operating GGS less than 24 months after filing an application for a Title IV (acid rain) permit. ACORN further alleges that PG&E was aware of this 24 month requirement as evidenced by Ex., 32. In fact, Ex. 320, which is a letter dated January 2, 2007 containing PG&E's application for a Title IV acid rain permit expressly states PG&E's intention to commence operation in late 2008 – less than 24 months from the date of the letter. Neither the BAAQMD nor USEPA – both of whom received this application – have raised any objections regarding this issue in the 31 months since the acid rain application was filed. The purpose of the 24-month requirement – which derives from federal regulations[18] - is to ensure that agencies have sufficient time to review and respond to requests for applications. If the 24 month deadline is missed, and the agencies nonetheless have sufficient time to review the application, the agencies typically exercise their enforcement discretion. That appears to be the case here.

Although ACORN cites Ex. 32 as supporting their allegation, in fact it demonstrates that PG&E's understanding of the 24-month requirement is the same as the BAAQMD's. Included within Ex. 32 is a May 7, 2008 e-mail message from the BAAQMD to PG&E's air quality consultant that states:

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[17] The unrounded total of the SOx ERCs surrendered is 336.6 tons. The origin of this requirement is the BAAQMD FDOC (Ex. 1), Condition 39, which requires the surrender of 112.2 tons of PM10 ERCs. Both the FDOC (Ex. 1, at p. 17) and CEC Decision (Ex. 300) allow the use of SOx ERCs at a 3.0:1 ratio. Thus, the precise CEC requirement, derived from the BAAQMD requirement, is 112.2 x 3 = 336.6 tons of SOx ERCs, which is the quantity that was surrendered. (See, e.g., FSA at p. 62, presenting the more precise CEC requirement of 336.6 tons of SOx ERCs.)

[18] 40 CFR 72.30

> "Most facilities do not have a TV issued by the District at the time of first fire- An application for a TV seems to be enough." [referring to the need for a combined Title IV/Title V permit prior to first fire]

A second e-mail message also included in Ex. 32 and dated May 8, 2008, contains the following statement from the BAAQMD engineer:

> "Based on my discussions with legal the 24 months issue is not a problem as long as it is clear that the application processing has not been delayed by the applicant not submitting required information."

Thus, the agency responsible for the implementation of Condition AQ-42 indicated that it was not necessary for PG&E to delay the commencement of operation until 24 months after submission of the acid rain application, and further indicated that it was not uncommon for such applications to be submitted less than 24 months prior to the commencement of operation.

PG&E Complied with All Source Testing Requirements

Complainants completely ignore the legal effect of Exhibit 315 which allowed an extension of the time to complete source testing. The contention that an agreement with a regulatory agency allowing additional time to conduct source testing is grounds for revoking the Commission Decision is untenable. The condition to complete source testing within 60 days was proposed by the District. PG&E acted responsibly when it notified the District it would not be able to comply with the requirement due to commissioning procedures designed to reduce emissions during commissioning. These commissioning procedures were submitted to both the BAAQMD and CEC staff in accordance with each agency's requirements. The legal effect of Exhibit 315 is that PG&E was no longer required to complete the source testing within 60 days, and thus was able to reduce emissions during commissioning. Complainants have provided no evidence that PG&E did not comply with the terms of the BAAQMD compliance agreement.

Alleged NOx Violations Do Not Warrant CEC Action

Complainants allege that PG&E violated unspecified NOx emission limitations on two occasions – once in January 2009, and a second time on March 16, 2009. Complainants allege that PG&E specifically violated conditions AQ-2, AQ-7, AQ-19, AQ-20, and AQ-26 in this regard. Complainants cite, as the basis for this allegation, Exhibits 14, 26 and 33. Exhibit 14 is PG&E's May 2009 Petition to Amend the Commission's Decision; it contains no evidence whatsoever that PG&E has violated any Commission conditions. Exhibit 25[19] is a copy of a Notice of Violation issued by the BAAQMD on May 2, 2009. Finally, Exhibit 33 is an incomplete collection of unsigned BAAQMD documents related to a CEMS malfunction experienced by the plant in January 2009. PG&E is requesting that the Committee take note of Proposed Exhibit 327, enclosed with this filing. Exhibit 327 is a *signed* version of the first four pages of Exhibit 26. The second page of Exhibit 327 differs from Exhibit 25 in that a box labeled "NOT APPLICABLE – After Source Test Evaluation – No violation was documented" is checked in Exhibit 327, while that box is blank in Exhibit 25. In addition, Exhibit 327 has the signature of a BAAQMD supervisor on the second page, while Exhibit 25 contains no such signature. The disposition of this matter – which relates to a malfunction in the CEMS at GGS between January 17 and January 20, 2009 – was that the BAAQMD found no evidence of excess NOx emissions. ACORN's presentation to the Committee, as evidence, an inaccurate copy of a record from the BAAQMD is negligent at best and willfully misleading at worst.

Both the January and March incidents were related to CEMS errors, one of which – in March – resulted in an exceedance of the 2.5 ppm NOx limit. Exceedances of these stringent NOx limits are never excusable –PG&E has evaluated the cause of the March exceedance (a loose cable at the CEMS) and has taken steps to ensure that it does not happen again. However, they cannot be fully eliminated, as a review of operating data from any California power plant will demonstrate.

[19] Complainants' brief incorrectly cites Ex. 26 as the basis for this allegation.

CONCLUSION

Complainants failed to state a prima facie case in their Complaints to support any action by the Commission other than prompt dismissal of the Complaints. Although given the opportunity to present evidence to explain its contentions, Complainants provided no clear evidence supporting any specific claim that PG&E significantly failed to comply with the conditions of certification or the Warren Alquist Act, Commission regulations or any order of the Commission. Rather, Complainants' allegations rest solely on the notion that the PG&E failed to amend conditions prior to certain activities. However, Complainants never contend or allege that such failure was material or significant. In fact nowhere do Complainants mention any potential negative effect on the environment or risk to workers or any other negative effect. Instead these Complainants want this Commission to elevate form over substance. If the Commission were to do so, it would pave the way for frivolous, unsupported claims like those contained in the Complaints. For the reasons discussed above, PG&E requests the Commission to dismiss Complaints in their entirety.

Dated: September 24, 2009

Respectfully Submitted,

Scott A. Galati
Counsel to PG&E

ATTACHMENT A
CORRECTED CHRONOLOGY

PG&E Gateway Generating Station – Chronology
Changes in red correct omissions in ACORN chronology

Date	Event
02/02/01	BAAQMD issues Final Determination of Compliance.
05/30/01	CEC licenses project
07/21/01	**Mirant surrenders ERCs**
07/24/01	BAAQMD issues Authority to Construct (which includes Prevention of Significant Deterioration permit).
Late 2001	Mirant commences construction.
05/07/2002	**BAAQMD approves amendment to ATC related to (1) use of an O2 CEMS during commissioning and (2) elimination of 16 hour/day operating limit on fuel preheater, both of which were approved by the BAAQMD on 05/07/2002.**
~~**(February)**~~ August 2002	Mirant suspends construction.
03/03/03	**EPA rescinds BAAQMD PSD delegation**
2003	**BAAQMD renews ATC**
06/21/04	**EPA partially redelegates PSD authority to BAAQMD, specifically including authority to amend the PSD permit for CC8**
09/26/05	**BAAQMD renews ATC**
11/30/06	PG&E acquires sole ownership over project.
12/19/06	**PG&E files petition for amendment with the CEC to (1) eliminate the use of San Joaquin River water as the cooling water source; (2) replace the wet cooling tower system with a dry cooled (air cooled condenser) system; (3) relocate various project facilities; (4) change the combustion turbine inlet evaporative cooling system to a chilled water system ; (5) eliminate the use of steam power augmentation; (6) include a redesigned closed cycle cooling water system ("dry cooling amendment")**
01/04/06	**BAAQMD transfers ATC to PG&E**
01/18/07	**CEC approves restart of construction**
Feb. 2007	PG&E restarts construction, **not including elements that were the subject of the 12/19/06 petition**
06/19/07	**BAAQMD renews ATC; PG&E renewal request specifically addressed PSD permit**
08/01/07	**CEC approves dry cooling amendment**
12/24/07	PG&E submits application for modifications of air permit to BAAQMD
01/15/08	PG&E submits petition to amend air quality conditions to CEC
06/04/08	BAAQMD issues public notice for modified air permit
10/28/08	**PG&E submits petition to CEC for amendments to conform CEC decision to BAAQMD permit amendments made in 2002 related to (1) use of an O2 CEMS during commissioning and (2) elimination of 16 hour/day operating limit on fuel preheater, both of which were approved by the BAAQMD on 05/07/2002**
11/03/08	**PG&E informs BAAQMD of need for 90 days for completions of initial compliance**

Date	Event
	and CEMS tests to allow early installation of oxidation catalysts, minimizing emissions during commissioning
11/10/08	PG&E commences operation.
11/25/08	**BAAQMD issues compliance agreement extending deadlines for completing initial compliance and CEMS tests**
Jan/Feb 2009	PG&E completes commissioning.
02/13/09	PG&E withdraws **01/15/08** petition to amend certification from CEC and application for air permit modifications from BAAQMD.
04/14/09	PG&E applies for amendments to air permit.
April 2009	**EPA informs BAAQMD and PG&E that PSD permit may not be valid**
05/01/09	**PG&E and BAAQMD enter into compliance agreement extending ATC while PSD issue is resolved with EPA**
05/07/09	PG&E submits petition to amend air quality conditions of certification with the CEC.
06/01/09	**PG&E and BAAQMD extend compliance agreement to allow resolution of PSD issue**
08/13/09	**EPA issues Notice of Violation indicating PSD permit was not validly extended in 2003**
08/26/09	**CEC approves amendments to AQ conditions of certification**
08/31/09	**PG&E and BAAQMD extend compliance agreement to allow resolution of PSD issue**

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
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IN THE MATTER OF THE COMPLAINT AGAINST

GATEWAY GENERATING STATION

Docket No. 00-AFC-1C
PROOF OF SERVICE
(Revised 7/28/09)

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DECLARATION OF SERVICE

I, Ashley Y. Garner, declare that on September 24, 2009, I served and filed copies of the attached **PG&E'S REBUTTAL BRIEF.** 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:

_X_ sent electronically to all email addresses on the Proof of Service list;

_X_ 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);**

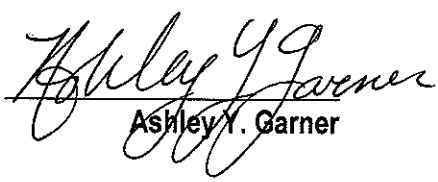
OR

___ depositing in the mail an original and 12 paper copies, as follows:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 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