BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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Complaints Against
The Gateway Generating Station
Brought by ACORN, LCEA, and CARE

Docket No. 00-AFC-1C

COMMISSION ORDER
PROPOSED DECISION OF THE SITING COMMITTEE

I. Introduction and Summary

Three complaints were filed alleging that PG&E's Gateway Generating Station was constructed in noncompliance with the Energy Commission's Decision certifying the facility. We conclude that most of the allegations have no merit and that the few violations that do exist have had limited adverse practical effect. Nevertheless, because any violation of conditions of certification is a serious matter, we impose a fine of $10,000 on PG&E.

II. The Law Applicable to Complaints

The substance of the law is simple: if there is a "significant failure" to comply with the conditions of certification for a power facility, the Energy Commission may amend the conditions, revoke certification, or impose a fine. [Pub. Res. Code, § 25534, subds. (a)(2), (b)(2).] Unfortunately, the procedure does not appear so simple. On the one hand, section 1237 of our regulations states that its complaint procedure is the sole means to pursue allegations of noncompliance with a power facility decision. [Cal. Code Regs., tit. 20, § 1237, subd. (a).] On the other hand, the Warren-Alquist Act could be read as authorizing complaints seeking fines to be pursued only under a different procedure. (See Pub. Res. Code, §§ 25534, 25534.1.) (The applicable provisions of the regulations and the Act are set forth in an Appendix to this Order.) This is a matter that we should address in our next siting procedures rulemaking. Fortunately, the instant proceeding has developed in a manner that allows us to move forward under both approaches.[1]

[1] Thus, we consider:
(i) the Staff's prehearing filings in this proceeding, and the complaint filed on June 4, 2009 by the Contra Costa branch of the Association of Community Organizations for Reform Now in this matter, to constitute a complaint filed by the Executive Director in compliance with Public Resources Code section 25534.1, subdivision (a);

III. The History of the Gateway Facility and of This Proceeding

In May 2001 the Energy Commission certified the Contra Costa Power Plant Unit 8 Power Project, a 530-megawatt, natural-gas-fired, combined cycle facility in Contra Costa County, just north of the City of Antioch. The project owner began construction later in 2001 but suspended construction in February 2002 due to financial difficulties.

In January 2007 the Energy Commission approved a transfer of ownership to Pacific Gas and Electric Company ("PG&E") and a change in name to the Gateway Generating Station ("Gateway"). In addition, between August 2007 and August 2009 the Commission approved various amendments to the Gateway certificate. PG&E restarted construction in February 2007, and the project began full commercial operations in January 2009.

In June and July 2009 three complaints were filed at the Energy Commission, alleging Gateway's noncompliance with various aspects of the project's certificate and with other laws. (The specifics of the complaints are discussed in the next section of this Decision.) On July 27, 2009, the Commission's Siting Committee ("Committee," Commissioner Jeffrey D. Byron, Presiding Member, and Chairman Karen Douglas, Associate Member) consolidated all three complaints into a single proceeding and bifurcated the proceeding into two phases. The first phase was limited to whether there was noncompliance, and the second phase, on the appropriate penalty, would take place only if the Committee found noncompliance. The Committee held an evidentiary hearing on August 5, 2009, and the parties subsequently submitted briefs. In light of the written pleadings and the record of the hearing, we do not need the second phase, and we can resolve the entire matter now.

IV. The Sufficiency of the Complaints

Three complaints were filed:

> (1) A complaint filed on June 4, 2009 by the Contra Costa branch of the Association of Community Organizations for Reform Now ("the ACORN Complaint").
>
> (2) A complaint filed on June 29, 2009 by the Local Clean Energy Alliance ("the LCEA Complaint"). The LCEA Complaint merely incorporates ACORN's Complaint. Therefore, everything we say about the ACORN Complaint applies equally to the LCEA Complaint.

(ii) the numerous notices received by PG&E throughout the proceeding to comply with the requirements of section 25534.1, subdivision (b); and
(iii) the August 5, 2009, hearing to be the hearing described in section 25534.1, subdivision (b).

We also note that any defects in these or other procedural matters that might exist (and we believe there are none) would clearly not be prejudicial, either to PG&E or to any other party, and therefore would not constitute grounds for judicial action. (See, e.g., Code Civ. Proc., § 1094.5, subd. (b); *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1054.)

(3) On July 17, 2009, a document titled "Complaint Request for Official Notice Comments on Staff Report Comments on Amendment Petition to Intervene" was filed by Californians for Renewable Energy ("CARE"), Rob Sarvey, and Rob Simpson ("the CARE Complaint"). The CARE Complaint also purports to incorporate the ACORN Complaint, and it also sets forth additional material.

The CARE Complaint is a hodgepodge of bits and pieces from which it is impossible to understand (a) which "statute[s], regulation[s], order[s], decision[s], or condition[s] of certification" are alleged to be violated, if any; or (b) what are the facts that allegedly demonstrate the violations. [See Cal. Code Regs., tit. 20, § 1237, subd. (a)(4).] Indeed, the CARE Complaint itself appears to acknowledge that it contains no specific allegations at all:

> PG&E is in violation of many conditions of the Commission's; [sic] Commission [sic] Final Decision on the [Gateway] Project Dated May 30, 2001[.] The Docket for these proceedings give [sic] no indication that any provisions of the commission's order have been complied with. *We are requesting an item by item verification of each condition* with the following conditions to be *most likely* not in conformance.

(CARE Complaint, second and third unnumbered pages, italics added.) This is not sufficient. Complainants must allege violations; they cannot merely ask someone (who?) to search our Decisions and the records (of what?) to see if something might seem amiss. Moreover, CARE, and Messrs. Simpson and Sarvey (and Mike Boyd, who also signed the CARE Complaint), are all seasoned litigants, with considerable experience at the Energy Commission and at other state agencies, federal agencies, and state and federal courts. They know – or they should know – better. We therefore dismiss the CARE Complaint, making "a determination of insufficiency of the complaint" and "a determination of . . . lack of merit." [Cal. Code Regs., tit. 20, § 1237, subd. (e)(1).]

That leaves the ACORN Complaint, to which we now turn.

V. The Allegations in the ACORN Complaint

The ACORN Complaint also suffers from a lack of precision. Some of the allegations are phrased in terms such as "PG&E is attempting" and "it appears that . . . ." (ACORN Complaint, ¶¶ 39, 42.) Therefore, it would have been reasonable to dismiss the ACORN Complaint for insufficiency and lack of merit. Nevertheless, from the Complaint and the subsequent development of the record the following allegations appear with reasonable-enough specificity for us to deal with them.

1. *Gateway was constructed with a preheater different from the preheater approved in the Decision.*

This is true, and therefore there is a violation. PG&E was required to obtain an amendment to the Decision before constructing the project with the new preheater. However, there is no substantive harm from the violation, because the new preheater has fewer emissions than the preheater approved in the Decision.

2. *Gateway was constructed with a cooling system different from the cooling system approved in the Decision.*

This is true, but there is no violation because before beginning construction PG&E obtained an amendment to the certificate allowing the new cooling system.

3. *Gateway was constructed with a diesel engine instead of the electric engine approved in the Decision.*

This is true, and therefore there is a violation. However, the violation appears to have been in good faith because the different engine was installed in order to meet the directives of the local fire marshal. Moreover, although the diesel engine will probably cause greater adverse environmental impacts than the electric engine would have, the difference is not significant.

4. *Gateway did not obtain a Final Determination of Compliance ("FDOC") or an Authority to Construct ("ATC") before construction.*

These allegations are true, but there is no violation. The Gateway facility required neither an FDOC nor an ATC, as both were subsumed in the Energy Commission's exclusive "one-stop" certificate.

5. *Gateway did not have a Prevention of Significant Deterioration ("PSD") permit before construction.*

The parties dispute whether this allegation is true, but we need not (and arguably should not) resolve the dispute here. The PSD permit is a federal requirement, so it is for the appropriate federal authorities, not us, to determine whether Gateway was constructed or is in operation of violation of PSD requirements. Indeed, there is a pending federal complaint to this effect.

6. *Gateway did not acquire sufficient offsets for its air emissions.*

This allegation is not true. The record indicates that all required offsets were obtained.

7. *There was an inadequate opportunity for public participation.*

This allegation is not true. Moreover, the matter is irrelevant. Any allegations of procedural unfairness in an Energy Commission proceeding are properly adjudicated via a lawsuit against the Commission, not in a complaint proceeding here.

In sum, the violations are few and of little practical consequence. Nevertheless, any violation of a condition of certification or other legal requirement applicable to a power facility is important and should be sanctioned, in order to deter future violations and in order to maintain the integrity of the Commission's decisions.

VI. The Appropriate Sanction

The law gives us three sanctioning options for violations of conditions of certification: amendment of conditions, revocation of certification, and a fine. (Pub. Resources Code, § 25534, subds. (a), (b).) There is no need to amend any condition, and revocation of certification would be vastly disproportional to the nature of the violations. That leaves a fine.

The largest fine that we can impose is $75,000, plus an additional $1,500 for each day of violation (with an upper limit of $50,000 for the per-day penalties), so the maximum aggregate fine is $125,000. (Pub. Resources Code, § 25534, subd. (b).) In determining the amount of a fine, the law instructs us to consider:

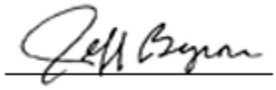
> the nature, circumstance, extent, and gravity of the violation or violations,
>
> whether the violation is susceptible to removal or resolution,
>
> the cost to the state in pursuing the enforcement action, and
>
> with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.

(*Id.*, § 25534.1, subd. (e) [paragraphing added].) Because the violations resulted in very limited harm, and because the violations do not appear to be deliberate attempts to flout the Commission's authority, the "nature, circumstance," etc. factors indicate that only a small fine is appropriate; to the same effect is the fact that the violations have already been removed or resolved (i.e., PG&E has obtained the appropriate amendments to the certificate). To a different effect is the "cost to the state in pursuing the enforcement action," which is on the order of tens of thousands of dollars, considering the salaries of the Commission personnel involved in the proceeding. Finally, the factors that we must consider "with respect to the violator," PG&E, are a mixed bag. On the one hand, PG&E has no prior history of violations of this type at the Energy Commission and does

not appear to have acted with malice, which would suggest a small fine. On the other hand, because PG&E is a very large company, its ability to pay (and thus the amount of fine necessary to make an impression on the company of the seriousness with which the Commission treats any violation) would suggest a large fine.

Carefully balancing all of the legally-applicable factors, we determine that a fine of $10,000 is appropriate, and we order PG&E to pay that amount to the Commission within 30 days of the date of this Order.

Dated January 14, 2010, in Sacramento, California.



JEFFREY D. BYRON
Commissioner and Presiding Member
Siting Committee

KAREN DOUGLAS
Chairman and Associate Member
Siting Committee

Appendix to Commission Order on the Gateway Complaints

California Code of Regulations, Title 20, Section 1237

(a) Any person must file any complaint alleging noncompliance with a commission decision adopted pursuant to Public Resources Code section 25500 and following solely in accordance with this section. All such complaints shall be filed with the Docket Unit and submitted to the designated compliance project manager for investigation and shall include the following information:

(1) the name, address, and telephone number of the person filing the complaint (complainant);

(2) the name, address, and telephone number of the person owning or operating, or proposing to own or operate, the project which is the subject of the complaint;

(3) a statement of facts upon which the complaint is based;

(4) a statement indicating the statute, regulation, order, decision, or condition of certification upon which the complaint is based;

(5) the action the complainant desires the commission to take;

(6) the authority under which the commission may take the action requested, if known; and

(7) a declaration under penalty of perjury by the complainant attesting to the truth and accuracy of the statement of facts upon which the complaint is based.

(b) Upon completion of the investigation of the alleged noncompliance, the commission staff shall file a report with the Docket Unit and with the committee assigned pursuant to section 1204 to hear such complaints, or the chairman if none has been assigned, setting forth the staff's conclusions. The report shall be filed no later than 30 days after the receipt by the designated compliance project manager of the complaint and shall be provided to the complainant, project developer, and other interested persons.

(c) If the commission staff is the complainant, it shall file a report with the Docket Unit and with the appropriate committee, detailing the noncompliance and explaining any steps taken to attempt to remedy the noncompliance. The committee shall act on the report in accordance with subsection (e).

(d) Any person may submit written comments on the complaint or staff report within 14 days after issuance of the staff report.

(e) Within 30 days after issuance of the staff report, the committee shall:

(1) dismiss the complaint upon a determination of insufficiency of the complaint or lack of merit;

(2) issue a written decision presenting its findings, conclusions or order(s) after considering the complaint, staff report, and any submitted comments; or

(3) conduct hearings to further investigate the matter and then issue a written decision.

(f) If either the project owner or the complainant is not satisfied with the committee decision, they may appeal to the full commission within 14 days after issuance of the decision. The commission, within 30 days of receipt of the appeal and at a noticed business meeting or hearing, shall issue an order sustaining the committee's determination, modifying it, overturning it, or remanding the matter to the committee for further hearings.

Public Resources Code Section 25534, subdivisions (a)-(b)

(a) The commission may, after one or more hearings, amend the conditions of, or revoke the certification for, any facility for any of the following reasons:

(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.

(4) . . . .

(b) The commission may also administratively impose a civil penalty for a violation of paragraph (1) or (2) of subdivision (a). Any civil penalty shall be imposed in accordance with Section 25534.1 and may not exceed seventy-five thousand dollars ($75,000) per violation, except that the civil penalty may be increased by an amount not to exceed one thousand five hundred dollars ($1,500) per day for each day in which the violation occurs or persists, but the total of the per day penalties may not exceed fifty thousand dollars ($50,000).

. . . .

Public Resources Code Section 25534.1

(a) The executive director of the commission may issue a complaint to any person or entity on whom an administrative civil penalty may be imposed pursuant to Section 25534. The complaint shall allege the act or failure to act for which the civil penalty is proposed, the provision of law authorizing civil liability, and the proposed civil penalty.

(b) The complaint shall be served by personal notice or certified mail, and shall inform the party so served that a hearing will be conducted within 60 days after the party has been served. The hearing shall be before the commission. The complainant may waive the right to a hearing, in which case the commission shall not conduct a hearing.

(c) After any hearing, the commission may adopt, with or without revision, the proposed decision and order of the executive director.

(d) Orders setting an administrative civil penalty shall become effective and final upon issuance thereof, and any payment shall be made within 30 days. Copies of these orders shall be served by personal service or by registered mail upon the party served with the complaint and upon other persons who appeared at the hearing and requested a copy.

(e) In determining the amount of the administrative civil penalty, the commission shall take into consideration the nature, circumstance, extent, and gravity of the violation or violations, whether the violation is susceptible to removal or resolution, the cost to the state in pursuing the enforcement action, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary removal or resolution efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
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IN THE MATTER OF THE COMPLAINT AGAINST

GATEWAY GENERATING STATION

Docket No. 00-AFC-1C
PROOF OF SERVICE
(Revised January 25, 2010)

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DECLARATION OF SERVICE

I, Maggie Read, declare that on January 25, 2010, I served and filed copies of the attached Commission Order Proposed Decision of the Siting Committee, dated January 14, 2010. 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
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docket@energy.state.ca.us

I declare under penalty of perjury that the foregoing is true and correct.

Original signed by:
Maggie Read
Hearing Adviser's Office