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December 1, 2003

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

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 Reply Brief for the Tesla Power Project (01-AFC-21).**

Sincerely,

Carol Phillips
for

Scott A. Galati
on behalf of
Midway Power, LLC

SAG/cp
Enclosures

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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:	**DOCKET NO. 01 AFC-21**
Application for Certification for the Tesla Power Project	**MIDWAY POWER, LLC REPLY BRIEF**

Midway Power, LLC (Midway) hereby files its Reply Brief for all topic areas relevant to the Committee's deliberations for the Tesla Power Project (TPP). As directed by the Committee the reply briefs are to focus on disputed or unresolved areas and should reply to issues raised by the parties in the Opening Briefs. In addition, the Committee directed the parties to respond to Staff's Supplemental Testimony in Response to Committee Requests, dated November 3, 2003 (Staff's Supplemental Testimony). Staff's Supplemental Testimony was prepared at the direction of the Committee and specifically sought to reduce to writing the agreements reached during the evidentiary hearings.

AIR QUALITY

Staff's Contentions

Staff contends in its Opening Brief that the TPP has the potential to cause significant air quality impacts to the local and regional airshed. Staff further contends that despite the voluntary efforts undertaken by Midway in entering into an Air Quality Mitigation Agreement (AQMA, Exhibit 22) with the San Joaquin Valley Air Pollution

Control District (SJVAPCD), additional mitigation is necessary in order to comply with CEQA. Staff proposes a revised Condition of Certification (**AQ-SC7**) that is ***nearly identical*** to that proposed by Midway. In accordance with the Committee's direction and desire to see a compromise between Staff and Midway, Midway revised Staff's original **AQ-SC7** (See Midway's Opening Brief, pages 7 through 9). At the evidentiary hearing, Midway produced the following evidence to dispute Staff's rationale and approach for imposing the original **AQ-SC7** as outlined in its Opening Brief. However, in the spirit of compromise, Midway has accepted Staff's overly conservative approach in almost every area except those outlined below.

I. PM10 Offsets

Staff claims in its Opening Brief that since the combustion emissions from the proposed TPP would consist primarily of PM2.5, the roadpaving credits from the nearby Altamont Landfill would not mitigate the emissions from the TPP in San Joaquin Valley. Staff cites in its Opening Brief the testimony of Dennis Jang of the Bay Area Air Quality Management District (BAAQMD) in support of its position but rejects the opinion of Mr. Sayed Sadredin, the SJVAPCD ***representative of the affected district*** (9/18/03 RT 134-135 and 139-141). As discussed in Midway's Opening Brief, Staff's opinion is also counter to that of Midway's expert David Stein (9/18/03 RT 125-126). However, in accordance with the direction provided by the Committee, Midway is willing to accept a condition that would require either lower PM10 emissions from the TPP or additional PM10 emission reductions. This compromise is reflected in Midway's Opening Brief as Midway's proposed revisions to **AQ-SC7**.

As discussed in Midway's Opening Brief, Staff reduced the effectiveness of the Altamont Landfill emissions by 85 percent. As outlined in the Supplemental Testimony of David Stein, dated October 27, 2003, Staff's reduction is based on overly conservative assumptions. These assumptions are

not indicative of the true site conditions existing at the Altamont Landfill (9/18/03 RT 125-126). Mr. Stein attached the results of three laboratory tests performed on the soil at the Altamont Landfill site to support the seasonal PM10 emission limit and emission reduction target contained in Midway's proposed **AQ-SC7**. Therefore, ***using Staff's methodology and accepting Staff's rationale*** in conjunction with the Altamont Landill site specific data, 57.8 percent of the PM10 would be PM2.5 instead of Staff's assumed 15 percent. Staff conceded that the 15 percent factor was based on generic data rather than a more accurate, site-specific analysis (9/18/03 RT 244). Furthermore, based on Staff's review of the data contained in Mr. Stein's supplemental testimony and discussions regarding the proposed compromise to **AQ-SC7**, Staff had informally agreed that some adjustment to the PM10 discount was appropriate. In fact, a Staff interim draft of a revised **AQ-SC7** reflecting this adjustment had been circulated for review by all of the Parties, but was later withdrawn. As a result, Mr. Stein submitted his supplemental testimony to include the data referenced by Mr. Stein during the evidentiary hearing (9/18/03 RT 125-126) to ensure that the data could be acknowledged. We urge the Committee to adopt the PM10 emission reduction target, and associated emissions limitation, contained in Midway's Opening Brief because it reflects the best data available. Staff's approach is already extremely conservative since it uses a generic emission factor that is not site-specific and rejects the SJVAPCD opinion and approved methodology. Additional conservatism in further reducing the effectiveness is not warranted nor supported by the evidence in the record.

II. NOx, VOC and SO2 Offsets

Even though Staff rejected the SJVAPCD methodology for calculating what, if any, additional emission reductions were necessary to accommodate the SJVAPCD concerns, Midway's proposed **AQ-SC7** accepts Staff's methodology completely.

III. Timing of Emission Reductions and Emissions Limitations

Besides the PM10 discount factor discussed above, the only remaining dispute between Midway and Staff is the timing of emission reductions and/or emission limitations. Midway requests that it be allowed a time period not to exceed five years in which to either obtain the emission reductions outlined in Midway's proposed **AQ-SC7** or to operate in such a way that the TPP's emissions will be below the thresholds necessitating obtaining the emission reductions. Staff has expressed concern that somehow allowing five years would result in significant impacts to the environment. The Committee should reject this argument for the following reasons.

First, Staff's contention is based on complete rejection of the SJVAPCD conclusion that there will not be a significant impact with implementation of the AQMA. Second, the emission estimates used by Staff assume an extremely high level of operation from the TPP during all seasons. The Committee should recognize that these emission estimates were used to provide a worst-case scenario and are not likely to occur during the winter seasons when the demand for power is lower.

Third, the Condition allows the TPP to either provide the emission reductions or alter its operations such that it need not provide the emission reductions. In reality, the AQMA binds Midway to provide the Mitigation Funds to SJVAPCD and binds SJVACPD to use the Mitigation Funds to obtain real-time emission reductions. Therefore, in all likelihood emission reductions will be achieved whether or not the TPP reduces its operations. If some emission reductions are not achieved for one or more of the priority pollutants during the first five years, then the TPP will be required to lower its emissions until additional emission reductions are achieved. For example, if emission reductions

are obtained for NOx but not PM10, Midway would be required to alter its operations to be in compliance with the PM10 emission limitation, which would likely also reduce actual NOx emissions. In such a case, the condition would result in even more of an air quality benefit to the region by providing emission reductions for emissions that do not occur.

Lastly, the Committee should reject Staff's position in that the alleged impact could only occur in the highly unlikely event that the worst-case scenario operation of TPP were required coincident with poor air quality conditions in the winter season (which do not occur every day) during the first five years. Any perceived impact during the first five years would also be temporary and transient considering that actual emission reductions would either be achieved or emission limitations would be imposed for the remaining life of the TPP, 25 years or more. Allowing Midway additional time will provide the flexibility necessary to identify, fund and actually achieve emission reductions in coordination with the SJVAPCD, City of Tracy or others.

Intervenor Sarvey's Contentions

Intervener Sarvey contends in his Opening Brief that the Cumulative Air Quality analysis is incomplete and inadequate because it fails to recognize development. However, Mr. Sarvey fails to cite to any evidence in the record supporting this contention. The Staff witness Brewster Birdsall, testified that the Staff did complete a cumulative air quality impact analysis and included those reasonably foreseeable projects that Staff believed could combine with the TPP emissions. (9/18/03 RT 369-372) Mr. Birdsall also testified that a cumulative air quality impact analysis was performed for the East Altamont Energy Center that incorporated the emissions from the TPP and the Committee took administrative notice of all documents submitted in that proceeding (9/11/03 RT 366). There is no evidence in the record to support that the TPP will result in a significant

cumulative air quality impact. In fact the evidence is uncontroverted that the TPP will comply with all applicable LORS and will not result in significant air quality impacts.

With respect to the adequacy of emission offsets for the project, BAAQMD witness Dennis Jang testified that the project will comply with all applicable laws, ordinances, regulations and standards. Mr. Jang also testified that the offset package complies with Public Resources Code section 25523 (d) (2) and that all offsets provided from the District bank are valid (9/18/03 RT 204-205, 210). The Committee should therefore reject Mr. Sarvey's assertion that the emission reduction credits provided to the BAAQMD are insufficient.

With respect to ammonia emissions, Mr. Sarvey asserts that the Committee should require complete mitigation of the project's ammonia emissions. However, there is no evidence in the record that these ammonia emissions are significant. First, the Committee should take notice of the fact that there is no Federal or State ambient air quality standard for ammonia or any air quality regulatory program requiring ammonia offsets. Second, the Committee should acknowledge that CEC has never required ammonia emissions to be offset and should specifically note that there is no requirement for the East Altamont Project to provide ammonia offsets. Thirdly, the Committee should acknowledge that even though there is no justification to require mitigation for ammonia, the Applicant has voluntarily agreed to reduce its ammonia emissions to 5 ppm, one half the limit accepted and required of the neighboring East Altamont Project (9/18/03 RT 113).

PUBLIC HEALTH

Staff's Supplemental Testimony

Midway supports Staff's Supplemental Testimony related to Public Health including the revised Condition of Certification **Public Health-1**.

WATER RESOURCES

Since the evidentiary hearings, Midway has continued to attempt to accommodate the Committee's strong desire that the TPP use recycled water while maintaining the short and long-term viability of the project. It proposed in its Opening Brief the conditions under which it believes it can do both. This position has been developed even though Midway believes there is no law or policy that would require the Commission to mandate its sole water supply to be recycled water from the City of Tracy. However, despite Midway's continued efforts to accommodate Staff's position, all of these attempts have been rejected by Staff. Instead, Staff has continued to cite irrelevant and inapplicable authority to justify its position. In short, Staff seeks a particular result and has abandoned its regulatory obligation to perform an independent review of the TPP. While Midway continues to be hopeful that the Committee will adopt the more reasonable approach proposed by Midway in its Opening Brief, it is compelled to reply to Staff's legal assertions. For the reasons described below, Staff's contentions should be rejected.

Staff's Contentions

I. Applicable Law and Policy

Staff contends in its Opening Brief that state law and policy require the Commission to find that the use of fresh water for cooling of the TPP is a waste or unreasonable use. Staff has located no authority or policy, which ***requires*** the Commission to condition the TPP upon the use of recycled water. The statutes and "policies" that Staff cites provide nothing more than guidance to public agencies considering the impacts of water use within the state. Staff attempts to provide legal authority through citation to the Warren–Alquist Act. Staff correctly asserts that the Commission has been given broad the authority to approve and condition projects such as the TPP. Staff also correctly asserts that the Commission has been given the permitting authority of, all such governmental entities that would have jurisdiction over the project. However, the Staff has incorrectly applied the laws and policies of other

agencies to the TPP that would apply to the TPP ***only*** if those agencies had jurisdiction over the TPP but for the Commission's exclusive jurisdiction. In some cases, Staff has applied laws that clearly do not apply to the specific facts surrounding Midway's water proposal. An analysis of the applicability of each of Staff's asserted legal authorities is provided below.

A. State Water Resources Control Board

The Water Code provisions relied upon by Staff establish a procedural framework under which the State Water Resources Control Board ("SWRCB") can compel certain uses of recycled water. Only after express findings have been made can the SWRCB require that recycled water be used. (Water Code Section 133550.) Moreover, the SWRCB is the exclusive agency charged with the task of making the requisite findings.

1. Applicability of Policy 75-58

SWRCB Resolution 75-58 is not a binding statute or regulation. It is a policy statement that SWRCB adopted to help guide decisions about water supplies for new power plants. Resolution 75-58 limits itself to "reasonable efforts" and attempts to balance the benefits of using recycled water against the costs. Further, the policy applies ***only when the SWRCB has jurisdiction***. Recognizing these limitations, the Commission itself has routinely rejected applying the policy in a mechanical manner so as to require strict use of recycled water. In fact, Staff has argued the opposite position in recent siting cases.

Resolution 75-58 establishes certain SWRCB policy principles for developing water sources for power plants. One of the principles is that recycled water should be preferred over other inland waters "depending on site specifics such as environmental, technical and economic feasibility considerations." The principles also limit the preference for recycled water when using it would be

"environmentally undesirable or economically unsound." When the SWRCB issues permits for power plants to use new allocations of nonrecycled water, it merely requires operators to study the "environmental desirability and economic feasibility" of minimizing use of fresh or raw water.

As demonstrated in testimony, although the City of Tracy has indicated a commitment to developing a recycled water supply for TPP, it currently has no definitive program and can only provide verbal assurances of key local and state approvals that would be required in order to actually deliver a "wet" vs. "paper" recycled water supply (Exhibit 45, pages 11 through 15). Price estimates and all other commercial terms for the proposed recycled water supply and the necessary delivery infrastructure are still conceptual. (9/12/03 RT 190 through 194) In addition, the City of Tracy may develop additional uses for recycled water that are more efficient or environmentally sound prior to the commencement of delivery to TPP. Additionally, the City of Tracy representative Mr. Bayley acknowledges that use of the City of Tracy recycled water would involve numerous regulatory approvals (9/12/03 RT 189) but could not describe a schedule for obtaining them (9/12/03 RT 193). These regulatory approvals might not be granted. Therefore, imposing a requirement for the exclusive use of the Tracy recycled water supply places development of the TPP at risk.

The policy principles contained with Resolution 75-58 limit the preference for using recycled water to situations where the SWRCB has jurisdiction. Recognizing the limits of this authority, the SWRCB merely encourages "water supply agencies and power generating utilities to study the feasibility of using wastewater for powerplant cooling" and encourages its use when "appropriate". SWRCB does not have jurisdiction of the water distribution here; TPP will be supplied under pre-1914 rights to high flow Kern River water held by the Districts. These pre-1914 rights are ***not subject*** to SWRCB jurisdiction. As a result,

Resolution 75-58 does not apply. In previous decisions, the Commission has rejected mechanical application of Resolution 75-58. For example, the Commission acknowledged the non-binding nature of Resolution 75-58 in the statement "We are not persuaded, moreover, the SWRCBR 75-58 has any application to this case, other than non-binding policy guidance. Although it applies to waste discharges, the prong of SWRCBR 75-58 is not at issue before us." (*In the Matter of Application for Certification for the Elk Hills Power* Project, 99 AFC 1 (California Energy Commission 2000). As noted in that decision "a SWRCB staff attorney appeared but could offer no definitive interpretation of SWRCB 75-58's application to siting cases. *Id.* at 252. The decision also states that "although SWRCBR 75-58 has long been with us, it's application remains somewhat of a mystery. Ms. Vassey, a senior 20-year employee with the SWRCB, could not recall a single instance of its definitive application to a siting case or otherwise." *Id.* On facts similar to the this proceeding, the Elk Hills decision properly declines to extend the application of SWRCB 75-58 to cases beyond the authority of the SWRCB. *Id.* at 254.

The Commission has explicitly recognized the SWRCB's lack of jurisdiction and the resolution's use of qualified language—for example, "should' not 'shall'" and 'it is the Board's position that.'" (*In the Matter of Application for Certification for the High Desert Power Project,* 97-AFC-1 (the California Energy Commission 2000).) In that case, the Commission also emphasized that nothing in the resolution mandated the use of recycled water. In another case, the applicant committed to using recycled water to the extent that it became available. The Commission stated that this requirement complied with 75-58, whether it applied or not. (*In the Matter of Application for Certification for the Three Mountain Power Plant Project,* 99 AFC 2, 247-49 (California Energy Commission 2001).) In addition, the Commission has repeatedly noted that under Resolution 75-58, "[t]he appropriate inquiry is not whether the applicant

could use alternative technology, but rather whether it *must*. ... Resolution 75-58 is not a prohibition on the use of inland waters but rather a direction on consideration of cooling alternatives, particularly when projects have the potential to cause a significant adverse impact." (*Id.; In the Matter of Application for Certification for the Pastoria Energy Facility*, 97 AFC 7 (California Energy Commission 2000) (emphasis added).)

2. Application of Policy 75-58 If It Applied

If, however, the Committee believes that Policy 75-58 applies or applies its principles, Staff's analysis needs further scrutiny. Such scrutiny will indicate that the Policy 75-58 does not require the Committee to mandate that the TPP use recycled water from the City of Tracy.

First, Staff bases its determination of costs on estimates. Midway has also provided estimates of costs. However, the Committee should recognize that although both parties have estimated the costs, the estimates are different by millions of dollars. When assigning weight to these competing estimates, the Committee should consider the following. Midway is a wholly-owned subsidiary of FPL Energy, who is in the business of developing and managing power generation assets. Staff has asserted that use of the recycled water from Tracy could be less expensive than Midway's proposed supply. If it were in fact less expensive, it would be inconceivable why Midway would not voluntarily elect to use the recycled water. According to Staff's estimates, which rely on the projections of a City of Tracy employee, the TPP would be more profitable if it used recycled water. Mr. Derrel Grant testified that if the recycled water was, in fact, less expensive than the current water source proposal, and if the City of Tracy could execute a contract providing the TPP with the same customary terms necessary to obtain financing, the TPP would use the recycled water. (9/12/03 RT 18) Midway proposed in its Opening Brief, that if the Committee desires the

TPP to use the recycled water from the City of Tracy and is relying on Staff's estimates, a condition requiring Staff's estimates to be validated is appropriate. Midway proposed the use of a third party independent engineer, such as a lender's engineer, to make such evaluation. Midway has proposed this to Staff, but it was rejected. It seems that Staff is unwilling to adrnit that its estimates may be proven wrong. Staff's estimates are based on assumptions that are clearly erroneous. For example, Staff assigned lost revenue to the TPP due to outages within the aqueduct. This opinion is unexplainably contrary to the opinion of the Department of Water Resources, the operator of the aqueduct. (Exhibit 29) Once the lost revenue is removed from Staff's calculations, the City of Tracy alternative is even more expensive than the proposed water supply.

B. Integrated Energy Policy Report

Recently, the Commission issued an 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.

Since the issuance of the Integrated Energy Policy Report, the Governor has issued Executive Order S-2-03, which requires an evaluation of all regulations recently adopted to assess the negative effects on businesses operating within the state. While it is unclear whether the policy referenced above will be subject to the Executive Order, we make the Committee aware of this potential issue. However, if the Committee were to apply the new policy to the TPP, the result would be similar to that provided above for Policy 75-58 as the Commission policy is nearly identical.

However, the Commission Policy does adopt the definition of feasibility which would include "legal issues" to be considered when determining whether the recycled water option is feasible for the TPP. The Committee should recognize that the lack of a enforceable contract with the City of Tracy, the lack of a City of Tracy obligation to serve the TPP, and the potential for administrative or judicial prevention from delivery of the recycled water to the TPP could render the recycled water option to be infeasible at this time. Again Midway would accept a condition to use the recycled water if these legal issues were identified as specific requirements. If any of these legal requirements prevent delivery, Midway should be allowed to proceed with its current water proposal as the City of Tracy recycled water would not be feasible.

C. California Constitution Article X, Section 2

All water rights in California are subject to a constitutional (Article X, Section 2) and statutory (Water Code Section 100) requirement of both beneficial and reasonable use. California law is clear that the reasonableness of requirement is a question of fact to be determined after taking into account all facts and circumstances. The California Supreme Court has stated that "reasonable use of water depends on the circumstances of each case, [and] such

an inquiry cannot be resolved in vacuo isolated from state-wide considerations of transcendent importance." Joslin v. Marin Municipal Water District, 67 Cal. 3d 132, 140 (1967). Recent decisions have confirmed this principal. See, e.g., City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 1242 (2000). In addition, the court has noted "What constitutes reasonable water use is dependent upon not only the entire circumstances presented but varies as the current situation changes. Environmental Defense Fund, Inc. v. East Bay Mun. Utility District, 26 Cal.3d 183, 194 (1980). Lastly, courts have repeatedly recognized the respected role of water agencies in determining reasonable use. See, e.g., Brydon v. East Bay Mun. Util. Dist., 24 Cal.App. 4th 178 (1994).

Analysis of beneficial use typically look to the type of the use or the purpose of the use. Determination of what is a beneficial and reasonable use typically involves consideration of the hydrological, economic, social, environmental, and energy circumstances of the subject use of the water, and its relationship to other existing or potential beneficial consumptive or nonconsumptive uses. In addition, the issue of reasonableness must respond to increasing demands for a finite quantity of water. Tulare Irrigation. Dist. v. Lindsay-Strathmore Irrig. Dist. (1935) 3 Cal.2d 489. To determine reasonable use, the benefits of the proposed District supply must be considered.

To the extent a balancing of competing interests is performed, a consideration of the overall public interest is material. The reasonableness of any use requires consideration of countervailing benefits. As evidenced in testimony, the proposed District supply provides substantial benefits to the efforts among Kern County water agencies to make more efficient use of the regions water supplies thereby providing a benefit to all of California through a corresponding reduction in export pressure on Northern California fresh water resources, including a benefit to the San Francisco Bay Delta. As California

politics have long shown, the dry and heavily populated southern part of the state will make demand on the wet northern half whenever need arises. Because the proposed District supply is based upon more efficient use of supplies, the increased economic activity associated with the transfer, constructing and maintaining capture and recharge facilities provides a direct benefit to the local Kern County Area and the state. It is far preferable to allow water supply agencies to market supplies of transferable water in an effort to obtain the requisite funding for further conservation and beneficial uses of water. California's pro-transfer position should not be overlooked in the context of prioritizing preferred supplies of cooling water for power plants.

Water transfers are recognized as an important means of meeting California's increasing water demands without injuring the environment. Given substantial differences in water endowments among regions of the state, and significant variations in precipitation from year to year, California's development has necessitated transfers. For the first 70 years of the 20th century, California met its increasing water needs by constructing large storage and diversion projects and moving water over distances. Water transfers are beneficial for a number of reasons. They create new sources of water or provide necessary funding to more fully conserve or utilize existing sources. By the Districts' capture and beneficial use of previously lost Kern River high flows, the Districts' can help ensure that their groundwater banking program remains full and thereby avoid future shortages to the regions important agricultural users. These types of banking programs provide a similarly valuable adjustment role during droughts. Finally, voluntary water transfers can provide the financial resources that many water users need to engage in conservation. Water conservation can often require significant amounts of money and, without the revenues from voluntary transfers, many users cannot afford to employ additional and more expensive conservation measures.

Based upon these considerations, the use of the District supply is not unreasonable when judged in the light of the overall benefits (the statutory standard), and considering the fact that the Districts' beneficial use and transfer activities will remain subject to compliance with state and federal environmental laws and regulations. The Districts' water rights are uncontested. Staff was provided with evidence of the validity of the Districts' water rights under state law. No parties have contested their validity. Similarly, Staff was presented with evidence that the District's are currently reasonably and beneficially exercising their water rights.

D. Water Code Provisions

1. Section 13550 et seq.

Staff's assertion that Water Code Sections 13550 et seq. sets forth legal authority that would authorize the Commission to require the TPP to use only recycled water from the City of Tracy is inaccurate. Under Water Code Section 13550, the SWRCB is the exclusive agency charged with making the necessary determinations regarding the "availability" of recycled water to offset the use of ***potable domestic water supplies*** for nonpotable uses. In making these determinations, the SWRCB must consider and make detailed findings regarding the following: (a) whether the source of recycled water is of adequate quality; (b) whether the recycled water may be furnished at a reasonable cost; (c) whether there may be detrimental effects on public health; and (d) whether the use of recycled water may have an adverse effect on downstream water rights, or have an injurious effect on plantlife, fish, and wildlife.

Water Code Sections 13552.6 and 13552.8 set forth specific provisions regarding the use of potable domestic supplies in power plant cooling operations.

Again, under these sections, the SWRCB is the exclusive agency charged with making the necessary determinations.

There are no reported cases, and only two administrative decisions of the SWRCB, interpreting Section 13550. See, SWRCB Decision 1625 (1990) and Decision 1623 (1989) as amended by Order No. WR 90-1 (1990). These SWRCB decisions involve questions relating to whether a water user and a water supplier were required to use recycled water instead of potable domestic water supplies for irrigation purposes. The decisions were decided on the basis of the specific facts unique to those projects, and each decision sets forth the SWRCB's detailed findings and determinations that are required under Water Code section 13550. These decisions demonstrate the SWRCB's exclusive authority to make the necessary and technically complex determinations regarding availability under Section 13550.

Given this complexity, Staff's reliance upon and interpretation of Water Code Section 13550 is misplaced. Section 13550 of the Water Code—which states that the use of ***potable water for nonpotable uses*** is a waste or unreasonable when recycled water is available—is not applicable to this proceeding. First, the section applies only when potable domestic water will be used. (Cal. Water Code Section 13550(a).) Under the terms of the supply agreement between Zone 7 and the Districts, the TPP water supply with not contain potable water. Second, the provision requires not using potable water only when another supply can be allocated at a reasonable cost, and the cost of providing recycled water to the project is not yet clear. Third, this section applies to proceedings of the State Water Resources Control Board ("SWRCB"), not the Commission.

Section 13550 does make a legislative determination that, under certain circumstances, the use of potable domestic water for nonpotable uses is unreasonable. However, Section 13550 applies only when potable domestic water will be supplied for a nonpotable use. Sections 113843 and 113844 of the California Health and Safety Code define "potable water" as any water meeting the standards set out in the California Safe Drinking Water Act. The District supply does not meet the drinking water standards detailed in this Act. Testimony has demonstrated that the raw water to be provided by the Districts does not qualify as potable. The water will not be treated to drinking water standards before it is piped to TPP. Because TPP will not receive potable water, Section 13550 does not apply and therefore does not require a substitute water source. This finding is consistent with the Commission's findings in the EAEC Decision. In that Decision, the Commission agreed that "raw or fresh water is not the same as potable water". (EAEC Decision, page 313.) Further, Section 13550 *et seq.* only establishes a process for determining when the use of potable domestic water is unreasonable, it does not state that all nonpotable uses of domestic water are unreasonable. Instead, the section says that the SWRCB may find the use of potable domestic water to be unreasonable only if a substitute can be provided at a reasonable cost.

Further, Section 13550 of the Water Code requires substitution of nonpotable water for potable only when the substitute can be supplied "at a reasonable cost." (*Id.* at 13550(a)(2).) The reasonableness requirement is met only if the "cost of supplying the treated recycled water is comparable to, or less than, the cost of supplying potable domestic water." (*Id.)* The cost of providing recycled water produced by the City of Tracy is unknown at this time. Staff and the City of Tracy have worked together to project costs, but the testimony demonstrates that this estimate is merely conceptual, not based on definitive figures and the estimates vary widely. However, based upon Staff's analysis, the

recycled water supply would be more expensive by up to $8 million. Applicant's review of the proposed Tracy supply also indicated an increase in costs to the project of up to $21 million, thereby rendering the proposed supply cost prohibitive (Exhibit 45, Update of Table 5, page 17).

II. Committee Should Allow Flexibility

In evaluating the different opinions, the Committee should consider the following:

1. Staff evaluated the Tracy recycled water option for the TPP in incredible detail for the TPP while summarily dismissing it in the EAEC proceedings.
2. Staff has raised many of the legal arguments it raised in the EAEC proceedings even despite their rejection by the Commission in that proceeding.
3. Staff fails to inform the Commission that the ***environmental and LORS compliance issue*** raised by the USFWS concerning the shrew has been resolved by USFWS's letter stating that the potential issues with the shrew are "unrelated" to the TPP.
4. Staff fails to work with Midway to craft a condition that would require the TPP to use recycled water from the City of Tracy ***if*** Staff's assumptions used in its analysis were independently proven correct.
5. Staff fails to give deference to the Department of Water Resources staff who have opined that assigning lost revenue to the TPP due to outages of the California Aqueduct is not warranted. DWR has agreed with the Applicant's analysis of such outages (Exhibits 26 and 29), which proves that under no foreseeable circumstances would the TPP be without water from the aqueduct.

It is clear that Staff is dedicated to achieving a particular result and not to a fair and independent analysis as required by the Commission regulations. This approach is inconsistent with the Commission's Decision in EAEC, which requires the Applicant to use recycled water if offered to it "...at a cost comparable or less than the cost of fresh water conveyed to the project." (EAEC Decision, page 329) The Committee should not adopt Staff's approach, as it would be arbitrary and capricious to do so as it cannot be reconciled with the EAEC Decision. Staff's predictions concerning the City of Tracy recycled water, including the costs, may not be accurate. If not accurate, the Committee cannot determine at this time that the costs are comparable or less than the costs of Midway's water proposal.

Staff's position is unreasonable and if adopted would place the TPP at great risk. As described by Midway's witnesses in their testimony, uncertainty surrounding the use and costs associated with the City of Tracy recycled water would make the project incapable of obtaining financing. (Exhibit 45, pages 15 and 16). If any one of the Staff's assumptions (timing, costs, willing of City of Tracy to enter into a binding agreement, all permits obtained) are not realized, the TPP would have obtained a license for a project that cannot be built. Such an approach is unreasonable.

However, Midway has proposed an approach that is reasonable while achieving the result Staff seeks. As stated in its Opening Brief and in the evidentiary proceedings, despite the lack of environmental impact or applicable statutory or regulatory requirement, Midway is willing to accept a condition requiring it to use recycled water if recycled water can be delivered to the site, the total cost for delivery and use is less than the cost of its current water proposal, and the City of Tracy enters into a binding agreement that would support financing of the TPP. We urge the Committee to accept this compromise position, which we believe would satisfy the Committee's objective of minimizing the use of fresh water for the TPP while allowing the flexibility necessary to support actual development of the TPP.

BIOLOGICAL RESOURCES

Staff's Contentions

Staff's Opening Brief discusses the issues surrounding the Buena Vista Lake Shrew and mischaracterizes both its relation to the TPP and United States Fish and Wildlife Service (USFWS) opinion. The USFWS had originally raised issues relating to the use of aqueduct water via the exchange agreement with Rosedale-Rio Bravo and Buena Vista Water Districts and its potential impact to the Buena Vista Lake Shrew. This issue was raised by the United State Fish and Wildlife Service (USFWS) in Exhibit 63. Staff failed to inform the Committee that 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 requested in its Opening Brief that the Committee receive this letter (attached to Midway's Opening Brief) 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.

Staff's Supplemental Testimony

Midway supports Staff's Supplemental Testimony related to Biological Resources including the revised Condition of Certification **BIO-5**. Midway believes that the revised condition clarifies the intent of the original condition consistent with the discussion at the evidentiary hearing on September 11, 2003.

Intervener Sarvey's Contentions

Intervener Sarvey contends in his Opening Brief that the TPP is incompatible with the Haera Mitigation Bank. Mr. Sarvey's contention is contrary to the opinion of Staff, the current opinion of the USFWS and California Department of Fish and Game (CDFG), Dr. Dwight Mudry, and does not recognize that the Wildlands Inc., the operators of the Haera Mitigation Bank owned the portion of the TPP site property adjacent to the Haera

Mitigation Bank and have subsequently entered into an option agreement with Midway for development of the TPP (9/11/03 RT 161). It is clear that if Wildlands Inc. believed that the TPP was incompatible with its operation of the Haera Mitigation Bank, it would not have optioned the property for development of the TPP to Midway. Additionally, as explained by Staff, close coordination with CDFG and USFWS resulted in evaluation of the potential impacts to the Haera Mitigation Bank and other species including the San Joaquin Kit Fox. (9/11//03 RT 114-117, 119-120).

SOCIOECONOMICS

Intervener Sarvey's Contentions

Mr. Sarvey contends that the environmental justice evaluation conducted by Midway in the AFC and Staff in its Final Staff Assessment is flawed. This is not supported by any evidence in the record. In fact, Exhibit 51 is uncontroverted and concludes that the TPP will not result in any disproportionate impacts to low income or minority populations in accordance with state and federal law. (Exhibit 51, page 4.8-11; Exhibit 1, pages 5.8-13-14).

WORKER SAFETY AND FIRE PROTECTION

Staff's Supplemental Testimony

Midway supports Staff's Supplemental Testimony related to Worker Safety and Fire Protection including the additional Condition of Certification **WORKER SAFETY-3**. Midway believes that the revised condition codifies its commitment made at the evidentiary hearing on September 10, 2003. Although the Committee requested thought be given to language memorializing the commitments discussed between the County of Alameda and the City of Tracy Fire Chiefs, we strongly oppose any condition of certification imposing enforcing such a commitment on the TPP. The record clearly demonstrates that the County of Alameda is the first responder and any aid rendered by the City of Tracy would be under a mutual aid agreement between the City and the County. We strongly urge the County of Alameda to cooperate with the City of Tracy

Fire Department and support some of the funds to be given by Midway to the Alameda County Fire Department be made available to address City of Tracy Fire Department needs.

Intervener Sarvey's Contentions

Mr. Sarvey contends that a condition of certification is required because the TPP along with the other power plants in the area impose a burden on the City of Tracy. Midway believes that such a condition is not warranted as the City of Tracy is not the first responder and will only render aid under a mutual aid agreement. For the reasons stated above, we believe the Committee should allow the City of Tracy and County of Alameda determine how best to utilize the funds to given to the County of Alameda Fire Department by Midway.

In addition, Mr. Sarvey fails to demonstrate that the TPP will impose any burden on the City of Tracy Fire Department. The response times identified by Staff are adequate and supported by the County of Alameda Fire Department Chief. (9/10/03 RT 184-188; 192-195)

FACILITY DESIGN

Staff's Supplemental Testimony

Midway agrees with Staff's modification to the reference to the 2001 California Building Standard Code (CBSC).

HAZARDOUS MATERIALS MANAGEMENT

Staff's Supplemental Testimony

Midway supports Staff's Supplemental Testimony related to Hazardous Materials including the revised Condition of Certification **HAZ-12**. Midway believes that the revised condition clarifies the intent of the original condition consistent with the discussion at the evidentiary hearing on September 10, 2003. However, Midway

continues to concur with Staff and opposes the institution of the Condition of Certification **HAZ-XXX** (Staff provided language). There has been no demonstration that deliveries of ammonia to the TPP during the winter months would result in significant risk of release for the reasons outlined in Staff's Supplemental Testimony. The Committee therefore has no basis in the evidentiary record to require such a condition of certification.

LAND USE

Staff's Supplemental Testimony

Midway supports Staff's Supplemental Testimony related to Land Use including the revised Condition of Certification **LAND USE-7**. Midway believes that the revised condition clarifies the intent of the original condition consistent with the discussion at the evidentiary hearing on September 10, 2003.

Intervener Sarvey's Contentions

Mr. Sarvey contends that the TPP is inconsistent with Measure D and the Williamson Act. The County of Alameda Board of Supervisor's officially cancelled the Williamson Act Contract for the parcel and specifically found that the TPP was consistent with Measure D and made all the required findings under the Williamson Act (Exhibit 21). While Mr. Sarvey's witness Mr. Schneider disagreed with the County's findings, the Committee should find, as staff did in Exhibit 51, that great deference should be given the land use agency for interpreting its own laws, ordinances, regulations and standards. Exhibit 21 should not be challenged by the Commission.

VISUAL RESOURCES

Intervener Sarvey's Contentions

Mr. Sarvey contends that an unmitigated visual impact would occur because of the "applicant's inability to provide an adequate Landscaping Plan due to Biological Concerns will allow the project to have an unmitigated adverse impact for up to 5

years...". Specifically, Mr. Sarvey cites to Exhibit 51, page 4.11-45. CEQA requires feasible mitigation measures. It is both appropriate and prudent to balance environmental objectives. In the case of the TPP, planting trees that may take up to five years to provide full screening in such a way as to prevent potential impacts to the San Joaquin Kit Fox is sufficient mitigation. Any potential visual impact from the relatively infrequent viewers would be temporary and transient. Clearly, Mr. Sarvey would not advocate a landscaping plan that did not protect the San Joaquin Kit Fox.

TRAFFIC AND TRANSPORTATION

Staff's Supplemental Testimony

Midway supports Staff's Supplemental Testimony related to Traffic and Transportation including the revised Conditions of Certification **TRANS-1** through **TRANS-8**. Midway believes that the revised conditions clarify the intent of the original conditions consistent with the discussion at the evidentiary hearing on September 11, 2003.

CARE'S REQUEST FOR SUPPLEMENTAL EVIDENTIARY HEARING

Intervener CARE's Opening Brief requested supplemental evidentiary hearings. Supplemental evidentiary hearings are unnecessary, unwarranted and CARE requests them solely to cause delay in the proceeding. CARE alleges ex parte communication between Midway and Staff. This communication was directed by the Committee and the results of all communications were docketed and explored with CARE and Mr. Sarvey's participation in a party workshop on October 30, 2003. Staff's Supplemental Testimony was prepared merely to reduce to writing the agreements and clarifications discussed at the evidentiary hearings. Mr. Sarvey and CARE participated fully in the evidentiary hearings and had the opportunity to file testimony and cross-examine any witness. When evidentiary objections were sustained, both Mr. Sarvey and CARE were allowed to enter public comment on the record. Midway believes the Committee has the right to ask the parties to clarify the record by submitting revised documents. The Committee could clearly have allowed the agreements to be read into the record. The

fact the Committee attempted to have the record clarified in a subsequent written document is not grounds for new evidentiary hearings. Midway believes that no new facts are presented in Staff's Supplemental Testimony and therefore cross-examination is not necessary. The parties had the right and responsibility to conduct cross-examination at the time of the hearings. Midway urges the Committee to reject CARE's motion and proceed to decision on this project which has been undergoing licensing review for over two years.

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. We urge the Committee to adopt the arguments contained in this and Midway's Opening Brief.

Dated: December 1, 2003

Respectfully submitted,

Scott A. Galati
Counsel to Midway Power, LLC

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 December 1, 2003, I deposited copies of the attached **Midway Power LLC's Reply B rief 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:

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

Carole Phelps

Carole Phelps