STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of: The Application for Certification for the VICTORVILLE 2 HYBRID POWER PROJECT	Docket No. 07-AFC-1

REPLY BRIEF OF THE CALIFORNIA UNIONS FOR RELIABLE ENERGY

April 28, 2007

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On reply, CURE simply responds to the issues raised by Staff and the City concerning whether the Commission may lawfully certify the Victorville 2 Hybrid Power Project ("Project") absent federally enforceable PM10 offsets under the Clean Air Act. Neither party provided any justification for the Commission deviating from its statutory mandates.

Both Staff and the City admit that federally enforceable PM10 offsets are required for the Project. However, both try to skirt federal law by raising inapplicable arguments based on secondary legal sources that have no bearing on the issue at hand, i.e., whether the Commission can, under the Warren-Alquist Act, make a finding that the Project complies with federal law. Neither the Staff nor the City addressed this issue because there was no way for them to do so and still argue that the Commission can make a finding that the Project complies with the Clean Air Act and the federally approved SIP rule mandating the District to ensure that all offsets are secured prior to commencement of project operations.

I. REPLY ARGUMENTS

A. CURE's Response to Staff's Opening Brief

Staff encouraged the Commission to ignore both the Warren-Alquist Act and the Clean Air Act, and approve the City's proposed non-traditional PM10 offset package absent any indication that the proposed offsets will ever be federally enforceable as required by the Clean Air Act.

Indeed, the best Staff could do was assure the Commission that the Project is "likely" to comply with federal law sometime in the future.[1]

Specifically, rather than address the legal issue CURE raised at the pre-hearing conference, the evidentiary hearing and in its opening brief, Staff incongruously referred the Commission to the Air District's final determination of compliance for the proposition that the Project will enjoy *excess* PM10 ERCs given the abundance of unpaved roads in the Mojave Desert.[2] Whether it would be possible for the City to generate 132.7 tons of PM10 ERCs through road paving is not at issue, the issue is that Rule 1406 must be SIP approved before the Commission can make its required compliance finding under Public Resources Code § 25523(d)(2).

For this reason, staff is incorrect that CURE conveniently ignored the fact that the Air District issued a final determination of compliance for the Project which contemplates the City utilizing the District's newly adopted Rule 1406 to create non-traditional PM10 offsets.[3] Actually, CURE raised many of the arguments it raised in its opening brief to the Commission with the District in comments on the preliminary determination of compliance. The District disregarded CURE's concerns.

The District's determination of compliance is immaterial here because the certification process has now reached the Commission. It is now up to the

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[1] Staff's Opening Brief, at p. 1.
[2] Staff's Opening Brief, at p. 2.
[3] CURE's Opening Brief, at pp. 1-2.

Commission to follow its own statutory mandates, which are completely separate from those that govern the Air District. Thus, just as the determination of compliance is immaterial, so is Staff's reference to a 1979 policy statement. Neither has any bearing whatsoever on the Commission's certification of the Project. In fact, the 1979 policy does not deviate from the Warren-Alquist findings requirement; but even if it did, the Commission may not relinquish its specific statutory duty to, among other things, make its own distinct certification findings that the Project's offsets package is "consistent with any applicable federal and state laws and regulations."[4] Here, the Commission's responsibility is to ensure that the City will surrender 132.7 tons of SIP-approved PM10 offsets before it commences project construction.[5] Nothing in the 1979 policy statement, the District's determination of compliance or the Staff's opening brief alters that fact.

B. CURE's Response to the City's Opening Brief

The City's opening brief took an approach similar to that of Staff, directing the Commission away from the Warren Alquist Act's findings requirement, and focusing on secondary legal authority having nothing to do with the issue at hand.

At least Staff acknowledged that the City must surrender federally enforceable offsets to the District prior to commencement of construction in

[4] Pub. Resources Code section 25523(d)(2).
[5] MDAQMD Rule 1302.

conformance with SIP Rule 1302.[6] The City ignored this SIP requirement altogether, and implied that the Commission could make findings regarding the Project's lack of consistency with federal law based upon a 1994 EPA memorandum dealing with NOx offsets.[7] This memo is inapposite because it concerns a very specific timing issue that occurred shortly after the 1990 Clean Air Act amendments.[8] It appears that sources in need of federally enforceable NOx offsets had trouble obtaining needed offsets due to EPA's delay in adopting RACT rules for NOx.[9] The resulting uncertainty caused some sources to hold on to offsets they might otherwise have offered on the market.[10]

Clearly, there is no over-arching policy issue here similar to the wide-spread shortage of NOx offsets in the early 1990s caused by EPA's delay in adopting RACT rules following the 1990 amendments. In reality, this case concerns an air district approving offsets pursuant to a recently adopted rule that is not SIP-approved, nor did the air district provide evidence that it will ever be SIP-approved.

In any case, this 14 year-old memorandum has no relevance to this proceeding, but even if it did, it is indisputable that secondary legal

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[6] Staff's Opening Brief, at p. 2.
[7] Memorandum Offsets Required Prior to Permit Issuance, Attachment A, at p.5 (June 14, 1994) ("EPA intended in the NOx Supplement that construction permits could be issued based on a commitment to secure offsets before commencement of operation only for NOx offsets.")
[8] *Id.* Attachment A, at pp. 4-5.
[9] *Id* at p. 5.
[10] *Id.*

authorities of this nature have no effect whatsoever on unequivocal statutory mandates. This EPA guidance memo has no bearing on the Commission's express duties under the Warren-Alquist Act.

II. CONCLUSION

Neither Staff's nor the City's opening brief provided any legal or factual justification that would allow the Commission to ignore the fact that the City has not secured federally-enforceable PM10 offsets. Related, neither provided evidence showing that the proposed PM offset package will ever be federally enforceable. Accordingly the Commission's only legal option is to require the City to identify an alternate source of federally enforceable PM10 offsets prior to the Commission certifying the Project.

Dated: April 28, 2008

Respectfully submitted,

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PROOF OF SERVICE

I, Bonnie Heeley, declare that on April 28, 2008, transmission of the attached REPLY BRIEF OF THE CALIFORNIA UNIONS FOR RELIABLE ENERGY via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list below:

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I declare under penalty of perjury that the foregoing is true and correct. Executed at South San Francisco, California, on April 28, 2008.

Bonnie Heeley