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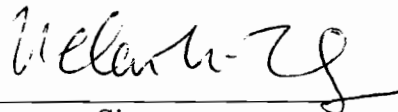
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Attorneys for Complainant
 Contra Costa Branch of the Association of
 Community Organizations for Reform Now

STATE OF CALIFORNIA
 Energy Resources Conservation
 and Development Commission

In the Matter of:)	Docket No. 00-AFC-1C
)	
)	REPLY OF COMPLAINANT
)	CONTRA COSTA BRANCH OF
)	ACORN TO STAFF RESPONSE
GATEWAY GENERATING STATION)	AND RECOMMENDATIONS

July 17, 2009
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Signature

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Contra Costa branch of the Association of Community Organizations for Reform Now (ACORN) respectfully replies to the July 3, 2009 Staff Response and Recommendations to ACORN's Complaint.

INTRODUCTION

It is undisputed that PG&E built and started operating the Gateway Generating Station without an amended certification: the facility approved by the Commission's 2001 certification is not the one PG&E is operating. PG&E should have thus received approval from the Commission for the changes to the Gateway facility, *before* constructing and operating a different facility from that originally certified in 2001. (The Staff Response agrees with ACORN on that point. Staff Response at 3: "ACORN is

correct in its assertion that ‘PG&E should have received approval from the commission for (the) modifications before beginning constructions on these modifications and commencing operation.’”)

Similarly, the Staff Response does not dispute that PG&E itself in January 2008 sought to amend the air quality conditions contained in the Commission’s Final Decision to reflect the best air pollution control technology available. Nor does the Staff Response dispute that the application of such pollution control technology would have reduced the permitted emission rates for NO_x, CO, and PM₁₀.

It is thus undisputed that PG&E failed to seek this Commission’s approval to amend the certification to reflect modifications to the Gateway facility’s construction plans and to the emission rates set forth in the air quality measures in the Final Commission Decision. PG&E’s failure to amend the certification violates the Warren-Alquist Act, the Commission regulations, and the federal new source review provisions, and thus the conditions of certification.

The Staff Response is wrongheaded in its assertion that ACORN does not set forth violations of the conditions of certification. ACORN indeed sets forth violations of the conditions of certification. A general condition of certification requires PG&E to petition for changes to (1) the project design; and (2) conditions of certification, such as air quality measures, that are no longer supported by new information. (See page 3 below.)

The Legislature gave this Commission the authority to “have the exclusive power to certify all sites . . . [including] a change or addition,” and the Commission’s findings cannot be in conflict with applicable federal law or regulation. Pub. Resources Code, §§ 25500, 25525. The Commission is thus within its powers to exercise that authority to correct a violation of law that results in air quality impacts that the Commission has the power to mitigate.

REPLY TO STAFF INVESTIGATION AND ANALYSIS

A. Commission's Authority over the Complaint

The Staff Response incorrectly claims that the Complaint is insufficient for failing to specify the conditions of certification that are at issue and therefore fails to provide the necessary information. Staff Response at 3. On the contrary, many of the violations ACORN alleges are violations of the General Conditions of Certification, while some are violations of specific conditions of certification (such as the offset requirement). For all of those violations, ACORN set forth the “statute, order, decision, or condition of certification upon which the complaint is based.” Cal. Code Regs., tit. 20, § 1237, subd. (a)(4).

Specifically, the General Conditions of Certification in the Gateway Final Decision include a requirement that the project owner seek amendments to the conditions of certifications (1) for post-certification project modifications; and (2) where new information changes or undermines the assumptions, rationale, findings, or other bases of the final decision. *See* General Conditions, Gateway Generating Station Final Decision at 186 (“[t]he project owner must petition the Energy Commission, pursuant to Title 20, California Code of Regulations, section 1769 for project design changes and modifications”); Cal. Code Regs., tit. 20, §§ 1769, subd. (a)(1) (“the applicant shall file with the commission a petition for any modifications it proposes to the project design, operation, or performance requirements”), subd. (a)(1)(D) (the petition must contain the following information: “[i]f the modification is based on new information that changes or undermines the assumptions, rationale, findings, or other bases of the final decision, an explanation of why the change should be permitted”).

Because PG&E failed to obtain a certification amendment before making the modifications to the project design, PG&E violated section 1769 and thus the General Conditions of Certification. Likewise, PG&E violated those provisions when it withdrew its January 2008 amendment because the conditions of certification do not conform to BACT requirements. The Complaint thus alleges the factual and statutory bases for the violations as section 1237 requires. *See also* Petition to Amend Air Quality Conditions in the Gateway Generating Station Final Decision, submitted to the Commission on May 7, 2009, *available at* <http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-05->

07_PETITION_TO_AMEND_CONDITIONS_OF_CERTIFICATION_TN-51498.PDF [May 2009 petition], at 1, cited in Complaint ¶ 29 (PG&E’s own concession that “there remain several inconsistencies between the facility as originally permitted and the GGS as constructed”).

The Commission therefore should adjudicate the Complaint because the Commission has the authority and the responsibility to ensure that the Final Commission Decision and the conditions of certification remain legal. *See* Pub. Resources Code, §§ 25500, 25525, 25534.

B. Count I

The issue is not whether the 2001 certification is valid for the equipment described there. ACORN agrees that in 2001 the facility was certified for Mirant’s design reflected in the Final Decision. The issue is whether the 2001 certification should have been amended. The Staff Response agrees with ACORN that the certification should have been amended. *See* Staff Response at 3 (“ACORN is correct in its assertion that ‘PG&E should have received approval from the commission for (the) modifications before beginning constructions of these modifications and commencing operation’”); *see also* Pub. Resources Code, § 25500 (the Commission has the exclusive jurisdiction to certify sites, “whether a new site and related facility or a change or addition to an existing facility”). ACORN thus states a valid ground for a complaint.

C. Count II

Contrary to the assumption in the Staff Response, ACORN does not ask the Commission to make a decision outside of its jurisdiction, *i.e.*, to make permitting decisions under the Clean Air Act. Rather, ACORN asks the Commission to find that the certification is invalid without an amendment because of PG&E’s non-compliance with the Warren-Alquist Act, which requires that certifications reflect applicable federal law or regulation. Complaint ¶ 54; *see* Pub. Resources Code, § 25525.

Even according to PG&E’s own assertions, the emission rates for NO_x, CO, and PM₁₀ – which are reflected in certification conditions AQ-20 (BACT limits) and AQ-23 (daily limits), among others – are higher than they are required to be under the BACT requirements of the federal new source review provisions. Complaint ¶¶ 18, 51; *see* January 2008 amendment petition, *available at*

http://www.energy.ca.gov/sitingcases/gateway/compliance/2008-01-15_PETITION_TO_AMEND_AIR_QUALITY_CONDITIONS.PDF, at 5 (PG&E states that, since the 2001 certification, “the short-term emissions limits for NOx and CO that are considered BACT for natural gas-fired gas turbines have become more stringent”); *see also Sierra Club v. Franklin County Power of Illinois, LLC* (7th Cir. 2008) 546 F.3d 918, 927 (“pollution control technology tends to improve over time, so it makes sense that a new permit would have more stringent emission standards than the 2001 permit”).

Had PG&E complied with the law and the conditions of certification, the Commission would have had an opportunity, *before* the facility completed most of its construction and began operating, to set environmentally protective conditions. The Commission should exercise its authority over the BACT issue by acting on ACORN’s complaint, especially now that PG&E has withdrawn its January 2008 petition amendment discussing the more stringent BACT for Gateway.

D. Count IV

The Staff Response in effect argues that the potential for public participation in the proceedings resulting from PG&E’s May 2009 amendment petition is sufficient to meet the Commission’s public participation requirements. Staff Response at 6. But the May 2009 amendment petition fails to raise the BACT issue. *See* May 2009 petition at 1. The public may therefore be foreclosed from commenting on PG&E’s noncompliance with the federal law.

Further, the Commission’s regulations allow for public participation *before* a facility is constructed and begins to operate. *See, e.g.,* Cal. Code. Regs., §§ 1748, 1754, subd. (a), 1769, subd. (a)(3). An opportunity for public comment at a business meeting *after* modifications affecting public health have been constructed does not provide the community with a meaningful opportunity to participate in the certification process.

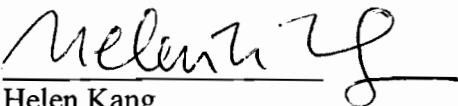
The Commission should thus adjudicate the Complaint to ensure that the public and the Commission itself have a meaningful avenue to address the issues, where PG&E has attempted to circumvent pre-construction and operation review.

CONCLUSION

Without the Commission's action to address PG&E's "construct, operate and seek permission later" approach, the public will not have the opportunity for meaningful participation. The Commission, which has a broader charge than the Bay Area Air Quality Management District, should adjudicate the Complaint and ensure that a company that evades pre-construction review does not obtain an undue advantage over others who comply with pre-construction requirements. The Commission should also exercise its authority to ensure that there is sufficient mitigation for the modifications.

Date: July 17, 2009

Respectfully Submitted,


Helen Kang

ENVIRONMENTAL LAW AND
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