



School of Law

Environmental Law and Justice Clinic

DOCKET	
00-AFC-1C	
DATE	SEP 10 2009
RECD	SEP 10 2009

September 10, 2009

SUBMITTED BY E-MAIL AND FIRST CLASS MAIL

Docket Office, California Energy Commission
1516 Ninth Street, MS4
Sacramento, CA 95814

Reference: Gateway Generating Station (00-AFC-1C)

Subject: **Complainants' Joint Opening Brief**

Dear Docket Office:

Please find attached Complainants Joint Opening Brief for filing in the above referenced proceeding. The Brief was sent via email to the Proof of Service List and via first class mail to the Docket Office.

Thank you,

Deborah Behles

CC:

- Kenneth Celli
- Karen Douglas
- Jeffrey Byron
- Kevin W. Bell
- Scott Galati
- Proof of Service List 00-AFC-1C (by email)

Mailing Address:
536 Mission Street
San Francisco, CA
94105-2968

Offices:
62 First Street
Suite 240
San Francisco, CA
tel: (415) 442-6647
fax: (415) 896-2450
www.ggu.edu/law/eljc

DEBORAH N. BEHLES (Cal. Bar No. 218281)
HELEN KANG (Cal. Bar No. 124730)
Environmental Law and Justice Clinic
Golden Gate University School of Law
536 Mission Street
San Francisco, CA 94105
Telephone: 415-442-6647
Facsimile: 415-896-2450
dbehles@ggu.edu
hkang@ggu.edu

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

RORY COX
251 Kearny Street
San Francisco, CA 94108
rcox@pacificenvironment.org

Representative of Local Clean Energy Alliance

MICHAEL BOYD
ROBERT SIMPSON
ROBERT SARVEY
5439 Soquel Dr.
Soquel, CA 95073-2659
Tel: (408) 891-9677
michaelboyd@sbcglobal.net

Representatives of Californians for Renewable Energy

STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:)
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GATEWAY GENERATING STATION)
_____)

Docket No. 00-AFC-1C
**COMPLAINANTS' JOINT
OPENING BRIEF**

The Contra Costa branch of the Association of Community Organizations for Reform Now (ACORN), Local Clean Energy Alliance, Californians for Renewable Energy, Robert Sarvey, and Rob Simpson (Complainants) respectfully submits this Joint Opening Brief in the Gateway Generating Station (GGS) non-compliance proceeding. Per the request of the Hearing Officer, this brief addresses PG&E's violations of the conditions of its certification and the applicable laws, ordinances, regulations and standards. This brief does not address the significance of or the available remedies for these violations.

I. INTRODUCTION

PG&E built and started operating GGS without first obtaining an amended certification from the Commission that reflects the equipment and design of the facility as built. This backwards approach to compliance with the certification process violates the law. Specifically, the Warren-Alquist Act, this Commission's siting regulations, and GGS's conditions of certification required PG&E to petition the Commission before making any, even purportedly minor, changes to the facility. Thus, as the Commission staff acknowledges, "PG&E should have received approval from the Commission for modifications before beginning construction on these modifications and commencing operation." Staff Response and Report to Complaint by ACORN at p. 3.

PG&E is well aware of this petition requirement, having sought the Commission's approval for changes to the GGS certification before. PG&E even sought an amendment for many of the changes at issue here before commencing construction, but it later withdrew the amendment requests as "no longer necessary." Exs. 6, 13. The Warren-Alquist Act requires the Commission's approval of all modifications to the certification

prior to construction and operation, whether or not PG&E believes it is “necessary.”

Most importantly, GGS was constructed and is operating without a current, valid Prevention of Significant Deterioration permit under the federal Clean Air Act in violation of the Commission’s certification requirements to be in compliance with federal law. As a result, the proposed emission limits in PG&E’s certification do not reflect the most effective air pollution control technology as required by the Clean Air Act and this Commission’s certification.

PG&E’s construct and operate first and seek permission later approach to the certification process is a circumvention of this Commission’s authority, a violation of its certification, and the law.

II. BACKGROUND¹

The facility is located on Wilbur Avenue, in Contra Costa County, California. Ex. 2 at p. 3. It was first owned and designed by Mirant Delta, LLC (Mirant), who called it Contra Costa Power Plant Unit 8. Ex. 2 at p. 3. In November 2006, PG&E acquired sole ownership of GGS, which it now owns and operates. Ex. 4.

A. Mirant’s Unit 8 Project Design

In 2000, Mirant submitted an application to the Commission for a certification for a proposed 530-MW natural gas-fired station at the Wilbur Avenue site. Ex. 2. Around the same time, Mirant also applied for air permits, including a Prevention of Significant Deterioration (PSD) permit and an Authority to Construct (ATC) from the Bay Area Air Quality Management District (BAAQMD or District). On February 2, 2001, BAAQMD issued a final determination of compliance for Mirant’s proposal. Ex. 1. Then, in May

¹ To assist the Committee, a chronology of the relevant events is attached as Attachment A.

2001, the Commission certified and approved Mirant's proposed facility. Ex. 2.

The facility approved in the 2001 certification included: two General Electric Frame 7FA combustion gas turbines, each equipped with dry-low-NOx combustors and abated by a Selective Catalytic Reduction system and a CO Catalyst System; two heat recovery steam generators abated by a Selective Catalytic Reduction system and a CO catalyst system; a gas-fired fuel preheater; and a 10-cell wet cooling tower. Ex. 2.

After the Commission's decision, on July 24, 2001, BAAQMD issued a PSD permit and an ATC for the facility. Ex. 3.

In late 2001, Mirant began construction of Unit 8, but suspended it in February 2002. Ex. 5 at p. 1. Upon suspension of construction, approximately 7 percent of the facility was completed. *Id.*

B. PG&E's Purchase and Redesign of Unit 8

In late 2006, PG&E acquired sole ownership of the Unit 8 project and renamed the project the Gateway Generating Station. Ex. 6 at p. 1. PG&E restarted construction of GGS on February 5, 2007. Ex. 6 at Attach. A. In January 2008, PG&E petitioned to amend the air quality conditions in its certification, stating it had made "several changes to the physical design of the facility and to several of the operating assumptions." Ex. 6. PG&E also submitted an application to BAAQMD to amend the PSD permit (the federal Clean Air Act permit) and ATC based on these changes. Ex. 6 at Attach. A.

The proposed changes included: replacing the permitted preheater with a dewpoint heater and increasing the heater's allowable daily hours of operation; increasing the allowable emission rates for the gas turbines during startup; reducing the permitted hourly emission rates for NOx, CO, and PM₁₀, based on technology represented to be

Best Available Control Technology (BACT) at the time of that January 2008 application and on operating experience at other facilities; and substituting a 300-hp diesel fire pump for the previously planned electrical pump. Ex. 6 at p. 2.

Although the Commission and BAAQMD started processing PG&E's amendment requests, the Commission did not issue an amended certification and the District did not issue a PSD permit or an ATC before operation of GGS commenced. PG&E later withdrew its requests.

C. PG&E's Construction and Operation of GGS

PG&E finished construction of GGS and started operating on or before November 10, 2008 or, at the latest, on January 4, 2009. *See* Exs. 11, 12. GGS appears to be substantially similar to the facility PG&E proposed to construct in its January 2008 amendment application to the Commission. Specifically, GGS includes all of the equipment that was described in its 2008 petition, including the dewpoint heater and the diesel engine. *Compare* Ex. 6 with Ex. 14.

In February 2009, PG&E withdrew the 2008 amendment from the Commission, claiming that it was "no longer necessary." Ex. 13.

Then, on May 7, 2009, PG&E requested modification of its certification to conform to the facility it had constructed and began operating. Ex. 14. On or about May 1, 2009, BAAQMD and PG&E entered into a Compliance Agreement purporting to allow PG&E to continue operating without the required Permit to Operate. Ex. 29. BAAQMD and PG&E extended this Compliance Agreement on or about June 1, 2009. Ex. 31.

III. PG&E VIOLATED CONDITIONS OF ITS CERTIFICATION.

The centerpiece of the Warren-Alquist Act (Act) is the requirement that "no

construction of any facility or modification of any existing facility shall be commenced without first obtaining certification for any such site and related facility by the commission.” Pub. Resources Code, § 25500. Facilities must then be constructed and operated in compliance with conditions of their certification. *See id.*; *see also* Cal. Code Regs., tit. 20, § 1770. PG&E violated its conditions of certification by failing to amend its conditions of certification to reflect the facility it constructed.

A. PG&E Violated Several Conditions of Its Certification by Constructing and Operating Before It Had Commission Approval.

PG&E was required to obtain Commission approval for *any* necessary, even minor, changes to its certification before constructing and operating the facility. Pub. Resources Code, § 25500; Cal. Code Regs., tit. 20, § 1769. This requirement is reiterated in GGS’s conditions of certification:

The project owner must petition the Energy Commission, pursuant to Title 20, California Code of Regulations, section 1769, to 1) delete or change a condition of certification; 2) modify the project design or operational requirements; and 3) transfer ownership or operational control of the facility. A petition is required for amendments and for insignificant project changes.

Ex. 2 at p.186 (general conditions). These requirements exist to ensure that modifications to the conditions of certification are evaluated by the Commission as part of the certification process. Pursuant to these requirements, many facilities, including GGS, have routinely petitioned the Commission for changes to air quality requirements, offsets and other conditions. *See, e.g.*, Jan. 2008 Petition to Amend Offsets in 03-AFC-1C; Sept. 2007 Petition to Amend in 82-AFC-2C.

Here, PG&E petitioned the Commission to make several necessary changes to its conditions of certification in January 2008. Ex. 6 at p. 2 (amendments are “necessary to

reflect new design information and/or standards”); Ex. 6 at p. 4 (“*several significant project design features associated with the 2001 [Air] District and CEC permit approvals would require modifications*”) (emphasis added); Ex. 6 at p. 9 (“this [application] includes proposed modifications to the project’s Conditions of Certification *that need to be reviewed and approved by the CEC concurrent with the CEC review of this amendment*”) (emphasis added).

Before receiving approval from the Commission for the changes, however, PG&E constructed and started operating GGS. Exs. 11, 12. Then, months later, PG&E withdrew those pending requests claiming that they were “no longer necessary.” Ex. 13. But, PG&E cannot rewrite the Act or its conditions of certification. As PG&E admitted in a later filing asking for many of the same changes it withdrew, the facility “as constructed” and the facility as approved are incongruent: “there remain several inconsistencies between the facility as originally permitted and the GGS as constructed.” Ex. 14 at p. 1. PG&E also admitted that “there are several discrepancies between the project as built, the BAAQMD Authority to Construct, and the CEC license.” Ex. 14 at pp. 2, 6 (proposed changes are necessary to “ensure that the conditions of certification accurately reflect the project as constructed”). PG&E’s failure to obtain the required amendments prior to constructing and operating GGS violated the Warren-Alquist Act, this Commission’s regulations, and GGS’s conditions of certification. *See Pub. Resources Code, § 25500; Cal. Code Regs., tit. 20, § 1769; Ex. 2 at p. 186* (GGS’s general conditions require Commission approval of post-certification changes). PG&E took a calculated risk when it decided to withdraw its January 2008 petition and construct and start operating before receiving this Commission’s approval.

At least twelve separate certification conditions were violated by PG&E's decision to circumvent this Commission's amendment procedures.

1. *Revision of Definition of Commissioning Period: Violation of Definitional Condition of Certification*

During its commissioning period, GGS's certification conditions required PG&E to initiate "sales to the power exchange." Ex. 14 at Attach. C (definition of commissioning period). PG&E did not sell power to the power exchange during the commissioning period.

At least by January 2008, PG&E knew about its inability to meet this requirement since the power exchange no longer existed, Ex. 6 (withdrawn January 2008 petition asking to change the same condition), and yet it began and completed its commissioning period before this condition was changed. PG&E's completion of its commissioning period before changing the condition violated this certification requirement. *See* Ex. 2 at p. 186 (general condition requiring amendment of any changes to conditions).

2. *Construction of Different Preheater: Violation of AQ-5, AQ-24, AQ-47*

When it constructed and started operating the facility, PG&E's conditions of certification authorized a 12 MM BTU gas-fired preheater. Ex. 2 at p. 15 (AQ-5). AQ-5 required PG&E to submit a plan detailing its commissioning of GGS, including its "gas-fired preheater" to the Commission four weeks prior to the first firing. Ex. 14 at Attach. C (conditions of certification when PG&E started operating GGS). AQ-24 required the measurement of the preheater's emissions. *Id.* AQ-47 limited operation of the gas preheater to 16 hours a day. *Id.*

When PG&E began operating GGS, it was in non-compliance with these three conditions because PG&E constructed and started operating a new dewpoint preheater

instead of the gas preheater specified in these conditions. *See* Rubenstein & Royall Decl. at p. 6 (describing PG&E’s operation and installation of different preheater). As a result, PG&E did not measure emissions or submit information related to emissions measurements at the gas-fired preheater.

PG&E has argued that its new dewpoint heater does not cause additional environmental impacts because it is smaller than the permitted preheater. Rubenstein & Royall Decl. at p. 6. PG&E is not the arbiter of these decisions – these are the Commission’s and BAAQMD’s decisions. PG&E must have known this; after all, it petitioned to change these exact conditions in January 2008. *See* Ex. 6.

3. *Failure to Use CO₂ Monitor During Commissioning: Violation of AQ-6*

PG&E finished the commissioning period before May 7, 2009. Ex. 14 at p. 1 (“GGS completed commissioning”). During the commissioning period, AQ-6 required that PG&E measure emissions with a CO₂ monitor. Ex. 14 at Attach. C. PG&E used an O₂ monitor, not a CO₂ monitor, during the commissioning period. Ex. 14 at p. 5.

PG&E’s failure to measure emissions during GGS’s commissioning with a CO₂ monitor violated AQ-6. Again, PG&E must have known that the Commission should first review this change as it petitioned to change this exact condition in January 2008. *See* Ex. 6.

4. *Elimination of Steam Injection Power Augmentation Mode: Violations of AQ-20, AQ-26, AQ-30*

When PG&E began operating GGS, AQ-20 required compliance during a “steam injection power augmentation mode.” Ex. 14 at Attach. C. AQ-26 required that PG&E measure the “steam injection rate at S-41 & S-43 Gas Turbine Combustors.” Ex. 14 at Attach. C. Similarly, AQ-30 required a monitoring test during steam injection mode. *Id.*

PG&E did not comply with the terms of these conditions. As PG&E admitted, “[n]o power augmentation has been included in the as-built project.” Ex. 14 at p. 4. PG&E has claimed that the Commission approved the removal of steam augmentation in 2007. A close look at that decision reveals that AQ-20, AQ-26, and AQ-30 were not changed. Ex. 14 at p. 5 (“the permit conditions still include references to power augmentation”); *see also* Ex. 5. Like the other changes discussed above, PG&E petitioned to change AQ-20, AQ-26 and AQ-30 before it began operation, Ex. 6 at Attach. B, but withdrew its request as “no longer necessary.” Ex. 13.

5. *Elimination of Cooling Tower and Fuel Gas Preheater and Addition of New Diesel Fire Pump: Violation of AQ-24*

When GGS began operation, AQ-24 required that PG&E measure emissions from the fuel gas preheater and the cooling tower. Ex. 14. PG&E did not build the cooling tower or the fuel gas preheater. *See* PG&E Response to Complaint. In addition to changing that equipment, PG&E built a diesel fire pump that was not included in the certification. *See* PG&E Response to Complaint at pp. 8-9 (admitting construction and operation of diesel fire pump); Ex. 14 (certification did not include diesel fire pump). Therefore, PG&E did not meet the terms of AQ-24 that required emissions measurements from certain equipment.

6. *Failure to Demonstrate Valid Emission Reduction Credits: Violation of AQ-24, AQ-39, AQ-40*

Emission Reduction Credits (ERCs) are required for certain pollutants under air quality requirements to offset emissions from new facilities. PG&E failed to demonstrate valid ERCs prior to constructing and commencing operation of the facility as modified. Under its certification, PG&E was required to demonstrate to BAAQMD and the

Commission prior to construction and commencement of operations that it owned ERCs to offset GGS's emissions of POCs, NO_x, and PM₁₀. Pub. Resources Code, § 25523, subd. (d)(2); Ex. 2 at p. 24 (AQ-29); BAAQMD Regs. 2-2-302, 2-2-303, 2-2-311.

Similarly, the Commission requires a BAAQMD finding that PG&E obtained "complete emissions offsets for the proposed facility" prior to construction and operation. Pub. Resources Code, § 25523, subd. (d)(2); *see* BAAQMD Reg. 2-2-201.

Although it appears that Mirant acquired ERCs for the facility as originally certified, no BAAQMD determination was made, prior to construction and operation, as to how many ERCs are needed to offset GGS as constructed and whether PG&E holds these offsets. Specifically, no determination was made regarding whether PG&E holds sufficient ERCs in light of the modifications made to the facility's design (such as replacing the electric fire pump).

Likewise, it is not clear that PG&E now owns the credits originally obtained by Mirant. Instead, the Banking Certificates BAAQMD approved for the facility in 2001 reflect that Mirant – not PG&E – is the current record owner of the credits. *See* Ex. 32 (Banking Certificate No. 693). This uncertainty about the ownership of the credits is a consequence of PG&E's failure to take the necessary steps to demonstrate that it has the requisite ERCs. *See* BAAQMD Reg. 2-4-412 (procedures for transferring ERCs to new owners). Neither the Commission nor the public should have to guess about whether PG&E owns the ERCs so that they can be applied to GGS. By failing to have BAAQMD determine the ERCs for the facility as constructed, PG&E violated BAAQMD regulations and the conditions of certification. BAAQMD Reg. 2-2-302, 2-2-303; *see also* Ex. 2 at p. 2.

7. Significant Revision to Major Facility Review Permit: Violation of AQ-41

AQ-41 requires PG&E to submit an application to BAAQMD for a significant revision of the facility “prior to commencing operations.” Ex. 14 at Attach. C. PG&E knew that it was changing the facility to include a new fire pump, preheater, and cooling equipment in December 2007 when it submitted an application to BAAQMD. Ex. 14; *see also* Ex. 26 (notice of violation for constructing fire pump). PG&E’s decision to withdraw its BAAQMD application after it started operating violated AQ-41. *See* Ex. 13 (withdrawing January 2008 petition); PG&E Response to Complaint at p. 8 (admitting that PG&E installed and operated fire pump); Rubenstein & Royall Decl. at p. 7 (describing installation of the fire pump).

Furthermore, as described below, PG&E violated AQ-41 by not applying for a new PSD permit after its PSD permit expired. *See infra* at pp. 15-17 (describing PG&E’s failure to obtain a PSD permit).

8. Title IV Acid Rain Permit: Violation of AQ-42

AQ-42 prohibited PG&E from operating the gas turbines until it either obtained a federal Title IV Acid Rain Permit or 24 months had passed since it applied for the permit. Ex. 2 at 27 (AQ-42). PG&E violated AQ-42 because it operated the turbines in November 2008, less than 24 months after it applied for a Title IV permit in December 2006 (and without having obtained the permit). Ex. 11 (PG&E represented to EPA and the District that it commenced operation on November 10 and November 11, 2008). What is more, PG&E knew that the 24-month rule was an issue, *see* Ex. 32; yet it started operating the facility anyway.

B. PG&E Has Violated Conditions of Certification Since It Started Operating.

Since constructing and operating the facility, PG&E has violated other conditions of its certification including emissions limits that impact air quality. Complainants do not believe that every air emission violation, by itself, should require a non-compliance proceeding before the Commission. The circumstances here, however, are different because PG&E has knowingly constructed and started operating a facility before obtaining the requisite approval from this Commission. All of these violations occurred before PG&E petitioned to amend the certification conditions described above in May 2009.

1. *Source Testing: Violation of AQ-29, AQ-30, AQ-32*

PG&E was required to complete source tests of its equipment within 60 days of commencing operation. Ex. 14 (AQ-29, AQ-30, AQ-32). PG&E failed to complete these required tests within the prescribed time limit. Ex. 10. Although PG&E entered into a compliance agreement with the District regarding its failure to comply with the same conditions in the ATC, PG&E did not get authority from the Commission to change the conditions of certification before the violations occurred. *See Compliance Agreement Between District and PG&E re: Violations of ATC (Nov. 25, 2008); see also Ex. 10.* PG&E violated AQ-29, AQ-30, and AQ-32 by failing to conduct the source tests within 60 days of commencing operation.

2. *Violation of AQ 38*

This condition requires that the facility contact BAAQMD 180 days after issuance of the ATC to determine monitoring for its equipment. Ex. 14 (AQ-38). PG&E failed to incorporate its new cooling equipment, preheater, and fire pump into the ATC. Ex. 3

(ATC for facility does not list changes to equipment); *see* PG&E Response to Complaint at pp. 8-9 (admitting that it constructed and started operating fire pump without an ATC).

3. NOx Excesses: Violation of AQ-2, AQ-7, AQ-19, AQ-20, AQ-26

PG&E violated the conditions relating to NOx emissions since commencing operation, as evidenced by BAAQMD's notice of exceedences for the NOx excesses that occurred in January 2009 and on March 16, 2009. *See* Ex. 26 (NOV No. A49324); Ex. 33. The violation of these limits is especially concerning here because the GGS's NOx emission standard does not meet BACT, *see infra* p. 16-17, and the Bay Area is in non-attainment for NOx. Specifically, PG&E violated the certification's NOx emissions standard when its Heat Recovery Steam Generator and Turbine exceeded the 2.5 ppm @ 15% O₂ limitation. *Id.*; Ex. 14 (AQ-2, AQ-19, AQ-20). Likewise, these NOx excesses violated the conditions requiring GGS's monitors to accurately measure NOx emissions. *See* Ex. 14 (AQ-7, AQ-26). These violations also contravene BAAQMD's rules. *See* BAAQMD Reg. 2-1-307.²

IV. PG&E VIOLATED THE APPLICABLE LAWS, ORDINANCES, REGULATIONS, AND STANDARDS (LORS) DUE TO ITS FAILURE TO COMPLY WITH AIR QUALITY LAWS

PG&E violated the Warren-Alquist Act and its certification by constructing and operating GGS without complying with the LORS. Indeed, PG&E violated and continues to violate the LORS by operating the facility without the required air permits

² Further, PG&E has previously asserted that it would not be able to comply with other certification requirements imposing emission limits. *See* Ex. 6 at p. 4 (changes to commissioning requirements are needed "based on recent project experience."); Ex. 6 *in passim* (all requested modifications are "necessary" for operation of the facility). Based on PG&E's repeated assertions that it would not be able to comply with the emission requirements, Complainants are concerned that PG&E may not be in compliance with other emission limits.

and by exceeding required emission limitations. Although the Commission is not the primary agency responsible for enforcing air quality laws, PG&E's failure to receive the necessary approvals and come into compliance with air quality requirements is a violation of this Commission's requirements. *See* Pub. Resources Code, §§ 25500, 25525.

A. PG&E's Failure to Obtain a Current Valid PSD Permit Violates the LORS.

PG&E constructed and is operating GGS without a valid PSD permit. The Clean Air Act requires a PSD permit for the construction and operation of new or modified major stationary sources in attainment and unclassifiable areas. 42 U.S.C. § 7475 (barring commencement of construction of a major emitting facility without a permit). As BAAQMD admitted in a related proceeding, "there is in fact no current, valid [PSD] permit, a point on which there is now no disagreement [between] EPA Region 9 and the District." Ex. 15. The U.S. Environmental Protection Agency (EPA) similarly found in a recent Notice of Violation that PG&E failed to obtain a valid PSD permit before constructing and operating GGS. Attach. B. EPA, the federal agency with authority over PSD permits, made the finding that the PSD permit became "invalid . . . [because] construction [was] discontinued for a period of 18 months or more." *See id.* (citing 40 C.F.R. § 52.21(r)(2); *see also* *Sierra Club v. Franklin County Power of Illinois*, 546 F.3d 918, 931 (7th Cir. 2008) (affirming that invalidation of a PSD permit occurs when construction is discontinued for 18 months or longer).

Construction at GGS was discontinued in February 2002, and was not restarted until PG&E acquired the facility years later in 2007. *See* PG&E's Response to Complaint (admitting that construction was discontinued); Attach. B. Consequently, the

2001 permit is invalid. The failure to obtain a valid PSD permit is a violation of this Commission's requirement that there be a determination of compliance with federal air quality laws before commencing operation. *See* Cal. Code Reg., tit. 20, §§ 1744.5, subds. (b), (d) (requiring that an amendment related to air quality compliance be submitted as part of the determination of compliance); *see* Pub. Resources Code, § 25525 (requiring that certification comply with federal law); *see also* Ex. 2 at p. 29 (Commission's 2001 Final Decision lists Clean Air Act as applicable LORS).

Among others, because it is operating without a valid PSD permit, GGS is not complying with the requirement to install "the best available control technology [BACT] for each pollutant subject to regulation." 42 U.S.C. § 7475(a)(4). As described by BAAQMD, "[c]learly the recurring theme in the above definitions of BACT . . . is 'the most effective emission control' or 'the most stringent emission limitation.'" Ex. 19. In its January 2008 application to the Commission, PG&E acknowledged that its limits in the expired 2001 permit did not meet current BACT. According to this submission, PG&E asserted, among other things, that 2 ppmvd @ 15% O₂ was BACT for NO_x and 4 ppmvd @ 15% O₂ was BACT for CO. Ex. 6 at p. 5. Therefore, several of GGS's conditions of certification do not reflect the federally required BACT because available control technology has changed since these conditions were issued in 2001, and PG&E does not have a valid PSD permit. *See, e.g.*, AQ-13 (limit based on "BACT for SO₂ and PM₁₀"); AQ-14 (limit based on "PSD for NO_x"); AQ-15 (limit based on "PSD for PM₁₀"); AQ-17 (limit based on "BACT for NO_x"); AQ-18 (limit based on "BACT for NO_x"); AQ-19 (limit based on "BACT for NO_x"); AQ-20 (stating that the CO emission limit is "BACT for CO"); AQ-23 (SO₂ emissions limitation based on "BACT"); AQ-21

(limits based on “PSD”); AQ-22 (limits based on “PSD”); AQ-26 (limits based on “BACT” and “PSD”); AQ-27 (limits based on “PSD”); AQ-30 (requirements based on “BACT”); AQ-31 (requirements based on “BACT”); *see* Ex. 6 (PG&E lowering hourly CO and NOx limits and fuel sulfur limits in January 2008 application to reflect PG&E’s version of BACT).

By relying on outdated BACT limits, PG&E violated this Commission’s requirements for a determination of BACT before commencing operation for each of these conditions. *See* Cal. Code Reg., tit. 20 §§ 1744, subds. (b), (d) (requiring that an amendment related to air quality compliance be submitted as part of the determination of compliance). Furthermore, PG&E has even failed to comply with the expired 2001 BACT levels. *See supra* at 13 (discussing NOx violations).

B. PG&E’s Failure to Timely Obtain an Operating Permit Violates the LORS.

In addition, PG&E is operating without a valid state or federal operating permit from the Air District. PG&E still does not have a valid permit to operate even though it has been operating for over 180 days. *See* Exs. 29-31. This is a violation of the applicable air requirements including BAAQMD Regulation 2-1-304 and BAAQMD State Implementation Plan (SIP) Rule 2-1-302, approved into the California SIP, 64 Fed. Reg. 3850 (Jan. 26, 1999), which is a federal requirement. PG&E thus violated its certification requirements by constructing and operating in violation of federal laws. *See* Pub. Resources Code, § 25525.

C. PG&E’s Failure to Receive an ATC for the Equipment It Constructed Violates the LORS.

PG&E also violated the law by not revising its ATC to reflect the equipment it constructed. The ATC that PG&E is relying on does not include the change to the

cooling system, the fire pump, or the dewpoint heater. *See* Ex. 3. Under Commission requirements, PG&E was required to “submit in its application all of the information required for an authority to construct under the applicable district rules.” Cal. Code Regs., tit. 20, § 1744.5, subd. (a); *see also* BAAQMD Reg. 2-1-301 (requiring ATC before construction). PG&E did not do that here. In fact, BAAQMD has issued a notice of violation for PG&E’s construction of the diesel fire pump without an ATC. Ex. 26. In addition, PG&E has violated and is violating other laws. *See supra* at 13 (discussing NOV issued for NOx violations).

PG&E does not have a valid final determination of compliance from the air district, which is a necessary element to a certification. *See* Cal. Code Regs., tit. 20, § 1744.5, subd. (b). As a consequence, PG&E is not in compliance with the LORS.

V. PG&E CIRCUMVENTED THE COMMISSION’S PUBLIC PARTICIPATION REQUIREMENTS

Public participation is a necessary part of certification proceedings under the Warren-Alquist Act. *See* Pub. Resources Code, §§ 25214, 25221, 25222. Public participation in these decisions is essential because clean energy is “of vital importance to the health and welfare of the citizens of the state and the environment.” *Id.* at § 25300(a). Further, as the legislature has recognized, public comments can improve the efficacy of the Commission’s decisions. *See id.* at § 25402(b).

PG&E’s decision to circumvent the Commission’s public hearing and comment process by starting operation and withdrawing its amendment application, denied the public its legal right to participate in a decision affecting its health and welfare before the facility started operating. The Commission’s regulations give the public an opportunity to comment on amended conditions *before* a facility is constructed and begins to operate.

See, e.g., Cal. Code. Regs., tit. 20, §§ 1748, 1754, subd. (a), 1769. The amendment procedures specifically provide an opportunity to comment when conditions are changed. Cal. Code Regs., tit. 20, § 1769. GGS's conditions of certification echo this requirement for a petition to change certification conditions. Ex. 2 at p. 186.

Had PG&E followed the law and sought approval for project changes from the Commission prior to construction, the public would have had the right and opportunity to file an objection before GGS began operation. *See* Ex. 7 (Commission's notice of a public hearing for PG&E's January 2008 amendment). By withdrawing its amendment and making the changes regardless, PG&E circumvented the public's ability to meaningfully participate in the decision before GGS began operating.

An opportunity for public comment at a business meeting *after* modifications affecting public health have been constructed does not provide the public with a meaningful opportunity to participate in the certification process.

VI. CONCLUSION

PG&E built and started operating GGS without first obtaining a certification from the Commission that reflects the equipment and design of the facility as built. In doing so, PG&E violated its certification and this Commission's requirements. The Commission should reject PG&E's backward approach to compliance and find that PG&E did not comply with its certification and the Commission's requirements.

Date: September 10, 2009

Respectfully Submitted,



Deborah Behles

Helen Kang

ENVIRONMENTAL LAW AND JUSTICE
CLINIC

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

/s/ Rory Cox
Representative of LCEA

/s/ Michael Boyd
/s/ Robert Simpson
/s/ Robert Sarvey
Representatives of CARE

ATTACHMENT A

PG&E Gateway Generating Station – Chronology

<u>Date</u>	<u>Event</u>
2/2/01	BAAQMD issues Final Determination of Compliance.
5/30/01	CEC licenses project.
7/24/01	BAAQMD issues Authority to Construct (which includes Prevention of Significant Deterioration permit).
Late 2001	Mirant commences construction.
Feb. 2002	Mirant suspends construction.
11/30/06	PG&E acquires sole ownership over project.
Feb. 2007	PG&E restarts construction.
12/24/07	PG&E submits application for modifications of air permit to BAAQMD.
1/15/08	PG&E submits petition to amend air quality conditions to CEC.
6/4/08	BAAQMD issues public notice for modified air permit.
11/10/08	PG&E commences operation.
Jan/Feb 2009	PG&E completes commissioning.
2/13/09	PG&E withdrew petition to amend certification from CEC and application for air permit modifications from BAAQMD.
4/14/09	PG&E applies for amendments to air permit.
5/7/09	PG&E submits petition to amend air quality conditions of certification with the CEC.

ATTACHMENT B

1 UNITED STATES
2 ENVIRONMENTAL PROTECTION AGENCY
3 REGION IX

3 In the Matter of:)	
4 PACIFIC GAS AND ELECTRIC COMPANY)	Docket No. R9-09-11
5 Proceeding under Section 113(a))	FINDING AND
6 of the Clean Air Act,)	NOTICE OF VIOLATION
6 42 U.S.C. § 9613(a))	

7
8 STATUTORY AND REGULATORY AUTHORITY

9 1. This Finding and Notice of Violation ("FNOV") is issued
10 to the Pacific Gas and Electric Company ("PG&E") for violations
11 of the Clean Air Act at PG&E's Gateway Generating Station ("GGS")
12 located in Contra Costa County near Antioch, California. This
13 FNOV is issued pursuant to Section 113(a)(1) of the Act, 42
14 U.S.C. § 7413(a)(1). Section 113(a)(1) of the Act requires the
15 Administrator of the United States Environmental Protection
16 Agency ("EPA") to notify any person in violation of an applicable
17 state implementation plan ("SIP") or a permit when the
18 Administrator finds that person to be in such violation. The
19 authority to issue this FNOV has been delegated to the Regional
20 Administrator of EPA, Region IX, and re-delegated to the Director
21 of the Air Division of EPA, Region IX.

22 2. The Administrator of the Environmental Protection
23 Agency ("EPA"), pursuant to authority under Section 109 of the
24 Clean Air Act (the "Act"), 42 U.S.C. § 7409, promulgated National
25 Ambient Air Quality Standards ("NAAQS") for certain criteria
26 pollutants, including PM₁₀, carbon monoxide, and nitrogen
27 dioxide. 40 C.F.R. §§ 50.6, 50.8, and 50.11.

28 3. Pursuant to Section 107(d) of the Act, 42 U.S.C.

1 § 7407(d), the Administrator promulgated lists of attainment
2 status designations for each air quality control region ("AQCR")
3 in every State. These lists identify the attainment status of
4 each AQCR for each of the criteria pollutants. The carbon
5 dioxide, PM₁₀, and nitrogen dioxide attainment status
6 designations for the California AQCRs are listed at 40 C.F.R.
7 § 81.305.

8 4. The Bay Area Air Quality Management District ("BAAQMD")
9 has primary jurisdiction over major stationary sources of air
10 pollution sources in the San Francisco Bay Area Intrastate AQCR.
11 40 C.F.R. 81.21. This jurisdiction includes GGS.

12 5. Section 161 of the Act, 42 U.S.C. § 7471, requires that
13 each state implementation plan ("SIP") contain provisions to
14 implement the Act's Prevention of Significant Deterioration
15 ("PSD") program for areas of that state which are designated as
16 being in attainment with any NAAQS for a criteria pollutant. The
17 PSD program applies to major new sources of air pollution.

18 6. The PSD permitting program for the San Francisco Bay
19 Area Intrastate AQCR is the federal PSD program, which is set
20 forth at 40 C.F.R. § 52.21 ("PSD Program").

21 7. The PSD Program requires, among other things, that the
22 owner or operator of a new major stationary source of air
23 pollution obtain a PSD permit, which complies with the
24 requirements of 40 C.F.R. § 52.21, prior to constructing a new
25 major source of air pollution. The PSD permit must require,
26 among other things, that the best available control technology
27 ("BACT") be installed at the source being constructed or
28 modified. The definition of a major modification is set forth in

1 40 C.F.R. § 52.21.

2 FINDINGS OF FACT AND LAW

3 8. PG&E generates electricity at GGS, which is a nominal
4 530 megawatt, natural gas-fired, combined cycle, combustion
5 turbine power plant. At all times relevant to this FNOV, GGS has
6 been and continues to be a major source of air pollution. GGS is
7 located in Contra Costa County near Antioch, California, which is
8 under the jurisdiction of BAAQMD and EPA.

9 9. On July 24, 2001, PG&E's predecessor in interest,
10 Delta, LLC ("Mirant"); obtained a PSD permit from the BAAQMD as
11 part of a single, comprehensive Authority to Construct. BAAQMD
12 issued that PSD permit pursuant to the authority set forth in 40
13 C.F.R. 52.21 and a delegation of authority from EPA dated April
14 26, 1986. Such delegation of authority to issue PSD permits and
15 implement the PSD Program is allowed under 40 C.F.R. 52.21(u).

16 10. The delegation of authority to BAAQMD to implement the
17 PSD Program was revoked on March 3, 2003. A partial re-
18 delegation of authority to BAAQMD to implement the PSD Program
19 was issued on June 21, 2004.

20 11. At some point during the time period between February
21 2002 and September 2002, Mirant ceased construction of GGS. This
22 cessation of construction lasted more than 18 months.

23 12. Pursuant to the PSD Program, 40 C.F.R. 52.21(r), where
24 construction of a major new source pursuant to a PSD permit is
25 discontinued for 18 months or more, the PSD permit automatically
26 expires unless an extension is granted by the Administrator of
27 EPA or someone who currently possesses a valid delegation of
28 authority from the Administrator to grant such an extension.

1 13. Between the time the PSD permit for GGS was issued to
2 Mirant and the latest time that PSD permit would have
3 automatically expired due to discontinued construction of GGS, no
4 valid extension of the PSD permit was requested from or issued by
5 the Administrator of EPA or someone who currently possessed a
6 valid delegation of authority from the Administrator to grant
7 such an extension. Therefore, the PSD permit automatically
8 expired when construction of GGS had ceased for 18 months.

9 14. PG&E took over ownership of GGS from Mirant on November
10 30, 2006, and restarted construction of GGS in January 2007. At
11 the time PG&E took over ownership of GGS and restarted
12 construction of GGS, the PSD permit for the construction and
13 operation of GGS had expired. PG&E has not applied for a new PSD
14 permit.

15 15. PG&E failed to obtain a valid PSD permit prior to
16 restarting construction of and operating GGS. PG&E's failure to
17 have a valid PSD permit continues to this time.

18 FINDING OF VIOLATIONS

19 16. PG&E violated the SIP and the Act by restarting
20 construction of and operating GGS, a major new source of air
21 pollution, without obtaining a valid PSD permit.

22 ENFORCEMENT

23 17. Section 113(a)(1) of the Act provides that at any time
24 after the expiration of 30 days following the date of the
25 issuance of this FNOV, EPA may, without regard to the period of
26 violation:

27 - issue an order requiring compliance with the
28 requirements of the SIP or permit, or

1 - issue an administrative penalty order pursuant to
2 Section 113(d) of the Act for civil administrative
3 penalties of up to \$32,500 per day of violation, or
4 - bring a civil action pursuant to Section 113(b) for
5 injunctive relief and/or civil penalties of not more
6 than \$32,500 per day for each violation.

7 42 U.S.C. § 7413(a)(1), as amended by the Federal Civil Penalties
8 Inflation Adjustment Act of 1990, Pub. L. 101-410, as amended, &
9 40 C.F.R. § 19. Furthermore, for any person who knowingly
10 violates any SIP or permit requirement more than 30 days after
11 the date of the issuance of a FNOV, Section 113(c) of the Act
12 provides for criminal penalties, imprisonment, or both. 42
13 U.S.C. § 7413(c)(3).

14 In addition, under Section 306(a) of the Act, the
15 regulations promulgated thereunder (40 C.F.R. Part 32), and
16 Executive Order 11738, facilities to be used in federal
17 contracts, grants, and loans must be in full compliance with the
18 Act and all regulations promulgated pursuant to it. Violation of
19 the Act may result in the GGS being declared ineligible for
20 participation in any federal contract, grant, or loan.

21 PENALTY ASSESSMENT CRITERIA

22 18. Section 113(e)(1) of the Act states that the
23 Administrator or a court, as appropriate, shall, in determining
24 the amount of any penalty to be assessed, take into consideration
25 (in addition to such other factors as justice may require) the
26 size of the business, the economic impact of the penalty of the
27 business, the violator's full compliance history and good faith
28 efforts to comply, the duration of the violation as established

1 by any credible evidence (including evidence other than the
2 applicable test method), payment by the violator of penalties
3 previously assessed for the same violation, the economic benefit
4 of noncompliance, and the seriousness of the violation. 42
5 U.S.C. § 7413(e)(1).

6 Section 113(e)(2) of the Act allows the Administrator or a
7 court to assess a penalty for each day of violation. 42 U.S.C.
8 § 7413(e)(2). For the purpose of determining the number of days
9 of violation, where EPA makes a prima facie showing that the
10 conduct or events giving rise to a violation are likely to have
11 continued or recurred past the date of the issuance of a FNOV,
12 EPA shall presume the days of violation to include the date of
13 issuance of the FNOV and each and every day thereafter until the
14 violator establishes that continuous compliance has been
15 achieved, except to the extent that the violator can prove by a
16 preponderance of the evidence that there were intervening days
17 during which no violation occurred or that the violation was not
18 continuing in nature.

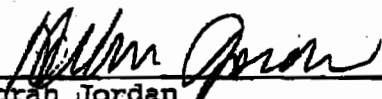
19 OPPORTUNITY FOR CONFERENCE

20 19. PG&E may, upon request, arrange to have a conference
21 with EPA to discuss this matter. A conference would enable PG&E
22 to present evidence bearing on the finding of violation, the
23 nature of the violation, and any efforts that it may have taken
24 or proposes to take to achieve compliance. If PG&E wishes to
25 take advantage of this opportunity, it must make a request for a
26 conference within ten (10) days of receipt of this FNOV. PG&E,
27 if it chooses to request a conference, may choose to be
28 represented by counsel at the conference. Any request for a

1 conference or other inquiries concerning this FNOV should be made
2 in writing to:

3 Allan Zabel
4 Office of Regional Counsel
5 U.S. Environmental Protection Agency, Region 9
6 75 Hawthorne Street (ORC-2)
7 San Francisco, CA 94105
8 (415) 972-3902

8 Date 8-12-09


9 Deborah Jordan
10 Director, Air Division
11 EPA Region IX

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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT
COMMISSION OF THE STATE OF CALIFORNIA
1516 NINTH STREET, SACRAMENTO, CA 95814
1-800-822-6228 – WWW.ENERGY.CA.GOV

IN THE MATTER OF THE COMPLAINT AGAINST
GATEWAY GENERATING STATION

Docket No. 00-AFC-1C
PROOF OF SERVICE
(Revised 7/28/09)

PROJECT OWNER

Steve Royal
Pacific Gas & Electric Company
Gateway Generating Station
3225 Wilbur Avenue
Antioch, CA 94509
sgre@pge.com

PROJECT OWNER'S COUNSEL

Scott Galati
Galati-Blek LLP
455 Capitol Mall, Ste. 350
Sacramento, CA 95814
sgalatti@gb-llp.com

INTERESTED AGENCIES

Alexander G. Crockett, Esq.
Assistant Counsel
Bay Area Air Quality Management
District
939 Ellis Street
San Francisco, CA 94109
scrockett@baaqmd.gov

California ISO
e-recipient@caiso.com

COMPLAINANTS

ACORN C/O
Deborah Behles, Esq.
James Barringer, Esq.
Lucan Williams, Graduate Fellow
Golden Gate Univ. School of Law
Environmental Law & Justice Clinic
536 Mission Street
San Francisco, CA 94105-2968
www.ggu.edu/law/eljc

ACORN C/O
John Adams
2401 Stanwell Drive
Unit 320
Concord, CA 94520
caacornbpro@acom.org

Rory Cox
Local Clean Energy Alliance
436 14th Street
Oakland, CA 94612
rcox@pacifenvironment.org

CARE
c/o Bob Sarvey and Rob Simpson
27216 Grandview Avenue
Hayward CA 94542
SarveyBob@aol.com
rob@redwoodrob.com

ENERGY COMMISSION

Jeffrey D. Byron
Commissioner and Presiding Member
Siting Committee
jlevin@energy.state.ca.us

Karen Douglas
Chair and Associate Member
Siting Committee
kidougl@energy.state.ca.us

Kenneth Celli
Hearing Officer
kcelli@energy.state.ca.us

Ron Yasney
Compliance Project Manager
ryasney@energy.state.ca.us

Kevin W. Bell
Staff Counsel
kbell@energy.state.ca.us

Elena Miller
Public Adviser's Office
publicadviser@energy.state.ca.us

DECLARATION OF SERVICE

I, Lucas Williams, declare that on September 10 2009, I served and filed copies of the attached the COMPLAINANTS' JOINT OPENING BRIEF. The original document, filed with the Docket Unit, is accompanied by a copy of the most recent Proof of Service list. The document has been sent to the other parties in this proceeding (as shown on the Proof of Service list) and to the Commission's Docket Unit, in the following manner:

For service on all other parties: sent electronically to all email addresses on the Proof of Service List;

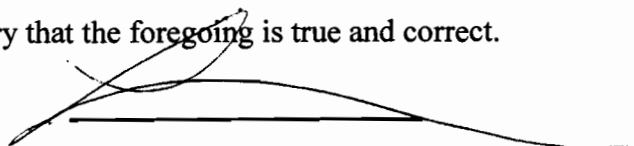
AND

For filing with the Energy Commission: sent an original paper copy and one electronic copy, mailed and emailed respectively, to the addresses below:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 00-AFC-1C
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512

docket@energy.state.ca.us

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

A handwritten signature in black ink, consisting of a series of overlapping loops and a long horizontal stroke at the bottom, positioned below the declaration text.