GOLDEN GATE UNIVERSITY SCHOOL OF LAW

ENVIRONMENTAL LAW AND JUSTICE CLINIC

October 13, 2009

SUBMITTED BY E-MAIL AND FIRST CLASS MAIL
Elena Miller
Public Advisor
California Energy Commission
1516 Ninth Street, MS-12
Sacramento, CA 95814

Reference: Gateway Generating Station (00-AFC-01C)
Subject: Concerns Regarding Public Participation Violation

Dear Ms. Elena Miller:

The Environmental Law and Justice Clinic at Golden Gate University School of Law respectfully submits this letter on behalf of the Contra Costa branch of the Association of Community Organizations for Reform Now (ACORN) to complain about a recent violation of the public's right to full and meaningful participation in certification related decisions under the Warren-Alquist Act. In particular, the California Energy Commission (Commission) staff failed to consider ACORN's public comments to PG&E's amendment proposal for the Gateway Generating Station (GGS) prior to the amendment's approval in a business meeting on August 26, 2009. To help cure this violation, we respectfully ask you to assure that the public's comments are reviewed as part of the Commission's decision-making process in the Motion for Reconsideration filed recently by Robert Sarvey and in future cases, in which such comments are filed.

BACKGROUND

After receiving the PG&E's May 7, 2009 Amendment Request, the Commission staff reviewed the proposal and issued a staff report on July 30, 2009. *See* California Energy Commission, *Staff Analysis of Proposed Air Quality Amendment*, http://www.energy.ca.gov/sitingcases/gateway/compliance/index.html. The July 30 staff report afforded the public fourteen days, until August 13, 2009, to comment on the staff report to Mr. Yasny, the compliance officer. *Id.* at p. 2. Accordingly ACORN submitted comments to the July 30, 2009 Staff Report on August 13, 2009 directly to

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Mr. Yasny, and copied other Commission staff including Mr. Ratliff, with the subject line: "Comments to Staff Analysis of Proposed Air Quality Amendment. *See* Attachment 1. Rob Simpson representing CARE and Bob Sarvey also submitted comments on the amendment. *See* CEC Business Meeting, p. 24, ln.19, p. 31 , ln. 21, http://www.energy.ca.gov/business_meetings/2009_transcripts/2009-08-26_TRANSCRIPT.PDF (August 26, 2009).

The August 13, 2009 comments by ACORN asked the Commission to reject PG&E's amendment request and to require PG&E to come into compliance with the applicable air quality requirements before approving its certification amendment. *See* Attachment 1. ACORN's comments also requested that the Commission fully asses the cumulative impacts that will result from the operation of this facility and the other power plants located in this already overburdened area including Mirant's proposed stations at Willow Pass and Marsh Landing and the new Contra Costa Power Plant. *Id.* Additionally we asked that the fire pump's operation be limited to only emergency situations because the fire pump's operation creates significant health risks since it is not controlled to BACT levels.

PG&E's May 7, 2009 amendment request was heard by the Commission in its August 26, 2009 business meeting. During this business meeting, the Commission requested that comments be limited to two minutes. Consequently, Mr. Lucas Williams, who commented on behalf of the Contra Costa branch of ACORN, kept the comments short and referred the Commission to the written comments submitted on August 13, 20009. *Id.* at p. 23, lns. 3-7.

Problematically, the Commission's Compliance Project Manager for the GGS, Ron Yasny, stated that he did not review the comments submitted by the public. *See id* at 35 (stating "they [the comments] were not sent to me, they were docketed and I interpreted those to be comments towards the complaint ..."). No one else stated that they had reviewed the comments at the meeting. The Commission approved PG&E's proposed amendment during the August 26, 2009 business meeting even though the public comments appear to have been ignored.

To determine whether the comments had actually been ignored, counsel for ACORN sent a follow-up email to staff counsel asking whether ACORN's August 13, 2009 comments had been received, but never received a response.

DISCUSSION

ACORN's comments, which were submitted directly to the designated member of the Commission staff, should not have been ignored. The Commission's staff failure to consider these public comments violated the public's right to full and adequate public

participation. Public participation is a necessary part of certification proceedings under the Warren-Alquist Act. *See* Pub. Resources Code, §§ 25214, 25222 ("All meetings and hearings of the commission shall be open to the public, and opportunity to be heard with respect to the subject of the hearings shall be afforded to any person") ("The adviser shall also advise such groups and the public as to effective ways of participating in the commission's proceedings"). Public participation in these decisions is essential because clean energy is "of vital importance to the health and welfare of the citizens of the state and the environment." *Id.* at § 25300(a).

Further, as the legislature has recognized, public comments can improve the efficacy of the Commission's decisions. *See id.* at § 25402(b). This has been demonstrated in the Commission's recent decisions in the Tesla and Chula Vista cases. See *CEC Order Denying Petition for Extension of Construction Deadline*, http://www.energy.ca.gov/sitingcases/tesla/compliance/2009-09-23_Order_Denying_LicExten.pdf (September 23, 2009). (The Commission denies the Petition because (1) the project for which it was filed is undefined and is certainly not the Project that was certified, and (2) there is no good cause for an extension of the start-of-construction deadline). Also See *CEC Chula Vista Energy Upgrade Project - Commission Final Decision*, http://www.energy.ca.gov/2009publications/CEC-800-2009-001/CEC-800-2009-001-CMF.PDF (July 17, 2009). (Commission declines to certify the Chula Vista Energy Upgrade Project because the proposed project is inconsistent with applicable local laws, ordinances, regulations and standards (LORS)). The Act further states the public advisor shall "insure that full and adequate participation by all interested groups and the public at large is secured in the planning, site and facility certification … " *Id.* at § 25222.

As the public advisor, we request that you make sure that the Commission consider all of the public comments submitted on PG&E's amendment when it evaluates the recently filed Motion for Reconsideration by Robert Sarvey on September 24, 2009. In addition, we request that you require the Commission have procedures put in place to assure that public's comments are reviewed and considered as part of the Commission's siting and amending process in the future. *See* California Code of Regulations, Title 20 § 2553 ("The adviser serves the public and the commission by advising the commission on the measures it should employ to assure open consideration and public participation in its proceedings").

CONCLUSION

The Commission's staff circumvented the public's right under the Act to full and adequate participation in the planning, site and facility certification of PG&E's GGS when it approved the amendment without reviewing the submitted public comments. We respectfully ask you to assure that the public's comments are reviewed

as part of the Commission's decision-making process in the Motion for Reconsideration and as part of future cases.

Thank you for your consideration of our comments and concerns.

Thank you,

/s/ Amy Erb

Amy Erb
Law Student, Environmental Law and Justice Clinic

cc: Service List for Docket No. 00-AFC-1C (via email)

GOLDEN GATE UNIVERSITY School of Law

Environmental Law and Justice Clinic

August 13, 2009

SUBMITTED BY E-MAIL AND FIRST CLASS MAIL

Mr. Ron Yasney
California Energy Commission
1516 Ninth Street, MS4
Sacramento, CA 95814

Reference: Gateway Generating Station (00-AFC-01C)

Subject: Comments to Staff Analysis of Proposed Air Quality Amendement

Dear Mr. Yasney:

On behalf of the Contra Costa branch of ACORN, the Environmental Law and Justice Clinic at Golden Gate University School of Law submits these comments. PG&E is currently emitting hundreds of tons of harmful air pollution from the Gateway Generating Station without a valid certification or air permit. In its May 7, 2009 amendment, PG&E is attempting to remedy some of these violations after the fact. PG&E's belated attempt to change its certification after it has started operating does not change the fact that PG&E violated its certification and the law. Further, PG&E's application will not bring the GGS into compliance with the applicable air quality requirements. The Commission should reject PG&E's attempt to amend its certification here and require PG&E to come into compliance with the applicable air quality requirements before it can receive approval of its certification amendment.

I. PG&E's Late Amendment Does Not Change the Fact that PG&E is in Violation of this Commission's Requirements.

As discussed in our Complaint filed on June 5, 2009 and further supported in our Exhibits 1-24 accepted into evidence during the August 5, 2009 evidentiary hearing at the Commission, PG&E has violated and is currently violating the law by not having a valid certification before constructing and operating its facility. To avoid unnecessary duplication, we hereby incorporate our allegations in the June 5, 2009 Complaint and Exhibits 1-24 into our comments. Specifically, we draw your attention to Exhibit 20, which outlines statements from our Exhibits which demonstrate that PG&E is out of compliance with its certification. In addition, we draw your attention to Exhibit 21, in which Robert Sarvey outlines his support of the Complaint and the reasons he believes PG&E is in non-compliance with its certification.

This evidence demonstrates that PG&E is in non-compliance with its certification and the requirements for that certification. Under the Warren-Alquist act, the Commission's regulations, and the general conditions of PG&E's certification, companies, such as PG&E, are required to amend their certification,

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even for insignificant changes, when a company plans to change the equipment and operational conditions of its facility. *See* Cal. Pub. Res. Code Section 25500; Ex. 2 at 186 (General Conditions from May 2001 Certification) (stating that "[a] petition is required for amendments and insignificant project changes"). PG&E is aware of this requirement as it has amended its certification for the facility at issue here, the Gateway facility, many times.

In this instance, however, PG&E decided to finish construction and start operating while many of the changes it is currently in non-compliance with were pending before this Commission. *See* Ex. 6 (PG&E's January 15, 2008 Petition to Amend Conditions). PG&E then withdrew those changes stating that they were unnecessary even though months later it is now asking for many of the exact same changes. Ex. 13; *compare* Ex. 14 (May 7, 2009 Amendment Request) *with* Ex. 6 (January 15, 2008 Amendment Request). As the Staff notes, "the project has already been modified (i.e., the equipment has already been installed prior to processing and/or approving the proposed changes) and the current amendment request addresses the difference between the decision and what is "as built." July 30, 2009 Staff Analysis at 1. In addition, PG&E violated certification conditions during the commissioning period without the Commission's approval. *See* Ex. 10, 12, PG&E Exhibit 315.

PG&E's decision to construct, operate and seek permission later is a circumvention of this Commission's authority, a violation of its certifications and of the law.

II. PG&E's Amendment Will Not Bring It Into Compliance with the Applicable Laws, Ordinances, Regulation and Standards.

PG&E constructed and is currently operating a facility that has violated and is violating the applicable laws, ordinances, regulation and standards (LORS).

Importantly, PG&E's Gateway Facility was constructed and is operating without a valid PSD or NSR permit. As BAAQMD admitted in a related proceeding, "there is in fact no current, valid permit, a point on which there is now no disagreement among Petition, EPA Region 9, and the District." Ex. 15. This is because, as required by the federal PSD regulations at 40 C.F.R. 52.21(r)(2), the PSD permit "shall become invalid . . . if construction is discontinued for a period of 18 months or more." *See also Sierra Club v. Franklin County Power of Illinois*, 546 F.3d 918, 931 (7th Cir. 2008) (affirming invalidation of a PSD permit occurs when construction is discontinued for longer than 18 months). Construction at the Gateway Facility was discontinued in February 2002, and was not restarted until PG&E acquired the facility years later. *See* PG&E's Answer to ACORN Complaint (admitting that construction was discontinued). Consequently, the 2001 permit is invalid.

Because it is operating without a valid PSD permit, the Gateway Facility is not complying with the best available control technology requirements. PSD

requires, among other things, the proposed facility to install "the best available control technology for each pollutant subject to regulation." 42 U.S.C. § 7475(a)(4). As described by the air district, "[c]learly the recurring theme in the above definitions of BACT . . . is 'the most effective emission control' or 'the most stringent emission limitation.'" Bay Area Air Quality Management District Best Available Control Technology (BACT) Guideline ("BACT Guideline"), *available at* http://www.baaqmd.gov/pmt/bactworkbook/default.htm (definition of BACT and TBACT).

The limits in PG&E's expired 2001 permit do not reflect current BACT. Indeed, PG&E has failed to comply with even what it believes to be current BACT. In its December 2007 application to the District, PG&E acknowledged that its limits in the old 2001 permit did not meet current definition of BACT. According to this submission, PG&E asserted, among other things, that 2 ppmvd @ 15% O_2 was BACT for NOx and 4 ppmvd @ 15% O_2 was BACT for CO. Despite this assertion, PG&E has stated in another proceeding before EPA's Environmental Appeals Board that its operating under the old, expired emission rates of 2.5 ppmvd @ 15% O_2 for NOx emissions and 6 ppmvd @ 15% O_2 for CO emissions. *See* PG&E's Response to Motion for Stay in EAB Proceeding PSD-09-02, Filing No. 26 at 4, *available at* www.epa.gov/eab/. Thus, PG&E has not complied with LAER or BACT.

PG&E's amendment request similarly fails to comply with BACT. The Commission need look no farther than the Russell City Generating Station's proposed limitations to see that a similar facility being constructed around the same time has very different emission limitations. *See* Ex. 18. PG&E's amendment, by not proposing emission limitations that comply with BACT, thus fails to comply with the applicable LORS.

In addition, PG&E has violated and is violating other LORS. The Air District has recently issued two notices of violation. *See* Notices of Violation (attached to this letter). One of these violations is a violation of the NOx emission standard. *Id*. This is especially concerning here because the Gateway NOx emission standard does not meet BACT and the Bay Area is in non-attainment for NOx.

In addition, this is an area with a number of industries and therefore is sensitive to increases. In fact, Contra Costa County is currently the second most industrialized area in California. *See* Hallissy, Erin, *Contra Costa County Chemical Stockpiles Raise Terror Attack Concerns*, San Francisco Chronicle (July 7, 2005). This is in part because Contra Costa County has 29 active power plants that generate more than .1 megawatts of electricity each. *See* Database of California Power Plants, *available at* http://energyalmanac.ca.gov/powerplants/POWER_PLANTS.XLS. We request that the Commission fully assess the cumulative impacts that will result from the operation of this facility and the other power plants proposed including Mirant's proposed stations at Willow Pass and Marsh Landing and the new Contra Costa Power Plant.

PG&E also violated the law by constructing a diesel fire pump. *See* Notices of Violation (attached to this letter). This fire pump, which causes health risks, should not be allowed to run for reliability purposes. This engine is not controlled to BACT levels and should be limited to operate in only emergency situations. As described above, this area is already significantly impacted by pollution, and therefore, we request that the Commission limit the operation of this fire pump to only truly emergency situations.

Finally, PG&E is operating without a valid state or federal operating permit from the air district. PG&E still does not have a valid permit to operation even though it has been operating for over 180 days. This is a violation of the LORS including BAAQMD Regulation 2-1-304.

In sum, due to PG&E's violations of the law, the Commission should reject PG&E's attempt to amend its certification here and require PG&E to come into compliance with the applicable air quality requirements before it can receive approval of its certification amendment.

Thank you for your consideration of our comments and concerns.

Sincerely,

/s/ Deborah Behles

Deborah Behles

cc: Scott Galati (via email)
Richard Ratcliff (via email)
CEC Docket Unit (via email and first class mail)
Kenneth Celli (via email)
Rory Cox (via email)
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