

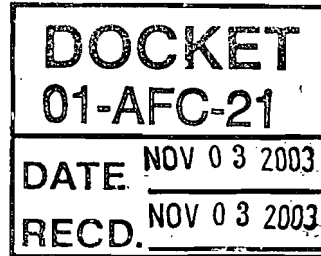
**GALATI & BLEK LLP**

Counselors & Advocates

Plaza Towers  
555 Capitol Mall  
Suite 600  
Sacramento, CA 95814

November 3, 2003

Ms. Theresa Epps  
Dockets Unit  
California Energy Commission  
1516 9<sup>th</sup> Street  
Sacramento, CA 95814



Attorneys

Scott A. Galati  
Scott W. Blek

Of Counsel

Jennifer Costanza

Lobbyists

Scott A. Galati  
Sandra A. Carey

OFFICES ALSO IN  
GLENDALE, CA

**RE: The Tesla Power Project (01-AFC-21)**

Dear Ms. Epps:

Enclosed for filing with the California Energy Commission are one original and 12 (Twelve) copies of the **Midway Power LLC's Opening Brief for the Tesla Power Project (01-AFC-21)**.

Sincerely,



Scott A. Galati  
on behalf of  
Midway Power, LLC

SAG/cp  
Enclosures

... Admin\Tesla\Dockets\Cover 11-03-03

Scott A. Galati  
GALATI & BLEK, LLP  
555 Capitol Mall Avenue  
Suite 600  
Sacramento, CA 95814  
(916) 441-6575

STATE OF CALIFORNIA

Energy Resources  
Conservation and Development Commission

In the Matter of:

Application for Certification for the  
Tesla Power Project

**DOCKET NO. 01 AFC-21**

**MIDWAY POWER, LLC OPENING  
BRIEF**

---

Midway Power, LLC (Midway) hereby files its Opening Brief for all topic areas relevant to the Committee's deliberations for the Tesla Power Project (TPP). As directed by the Committee at the last evidentiary hearing on September 18, 2003, briefs are to focus on disputed or unresolved areas. At the last evidentiary hearing, the Committee encouraged the parties to coordinate and attempt to resolve disputes. Midway has worked in good faith to resolve disputed areas. Despite these efforts, disagreements continue to persist. The following summarizes areas that are disputed between the parties.

1. Whether additional emission reductions are necessary above and beyond those that will be surrendered to the Bay Area Quality Management District (BAAQMD) and those to be achieved by the Air Quality Mitigation Agreement (AQMA) between Midway and the San Joaquin Valley Air Pollution Control District (SJVAPCD) (*Exhibit 22*) ; and
2. The use of recycled water from the City of Tracy as the **exclusive** water supply for the TPP.

Additionally, the Committee directed Staff to redraft Conditions of Certification to reflect the Committee's understanding of various issues and to reflect the parties' agreements. We understand that Staff will be filing supplemental testimony with its Opening Brief and therefore, we reserve the right to provide comments in our Reply Brief concerning any modifications to the Conditions of Certification proposed by Staff. However, Midway does wish to inform the Committee that Staff has provided a draft of its supplemental testimony as directed by the Committee. The purpose of this supplemental testimony was to redraft certain conditions reflecting the parties agreements reached at the evidentiary hearings. The draft supplemental testimony was reviewed by all the parties and discussed via telephone conference call on Thursday, October 30, 2003. Intervenor Sarvey was present at the Commission and Intervenor CARE participated via telephone. During that conference call, Midway requested some additional modification to Staff's supplemental testimony. Midway believes that with those modifications, it can agree with Staff's recommendations in areas of Traffic and Transportation, Hazardous Materials, Biological Resources, Land Use, Facility Design, Worker Safety and Fire Protection and Public Health. If Staff does not file its Supplemental Testimony as anticipated, Midway will address in its Reply brief the modifications to the conditions of certification necessary to reflect parties' agreements.

Midway also agrees with Staff recommendations including the proposed Conditions of Certification in the areas of Transmission System Engineering, Transmission Line Safety and Nuisance, Geological and Paleontological Resources, Cultural Resources, Waste Management, Visual Resources, Noise and Vibration, Compliance, Soil Resources, Socioeconomics, and Alternatives. As Midway believes that it is premature to require it to use recycled water from the City of Tracy for the reasons described below, it disagrees with all additional conditions of certification proposed by Staff in its Final Staff Assessment Addendum (*Exhibit 52*).

This Opening Brief will focus on the topic areas of Air Quality and Water Resources.

## AIR QUALITY

Both Midway and Staff agree that the project will comply with all applicable laws, ordinances, regulations and standards with the implementation of Conditions of Certification (*Exhibit 47, page 16, 9/18/03 RT 233*). Additionally, the BAAQMD has issued a Final Determination of Compliance (FDOC) (*Exhibit 23*) and errata (*Exhibit 24*) with proposed conditions that demonstrates that the TPP will comply with all applicable BAAQMD rules and regulations (See also *Exhibit 159*). Mr. Dennis Jang, BAAQMD representative, also testified that the project will comply with all applicable BAAQMD LORS and will provide offsets that comply with Public Resources Code Section 25523 (d) (2) (9/18/03 RT 205).

Midway disagrees with Staff and Intervenors regarding the air quality impacts associated with operation of the TPP. Midway agrees with all of Staff's proposed Conditions of Certification as modified with the exception of AQ-SC7, which encompasses Staff's proposed additional mitigation it asserts is required under the California Environmental Quality Act (CEQA)<sup>A</sup>. All parties agree that for air quality permitting purposes, the TPP is within the jurisdiction of the BAAQMD. However, the TPP is adjacent to the jurisdictional boundary between the BAAQMD and SJVAPCD. It is this location that initially raised some concern with the SJVAPCD and citizens of the City of Tracy.

As explained by Midway's expert Mr. David Stein, when Midway became aware of SJVAPCD's concerns, it began negotiating in good faith with the SJVAPCD, the air quality expert in the region. These negotiations resulted in the AQMA between Midway and the SJVAPCD (*Exhibit 22*). Midway Power was the first Applicant to voluntarily enter into such an agreement with the SJVAPCD (*Exhibit 47, page 8; 9/18/03 RT 115-116*).

---

<sup>A</sup> Public Resources Code Section 21000 et seq.

Midway and the SJVAPCD agree that with the AQMA, the project will not result in significant air quality impacts. The AQMA requires Midway to provide an amount of \$957,751 to the SJVAPCD to be used for air quality benefit programs within the San Joaquin Valley, and particularly in the Northern Region within or near the City of Tracy (*Exhibit 47, page 8*). Under the terms of the Tesla AQMA, SJVAPCD would have discretion to direct the money to be used for purposes of generating real-time air quality benefits. This discretion is necessary in order to ensure that the SJVAPCD is able to rely on its expertise to fund cost-effective reduction projects that will maximize the air quality benefits from the program. However, the AQMA does specifically require the SJVAPCD to include one or more the following types of emission reduction programs: Bus retrofitting and/or replacement; lawnmower replacement; and replacement or retrofitting of internal combustion engines. The AQMA requires SJVAPCD to apply the funds to generate real-time air quality improvements, with a preference for projects in or near the City of Tracy, San Joaquin County and the Northern Zone of the SJVAPCD to the greatest extent possible (*Ex. 47, page 8*).

The dispute between the parties is based on the methodology employed to calculate whether any emission reductions beyond those required by the Clean Air Act as implemented by the BAAQMD, should be required. If the TPP were not close to the jurisdictional boundary of the SJVAPCD, the Commission Staff would have concluded, as it has in almost every other case where full offsets were provided in the jurisdictional air quality district in which the project resides, that the project would not require additional mitigation. For projects licensed within the BAAQMD, with the exception of the East Altamont Energy Center, Staff has not engaged in any analysis of transport or effectiveness of offsets although many BAAQMD projects are close enough to jurisdictional borders to arguably impact other airsheds. For example, under similar logic to Staff in this case, the Delta and Los Medanos Projects would have the potential to impact the Yolo-Solano, Sacramento and San Joaquin Valley air districts and the

Metcalf Energy Center would have the potential to impact the Monterey Bay Unified air district, yet the CEC license evaluations did not address transport as a concern in any of these cases.

Staff recalculated the amount of emission reductions that, in its opinion, should be required under the AQMA. Staff rejected the methodology developed by the SJVAPCD and, in so doing, arrived at additional emission reductions. Staff's approach fails to recognize that the SJVAPCD, which has the most significant experience in implementing emission reduction programs to achieve air quality goals within its jurisdiction, developed the methodology which underpins the AQMA. (*Exhibit 47, page 8*). The SJVAPCD representative, Mr. Sayed Sadredin, agrees that the AQMA will result in a net air quality benefit to the air quality within the region and not an impact requiring mitigation as Staff opines (9/18/03 RT 139).

Midway employed methodology developed in coordination with and approved by the SJVAPCD. Simply stated, this methodology used a transport and seasonal factor to both calculate the portion of the emissions from the plant that would potentially impact the San Joaquin Valley and the benefit to the San Joaquin Valley of the Bay Area offsets being provided under the FDOC. These results were calculated using factors developed by the SJVAPCD that reflected their expert understanding of both transport from the Bay Area and seasonal nonattainment characteristics (9/18/03 RT 159; 9/18/03 RT 162).

Staff developed its own methodology that assigned different transport factors than those approved by the SJVAPCD and further discounted the effectiveness of the road paving offsets (Altamont Landfill ERCs) to be surrendered by Midway to comply with the BAAQMD offset requirements. Midway objects to Staff's development of its own transport factors and requests the Committee rely on the SJVAPCD expertise in the field of protecting its region from Bay Area emissions. SJVAPCD has intervened in the

TPP proceeding and has stated that with the AQMA, it supports the TPP (9/18/03 RT 136-139).

In addition to developing its own transport factors, Staff has undervalued the effectiveness of the Altamont Landfill ERCs by reducing them by 85 percent. Staff asserted that this reduction was needed to account for the percentage of ultrafine particulate matter (PM<sub>2.5</sub>) that is contained within the fine particulate matter (PM<sub>10</sub>) from road paving and then relied on generic, overly conservative information that is not site specific to calculate the discount. Staff further relies on an outdated letter from an employee of the California Air Resources Board (*Exhibit 51, Appendix B to the Air Quality Section*). As explained by Mr. Sadredin and Mr. Stein, this letter is not official guidance from CARB. The SJVAPCD believes, as does Mr. Stein, that the Altamont Landfill ERCs will result in a net air quality benefit to the San Joaquin Valley and therefore, no additional particulate matter emission reductions are necessary. (9/18/03 RT 125-126 and 134-135).

It appears that the technical disagreements between Staff and Midway and the SJVAPCD are unresolvable. However, the Committee directed the parties to engage in further communication to develop a compromise. Staff, the Intervenors and Midway participated in further communications. Midway proposed a compromise condition of certification to replace Staff's suggested AQ-SC7. Our understanding is that Staff agrees with nearly all of the condition. In accordance with the Tesla Siting Committee direction, the following changes to AQ-SC7 reflect the applicant's willingness to compromise between its and Staff's approach. This additional condition will provide additional assurance that the project will not result in significant unmitigated air quality impacts, but in fact will provide a net air quality benefit to the region. This proposed compromise condition is presented with ~~strikethrough~~ indicating language to be deleted and ***bold and italic*** indicating language to be added:

**AQ-SC7** The project owner shall *limit facility emissions* provide emissions reductions for the life of the project in the northern region of the San Joaquin Valley equivalent to the amounts shown in the following table **Table AQ-SC7a**. *The seasonal emission limits in Table AQ-SC7a shall be increased to reflect all emission reductions obtained under this condition by the owner/operator on a ton for ton basis, up to a maximum increase in the amount shown in Table AQ-SC7b. Seasonal emission limits shall be updated quarterly to reflect the project owner/operator's progress in securing emission reductions. Notwithstanding the above, the project owner/operator shall also comply with all emission rate limits set forth in Conditions AQ-1 to AQ-62.*

Seasonal Term	Quarter	NOx (ton)	PM10/2.5 (ton)	SOx (ton)	VOC (ton)
January, February, March	Q1	14.6	18.5	4.9	0.0
April, May, June	Q2	7.3	0.0	0.0	2.6
July, August, September	Q3	21.9	0.0	0.0	7.7
October, November, December	Q4	7.3	27.8	2.5	0.0

TABLE AQ-SC7A –SEASONAL EMISSION LIMITS<sup>1</sup>

Seasonal Period	Quarter	NOx (ton)	PM10 (ton)	SOx (ton)	VOC (ton)
October through March	Q1/Q4	103.1	66.2	7.4	--
April through September	Q2/Q3	95.8	--	--	19.9

<sup>1</sup>The seasonal emission limits shown above are base amounts assuming no emission reductions are obtained by the owner/operator. Seasonal emission limits shall be increased by the value of the emission reductions actually achieved for each seasonal period. (For example, if 10 ton of NOx reduction is obtained in Q1/Q4, the October through March seasonal emission limit would be increased as follows: 103.1 ton +10 ton = 113.1 ton).

<sup>2</sup>-- denotes no limit for the seasonal period



**TABLE AQ-SC7B – EMISSION REDUCTION TARGETS**

<b>Seasonal Period</b>	<b>Quarter</b>	<b>NOx (ton)</b>	<b>PM10 (ton)</b>	<b>SOx (ton)</b>	<b>VOC (ton)</b>
<b>October through March</b>	<b>Q1/Q4</b>	<b>21.9</b>	<b>28.8</b>	<b>7.4</b>	<b>--</b>
<b>April through September</b>	<b>Q2/Q3</b>	<b>29.1</b>	<b>--</b>	<b>--</b>	<b>10.3</b>

The emissions reductions *to be used by the project owner/operator to increase the Seasonal Emission Limits set forth in Table AQ-SC7a* shall be obtained through an emission reduction program administered by the San Joaquin Valley Air Pollution Control District *and/or an air quality improvement program administered by the City of Tracy*, as follows.

- a) The project owner/operator may use the Air Quality Mitigation Agreement *and/or an air quality improvement program administered by the City of Tracy* as a means to achieve some or all of the emission reductions required by this condition. The project owner/operator shall provide to the CPM for review and approval a copy of an initial plan for allocating the funds or identification of the method of obtaining the emission reductions **targets** required. The project owner/operator shall also submit quarterly reports for CPM review and approval identifying the emission reductions achieved to-date and those planned to **increase seasonal emission limits** mitigate remaining reduction requirements.
- b) The project owner/operator may acquire and surrender to the SJVAPCD emission reduction credits from the northern region of the San Joaquin Valley to achieve some or all of the emission reductions *to increase seasonal emission limits* required by this condition.
- c) **The project owner/operator shall use its best efforts to obtain emission reductions in the northern region of the San Joaquin Valley. If, despite demonstrated best efforts, it is not feasible to obtain the emission reductions within the northern region of the San Joaquin Valley, emission reductions from outside the northern region of the San Joaquin Valley will be permitted.**
- d) **NOx emission reductions obtained from the period April through September (Quarters 2 & 3) may be used to increase NOx seasonal emission limits during either seasonal period.**
- e) **Interpollutant emission reductions shall be permitted under this condition at the ratios specified below:**
  - **NOx reductions for PM10 emissions: 2.2:1**
  - **SO2 reductions for PM10 emissions: 1.2:1**
  - **NOx reductions for VOC emissions: 1:1**

- **NOx reductions for SO2 emissions: 2:1**
- f) **No double or multiple counting of interpollutant reductions shall be allowed.**

Full mitigation **The seasonal emission limits set forth in Table AQ-SC7a shall be completed before applicable commencing 5 years after the start of commercial operation. Once the project owner/operator has obtained the full amounts of the emission reduction targets identified in Table AQ-SC7b to the satisfaction of the CPM the seasonal emission limits specified above will no longer apply.**

Emission reduction credits from years prior to 1990 (pre-1990 credits) shall only be allowed with concurrence from U.S. EPA. The northern region of the San Joaquin Valley is defined as San Joaquin, Stanislaus, and Merced Counties.

**Verification:** Sixty (60) days after the delivery of the first Combustion Turbine Generator (CTG) to the project site, the project owner/operator shall provide evidence of having provided the funds identified in the Air Quality Mitigation Agreement to the San Joaquin Valley Air Pollution Control District (SJVAPCD) and the initial plan for allocating the funds or identifying alternate emission reductions. The project owner/operator shall provide a quarterly report discussing any emissions reductions purchased/achieved in the SJVAPCD. The quarterly report shall list the tons of emission reductions obtained, the date the reduction occurs, the method used to secure these reductions, the location of emission reductions, and the running total emission reduction credits secured and surrendered, if any. **The report shall account for any interseasonal or interpollutant credit applied under AQ-SC7(e) or (f). Each quarterly report shall include an updated determination of applicable facility seasonal emission limits based on Table AQ-SC7a.** ~~If the reductions provided by the SJVAPCD through use of the Air Quality Mitigation Agreement are less than the reductions required by this condition, the project owner shall identify the additional reductions that would be used to make up the shortfall.~~

This proposed condition, **accepts the majority of Staff's methodology and its resulting emission reduction targets.** However, the proposed condition is different in the following ways:

- The condition establishes seasonal emission caps for the Tesla Power Plant that would limit plant emissions to the levels that match the staff-calculated BAAQMD ERC effectiveness, a level at which no significant air quality impacts are expected by Staff. The condition provides the ability to raise the seasonal caps

by providing emission reductions. The condition has been modified to allow Midway to elect to achieve the emission reductions, control its emissions with the use of an emissions cap or, to utilize a combination of both methods. Midway has proposed to cap its emissions of certain pollutants on a seasonal basis. The caps reflect the level at which emissions will not significantly impact nonattainment, even assuming Staff's methodology. Additionally, Midway can obtain emission reductions, as will occur with implementation of the AQMA or other program, to increase the emissions cap. The emissions cap can therefore, only be increased by an amount equal to the actual emission reductions achieved and only after the emission reductions have been actually achieved.

- The emission targets are expressed somewhat differently in terms of season instead of quarter. This change simplifies the condition without impacting its overall ability to target emission reductions in nonattainment seasons.
- The proposed condition also recognizes that interpollutant and interseasonal trading are allowed in accordance with District rules and incorporates recognized trading ratios, including those ratios previously approved by the Commission.
- Midway is proposing that the PM10 emission reduction targets be reduced to reflect the actual amount of PM2.5 that is contained within the PM10 that will be generated by the Altamont Landfill ERCs. While Midway disagrees that any reduction should be required, it proposes that if any reduction is applied, it should reflect actual soil conditions and not overly conservative assumptions that are generic and not site specific. Midway provided the Supplemental Testimony of David Stein, dated October 27, 2003, which defines the actual site conditions at the Altamont landfill. Midway hereby requests that the Committee accept this Supplemental Testimony as evidence and make it part of the evidentiary record. The Supplemental Testimony of David Stein indicates that the amount of PM2.5 that is contained within the PM10 fraction is 57.8 percent. Applying the reduction factor of 57.8 percent instead of Staff's assumption of 15 percent results in the

PM10 emission reduction targets (and emissions caps) reflected in the proposed compromise condition.

- Staff's condition was also modified to reflect that Midway has proposed air quality enhancement funds to the City of Tracy and if some agreement is reached, the benefits from such air quality enhancement funds should be counted toward the emission reduction targets.
- The proposed condition also allows Midway some time to achieve the emission reduction targets, while not curtailing operations. There is evidence in the record that the emissions from the TPP will not result in long-term air quality impacts. In exchange for accepting Staff's methodology and corresponding amount of emission reductions, and eventually operating under emission limits more stringent than imposed by the BAAQMD, Midway request the Committee grant some time to achieve the emission reductions without imposing the emission cap. Midway has requested five years, in order to achieve the reduction targets while monitoring the plant's actual emissions. Midway believes that there will be no impact during the five years as the full emission offset package required by the BAAQMD will be surrendered prior to operation of the TPP.

Midway encourages the Committee to adopt the condition as proposed and believes that it is more stringent than that recently approved by the full Commission in its recent decision on the East Altamont Energy Center. In that decision, the Commission adopted a condition of certification that reflected the agreement between Calpine and the SJVAPCD, without additional mitigation as recommended by Staff. With or without the condition, Midway has obligated itself to provide the AQMA fee to the SJVAPCD. There is no question that there will be emission reductions achieved with this fee, even if the TPP produces less emission than anticipated.

## WATER RESOURCES

Over the past several years, the Commission has wrestled with the application of State Water Policy to the use of water for power plant cooling. Staff has opined in some cases, that certain laws and policies are applicable, and has opined in others that the same laws and policies are not applicable. Applicants have struggled to select water supplies that will meet this changing target. Midway conducted a major due diligence effort that included a review of all Commission Decisions relating to water supply prior to selecting its own water supply. While those decisions are less than consistent, they did provide a framework under which Midway searched for a source of recycled or reclaimed water. A summary of those decisions revealed that the Commission would assess whether to require use of recycled water as an alternative if the use of the proposed water supply would result in significant unmitigated environmental impacts. In applying state water law and policy, the Commission sometimes applied State Water Board Policy 75-58. While it is clear that this policy only applies when the Water Board has jurisdiction, the Commission has sometimes applied it to water sources that are outside the Water Board jurisdiction or to those supplies that do not require a new allocation of water rights. In those cases where the Commission has applied the policy, it assessed first whether reclaimed or recycled water was available, and if so, whether it could be supplied at a cost comparable to the applicant's proposed water supply.

Recently, the Commission issued a Draft Integrated Policy Report. This report states proposed Commission water policy. Specifically, the report states at page 36;

...the Commission will approve the use of fresh water for cooling purposes by power plants which it licenses only where alternative water supply sources and alternative cooling technologies are shown to be "environmentally undesirable" or "economically unsound".

The Commission interprets "environmentally undesirable" to mean the same as having a "significant adverse environmental impact" and

“economically unsound” to mean the same as “economically or otherwise infeasible”.

“Feasible” is defined under the California Environmental Quality Act as meaning “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors.

Staff concluded in its Final Staff Assessment and various Addendums that the only unresolved environmental issue relating to the use of aqueduct water via the exchange agreement with Rosedale-Rio Bravo and Buena Vista Water Districts, was related to the Buena Vista Lake Shrew. This issue was raised by the United State Fish and Wildlife Service (USFWS) in Exhibit 63. USFWS clarified its position in a recent letter dated September 25, 2003 in which it determined that the water withdrawal within Kern County is not considered to be part of the TPP. Midway requests the Committee receive this letter (attached) into the evidentiary record. With this clarification, Midway believes that as opined by Dr. Dwight Mudry, the TPP will not cause impacts to the Buena Vista Lake Shrew (*Exhibit 46*). No impacts have been identified with the TPP’s use of aqueduct water via the exchange agreement with Rosedale-Rio Bravo and Buena Vista Water Districts.

Therefore, Staff relies on an asserted non-compliance with applicable water LORS as its basis for requiring the TPP to use reclaimed water from the City of Tracy. Staff cites various provisions of the State Constitution and the water code as applicable LORS. As the Siting Committee has taken administrative notice of the record in the EAEC proceeding, we request the Committee make the same finding the Commission did in that proceeding that these LORS are inapplicable to the TPP. It would be arbitrary and capricious for the Committee to find these LORS applicable to the TPP and not to an almost identical project, the EAEC.

While we disagree that Policy 75-58 applies to the TPP water source because it is not a new allocation of water within the State, Midway is willing to use the City of Tracy

reclaimed water if it is economically feasible. Applying the principles and definitions of the new proposed Commission water policy, it is clear that only under certain conditions would the City of Tracy reclaimed water supply be economically or otherwise feasible. Recognizing the Committee's strong desire to have the TPP use the City of Tracy reclaimed water supply, Midway would accept a Condition of Certification that would require its use. However, such a Condition of Certification must allow the TPP to use its proposed water supply, if circumstances indicate that the City of Tracy reclaimed water is not available at a cost that is comparable to the proposed water supply or is otherwise unavailable. At this time, Midway is concerned that promises of availability without agreement on specific contract terms renders the reclaimed water supply commercially unavailable and economically infeasible.

First, as was agreed to by Staff, if the reclaimed water was physically available, but the City of Tracy refused to enter into a contract granting the right to use a sufficient amount of the reclaimed water to Midway, the reclaimed water would not be available (9/12/03 RT 194-195). Such lack of commitment would render the project unfinanceable and economically infeasible. Similarly, if the water were physically available, but a court order or administrative order precludes its delivery to the site, the reclaimed water would be unavailable and therefore an economically infeasible solution.

Mr. Derrel Grant testified on behalf of Midway to certain conditions that would be necessary in order to obtain financing for the TPP. Financing is critical to building a multi-million dollar asset. If these conditions were met, Midway concedes that strict application of the proposed policy would require it to use reclaimed water from the City of Tracy. These conditions include:

1. The City must enter into a contract with Midway that reflects the following basic terms:
  - Term of 35 years

- The reliable interim supply would be provided until recycled water is available and as a backup
  - The City will deliver up to 5,900 AF/year of reliable water at the times necessary to support plant operation
  - The City will deliver the recycled water at a quality that meets Title 22 restricted use.
  - Reasonable and customary commercial terms.
2. The total cost to the project for use of the reclaimed and other water supply from the City of Tracy must be comparable to the total cost of using the proposed water supply.
  3. No court or administrative order or lack of appropriate permits prohibits or restricts the delivery of reclaimed or interim water supply to the TPP.

If these conditions are satisfied, Midway will use the reclaimed water from the City of Tracy and will agree to a condition specifying this requirement. However, at this point in time the uncertainty surrounding the lack of City commitment or obligation renders the reclaimed water commercially unavailable and therefore infeasible.

### **City Contract**

Midway needs a contract with City of Tracy in order to obtain financing. The City must actually enter into a binding obligation to serve the TPP. Since the TPP is outside the physical jurisdiction of the City of Tracy, without a contract the City of Tracy is under no obligation to serve TPP. Without such a contract and its corresponding obligation to serve, the reclaimed water and interim supply is not commercially available and therefore, not economically feasible.

A term of 35 years is necessary to accommodate the life of the asset that will be reflected in financings. Since the reclaimed water quantity and quality is dependent



upon the City of Tracy completing its reclaimed water plant expansion, the need for an interim supply of water is necessary to accommodate any delay in the expansion project. Additionally, to assure reliability, the interim supply should also operate as a backup supply. The amount and quality of both the reclaimed water and the interim and backup supplies are necessary to accommodate TPP's planned operational schedule and to properly design the facility.

Additionally, since there is no contract at this time with the City of Tracy, any future contract should include reasonable terms that are routinely contained in water supply contracts. This is also important as the TPP lies outside the boundary of the City of Tracy and therefore, the City of Tracy has no obligation to serve the TPP without a contract. Midway would welcome a qualified CEC designee to facilitate the negotiations with the City of Tracy to ensure good faith negotiation and the reasonableness of terms.

### **Cost**

Even using Staff's own estimates, which are millions of dollars lower than Midway's estimates, the total cost to the project would be greater if reclaimed water were required. Clearly Staff and Midway cannot agree on the total projected cost to the TPP for the use of the reclaimed water. We therefore propose that an independent evaluation be performed prior to constructing either pipeline for the project. We propose that after the City has issued its resolution confirming the basic costs of the reclaimed water supply that an independent engineer, such as a lender's engineer, perform an evaluation of all of the costs and if Staff's estimates are correct, the reclaimed water source will be deemed comparable to Midway's proposed water supply.

### **Prohibition and Authorization of Use**

Midway Power requests that the Committee allow the TPP to use its proposed water supply if the use of reclaimed water or the interim supply from the City of Tracy is prohibited by court or administrative order or appropriate permits are not obtained. At

this time, it is uncertain whether any such risk exists or whether additional permits are required, but with opposition to the project and with criticism of the City of Tracy's use of water within its jurisdiction, such protection is necessary. Additionally, it is likely that the City of Tracy will not be able to agree to contractual terms covering these types of risks and therefore, if the risk were insurmountable, TPP would need to use a different water supply.

Midway has attempted to respond to the wishes of the Siting Committee that reclaimed water be used at the TPP. Midway does not oppose the use of reclaim water at the TPP, but must insist on reasonable conditions governing its use. Staff has made positive assumptions for each of the conditions outlined above. Staff has been unwilling to engage in further discussion concerning these issues and therefore, we have presented this proposal to the Committee for your consideration. In effect, we have proposed that if everything Staff has predicted is in fact realized, the TPP will use reclaimed water from the City of Tracy. We do, however, believe that Staff has been overly optimistic.

In addition, Midway has spent a considerable amount of time, money and effort in securing the Rosedale-Rio Bravo Buena Vista water supply. This water supply complies with all applicable LORS, does not result in significant environmental impacts and should be approved by the Committee for use if the City of Tracy cannot deliver.

## **CONCLUSION**

The evidence in the record establishes that the TPP will be a state-of-the-art highly reliable and clean facility. The evidence in the record supports the Commission findings that TPP will not result in significant environmental impacts, will not result in significant adverse impacts to the electrical system, and will comply with all applicable LORS. Since the Project's inception, Midway and its team have been working for over three years employing a creative solution-oriented approach to siting issues. In this Opening

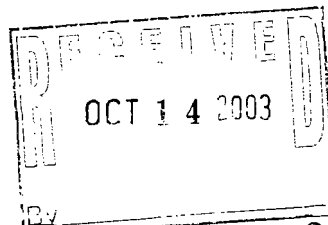
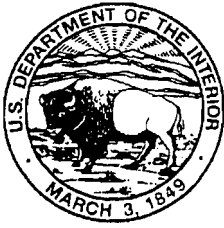
Brief, Midway has proposed solutions to the Air Quality and Water Resource issues raised by the Siting Committee. We trust that this approach will be useful in preparation of the Presiding Members Proposed Decision and look forward to obtaining a license that protects the environment while granting the TPP the ability to obtain financing and proceed to construction.

Dated: November 3, 2003

Respectfully submitted,

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

Scott A. Galati  
Counsel to Midway Power, LLC



01-AFC-21  
CALIF ENERGY COMMISSION

United States Department of the Interior  
FISH AND WILDLIFE SERVICE

OCT 09 2003

Sacramento Fish and Wildlife Office  
2800 Cottage Way, Room W-2605  
Sacramento, California 95825-1846

RECEIVED IN DOCKETS

IN REPLY REFER TO:  
1-1-03-I-3103

SEP 25 2003

Mr. Jack Caswell  
Tesla Power Project  
California Energy Commission  
1516 9<sup>th</sup> Street  
Sacramento, California 95814

Subject: Clarification of U.S. Fish and Wildlife Service Testimony at the September 18, 2003 Hearing Concerning Water Supply for the Tesla Power Project, Alameda County, California (Application for Certification 01-AFC-21)

Dear Mr. Caswell:

We are writing in response to inquiries to our office concerning the U.S. Fish and Wildlife Service's (Service) testimony at the California Energy Commission hearing in Tracy on September 18, 2003. The Tesla Power Project is being proposed by Florida Power and Light Energy (FPL Energy) in the Altamont Pass area of East Alameda County, and the U.S. Environmental Protection Agency initiated consultation with us on February 25, 2002, in accordance with section 7 of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 et seq.)(Act).

The applicant proposes to purchase flood water from the Kern River in Kern County from the Buena Vista/Rosedale-Rio Bravo Water Banking and Recovery Program. The U.S. Fish and Wildlife Service (Service) has determined that use of the Kern River water is not a part of the Tesla Power Plant project because the water withdrawal is likely to occur whether the Tesla Power Project is built or not. At the hearing the Service stated that this determination had recently been made. The Service also stated that the Tesla Power Project Biological Opinion, to be issued by the Service, will include a requirement that any water source used by the project will have to have demonstrated compliance with the Act.

PROOF OF SERVICE (REVISED 6-18-03) FILED WITH  
ORIGINAL MAILED FROM SACRAMENTO ON 9-9-03

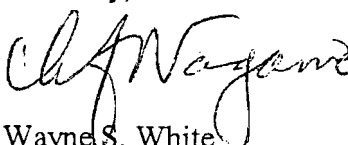
*F. Atwater*

Mr. Jack Caswell

2

If you have any questions concerning the Tesla Power Project, please contact Susan Jones of my staff at the address above or at (916) 414-6630.

Sincerely,

  
fn Wayne S. White  
Field Supervisor

cc:

California Department of Fish and Game, Tracy, California (Attn: Janice Gan)

U.S. Environmental Protection Agency, San Francisco, California (Attn: Roger Kohn)

Florida Power and Light, Florida (Attn: Scott Busa)

California Energy Commission, Biology Unit, Sacramento, California (Attn: Andrea Erichsen)

California Energy Commission, Legal Department, Sacramento, California (Attn: Darcy Houck)

STATE OF CALIFORNIA

State Energy Resources  
Conservation and Development Commission

In the Matter of:

**Docket No. 01-AFC-21**

Application for Certification for the  
Tesla Power Project  
By Midway Power LLC

PROOF OF SERVICE

I, Carole Phelps, declare that on November 3, 2003, I deposited copies of the attached **Midway Power LLC's Opening Brief for the Tesla Power Project** with first class postage thereon fully prepaid and addressed to the following:

**DOCKET UNIT**

I have sent the original signed document plus the required 12 copies to the address below:

CALIFORNIA ENERGY COMMISSION  
DOCKET UNIT, MS-4  
ATTN: Docket No. 01-AFC-21  
1516 Ninth Street  
Sacramento, CA 95814-5512

\*\*\*\*\*

I have also sent individual copies to:

**APPLICANT**

Midway Power, LLC.  
Attn: Derrel A. Grant, Jr.  
Attn: Scott Busa  
700 Universe Blvd.  
Juno Beach, FL. 33408-2683

**COUNSEL FOR APPLICANT**

Galati & Blek LLP  
Scott A. Galati  
555 Capitol Mall, Suite 600  
Sacramento, CA 95814

**INTERVENORS**

CURE  
C/o Marc D. Joseph, Esq.  
Adams, Broadwell, Joseph & Cardozo  
651 Gateway Blvd., Suite 900  
S. San Francisco, CA 94080

Robert Sarvey  
501 W. Grantline Rd.  
Tracy, CA 95376

Syed Sadredin  
Director of Permit Services  
San Joaquin Valley APCD  
4230 Kiernan Avenue, Suite 130  
Modesto, CA 95356

Californians for Renewable Energy  
(CARE)  
Attn: Michael Boyd  
5439 Soquel Drive  
Soquel, CA 95073

**INTERESTED AGENCIES**

Central Valley Regional Water Quality  
Control Board  
Attn: Ann Olson  
3443 Routier Road, Suite A  
Sacramento, CA 95827

Bay Area Air Quality Management District  
Attn: Dennis Jang  
939 Ellis Street  
San Francisco, CA 94109

Alameda County Community Development  
Agency, Planning Department  
Attn: Bruce H. Jensen, Planner  
399 Elmhurst Street, Room 136  
Hayward, CA 94544


**OTHER INTERESTED PARTIES**

Alicia Torre  
Calpine Corporation  
4160 Dublin Blvd.  
Dublin, CA 94568

Susan Strachan  
P.O. Box 1049  
Davis, CA 95617-1049

Jerry Salamy  
CH2M Hill  
2485 Natomas Park Drive, Suite 600  
Sacramento, CA 95833-2937

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

  
\_\_\_\_\_  
Carole Phelps