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STATE OF CALIFORNIA
Energy Resources Conservation
and Development Commission

In the Matter of:	)	Docket No. 00-AFC-1C
	)	
	)	**JOINT REPLY BRIEF OF**
	)	**COMPLAINANTS**
	)	
GATEWAY GENERATING STATION	)	
_____	)	

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 (collectively Complainants) respectfully submit this Joint Reply Brief in the Gateway Generating Station (GGS) noncompliance proceeding.

I. INTRODUCTION

PG&E in effect acknowledges that it *knew* it needed to change its certification conditions and went ahead with construction without the Commission's advance approval. In doing so, PG&E violated the conditions of certification, the Warren-Alquist Act, and the Commission regulations. Yet PG&E wants to rewrite the Commission's requirements and asserts that it should only be subject to the Commission's review when PG&E alone deems it necessary. This illegal approach has not only resulted in the emission of tons of harmful air pollution without the required controls, but without the community's ability to have a say in decisions affecting it. Utilities like PG&E should not be allowed to unilaterally determine which changes are important enough to seek the Commission's advance permission.

Contrary to PG&E's assertions, this case does not allege that the original certification was invalid. Nor will Complainants always argue that every administrative difference, however small, is necessarily a noncompliance issue. Where, however, a company *knows* it should be applying for a change – and indeed does so – and withdraws an application for strategic reasons (*i.e.,* avoiding delay), the Commission unquestionably and swiftly should act to deter future violations of this sort by PG&E and other utilities. Not holding PG&E liable will likely encourage companies to follow PG&E's build now and seek permission later approach and will punish law-abiding companies who seek permits and are delayed in operating their plants.

II. ARGUMENT

A. PG&E's Noncompliance with Its Certification and the Post-Certification Amendment Procedures Violated the Law.

PG&E spends much of its rebuttal attempting to rewrite and create exceptions to this Commission's requirements that (1) facilities must operate in conformance with their conditions of certification, and (2) any and all post-certification modifications must be approved by the Commission prior to implementation of those changes. Pub. Resources Code, § 25500; Cal. Code Regs., tit. 20, § 1769. These statutory and regulatory strictures apply even when PG&E characterizes the modifications as not "significant," "material," or merely "administrative." PG&E Rebut. at pp. 6-7, 23. "PG&E should have received approval from the Commission for modifications before beginning construction on these modifications and commencing operation," as the Commission staff recognizes. Staff Response & Report to Complaint by ACORN at p. 3.

Contrary to PG&E's contention, the statute states unequivocally that "*no* modification of any existing facility shall be commenced" without first obtaining proper certification for the change, Pub. Resources Code § 25500 (emphasis added), without any reference to its significance (although here, there were indeed many changes that were significant). Likewise, the siting regulations and GGS's conditions of certification specify that the utility must petition the Commission to make post-certification changes. Cal. Code Regs., tit. 20, § 1769, subd. (a)(1) ("the applicant shall file with the commission a petition for *any* modifications it proposes") (emphasis added); *see also* Cal. Code Regs., tit. 20, § 1237 (no requirement that post-certification complaints allege the significance of the noncompliance); Ex. 2 (general condition of Final Commission Decision).

PG&E nevertheless argues otherwise, citing a statutory provision that is inapplicable to this phase of the proceeding. PG&E Rebut. at p. 7. Importantly, the statute does not require

"significance" in determining whether there was noncompliance with a "regulation or order issued by the commission." Pub. Resources Code, § 25534, subd. (a)(3). The "significant failure" requirement in section 25534(a)(2), to which PG&E cites (PG&E Rebut. at p. 7), is only one of the circumstances for which this Commission may "amend the conditions . . . or revoke the certification" or issue a penalty. *See* Pub. Resources Code, § 25534, subds. (a) & (b).

Further, it is important to note that this is not a case where a reasonable power plant operator, despite its due diligence, was unaware of the need to obtain permission for ministerial modifications, or where exigencies outside of the operator's control necessitated modifications prior to formal approval. Rather, PG&E was indisputably cognizant of the need to obtain permission for the modifications, had more than enough time to petition for those modifications, and even submitted such petitions only to later withdraw them. Thus, PG&E's policy arguments for creating exceptions to the Commission's procedures (PG&E Rebut. at pp. 6-7, 23) are unpersuasive.

B. It Is Undisputed that PG&E Violated Many Conditions of Certification.

PG&E does not deny that it violated conditions of its certification. Rather, PG&E argues that the Commission should excuse its noncompliance. This discussion is inappropriate for this phase of the case, which is solely to determine whether PG&E was in noncompliance with its certification. (On this subject, Complainants similarly have much to say, and the Commission should not yet prejudge this issue.)

The following table describes the violations that PG&E does not dispute:

Condition / LORs	**Complainant's Joint Opening Brief (Opening Br.) Description**	**PG&E's Response**
Installation of Fire Pump	Opening Br. at pp. 6-8, 10.	PG&E Rebut. at pp. 10-11 (believes it does not "warrant commission action").
No Operating Permit, LORS	Opening Br. at p. 17.	No response.
Authority to Construct Amendment	Opening Br. at pp. 17-18.	No response.
Change conditions of its certification to comply with BACT.	Opening Br. at pp. 16-17.	No response.
Commission requirements related to PSD permit.	Opening Br. at pp. 15-17.	PG&E Rebut. at pp. 11-14. No response, states the CEC is not proper venue, but does not address the Commission's requirements related to PSD permits and BACT.
Demonstrate Ownership of Emission Reduction Credits (ERCs)	Opening Br. at pp. 10-11.	No response. PG&E submits an exhibit showing that Mirant, not PG&E, owns many of the ERCs PG&E claims apply to GGS. *See* Ex. 318.
Circumvention of public participation requirement	Opening Br. at pp. 18-19.	No response.
NOx Violation	Opening Br. at p. 14.	PG&E Rebut. at p. 22. States that NOx violations "do not warrant CEC action."[1]
Definition of Commission Period	Opening Br. at p. 8.	PG&E Rebut. at p. 15. Argues that the Commission should apply a "common-

[1] PG&E takes issue with Complainants' Exhibit 25, arguing that it is not a copy of the final version. PG&E Rebut. at p. 22. This difference is immaterial here because it is undisputed that the March incident resulted in a NOx exceedence. In addition, PG&E had an opportunity to raise this objection a week after the exhibit was produced, as this Commission required. This exhibit was produced on August 13, making this objection late. Moreover, Complainants only have access to what we receive from agencies in response to Public Records Act requests. As we have previously stated, the Air District withheld documents related to these violations as enforcement confidential. *See* Aug. 13, 2009 Ltr to S. Galati, K. Celli. Unlike PG&E, Complainants have not had access to a full record of what has transpired because documents have been withheld and we have not had an opportunity to conduct discovery. If PG&E still believes this issue to be material, PG&E should produce the complete record in this case so that both the Commission and the Complainants are not left with an incomplete record.

		sense" exception as to when a petition is required.
Elimination of Steam Injection Power Augmentation Mode, AQ-20, AQ-26, AQ-30	Opening Br. at pp. 9-10.	PG&E Rebut. at p. 16. Argues that this "error" should not support a noncompliance finding.
Addition of New Diesel Fire Pump and Different Preheater, AQ-24	Opening Br. at p. 10.	PG&E Rebut. at pp. 10-11, 17. PG&E admits that it built different equipment.
Significant Revision of Major Facility Review Permit, Violation of AQ-41	Opening Br. at p. 12.	No response.
Title IV Acid Rain Permit, AQ-42.	Opening Br. at p. 12.	PG&E Rebut. at p. 20. PG&E states that because it told the regulators that it planned to commence operation before 24 months that this was not a violation.
Source Testing, Violation of AQ-29, 30 and 32	Opening Br. at p. 13.	PG&E Rebut. at p. 21. PG&E states that it complied with the compliance agreement, not with the conditions.

As to the rest of the violations, PG&E's arguments that they did not occur are unconvincing. For example, PG&E claims that it did not violate the requirement of using a CO_2 monitor during the commissioning period because "due to an oversight, the previous owner apparently failed to request a conforming change in the CEC decision until PG&E did so." PG&E Rebut. at pp. 15-16[2] (describing how CO_2 has been calculated and recorded, but that its monitoring plan used an "O_2 diluent monitor"). PG&E cannot blame the previous owner for its failure to modify conditions of certification when it took responsibility for these conditions upon change of ownership. *See* Ex. 4 (PG&E became the "responsible party for compliance with the conditions of certification" when it acquired sole ownership of the facility).

C. PG&E's Noncompliance Is Significant.

Even though the Commission's regulations and PG&E's certification require a petition for any, even insignificant, changes to certification conditions, *see supra* at pp. 3-4, PG&E's

violations were significant.

1. PG&E's Noncompliance Is Significant Because PG&E Knowingly Constructed and Started Operating in Violation of Conditions of Its Certification.

This is not a case of insignificant noncompliance because PG&E *knew* it needed to change its certification before it finished construction and started operating. PG&E petitioned the Commission to make several "necessary" changes to its certification conditions in January 2008, which it later withdrew as "no longer necessary." *See* Ex. 13; Ex. 6 at pp. 2, 4, 9. Contrary to PG&E's statement, many of the changes it requested were necessary. *Compare* Ex. 14 *with* Ex. 6; *see* Opening Br. at pp. 6-12 (describing how PG&E had to re-request many of the same changes); *see also* Pub. Resources Code, § 25534 (Commission can "revoke certification or impose civil penalties" for "[a]ny material false statement . . . included in supplemental documentation provided by the applicant"). PG&E's knowing disregard of the requirements to comply with and petition for changes to its conditions of certification was a significant violation of this Commission's requirements. *See id.* at § 25500; Cal. Code Regs., tit. 20, §§ 1769, 1770.

2. PG&E's Noncompliance Is Significant Because PG&E Built and Started Operating Equipment Without Approval from the Commission.

PG&E's noncompliance was also significant because PG&E constructed and started operating equipment that had not been approved by the Commission. PG&E argues that its failure to receive permission for constructing the fire pump and new dew-point heater did not violate any requirements because the dew-point heater is smaller than the original permitted heater, and the fire pump was required by the Fire Marshal. Both of PG&E's excuses are unavailing.

PG&E's arguments are contrary to the law and this Commission's "essential role to

[2] PG&E states that it requested some of the proposed changes in October 2008, but the Commission

ensure that a reliable supply of energy is provided consistent with protection of public health and safety." Pub. Resources Code, § 25300. As part of the Commission's "essential role," when examining equipment changes such as the dew-point heater and fire pump, the Commission applies the California Environmental Quality Act (CEQA), which requires a comprehensive assessment of environmental impacts. *See* Pub. Resources Code, § 25519; *id.* at § 21000 (describing CEQA's policy goals). Accordingly, the Commission examines the operation of equipment for all types of potential environmental impacts including water, air, public health, hazardous wastes, and noise. *See, e.g.*, Ex. 2. Importantly, the Commission, not the utility, completes this comprehensive evaluation. PG&E cannot rewrite the Commission's requirements and unilaterally determine when it should seek the Commission's approval.

PG&E's argument that utilities should be able to install smaller pieces of equipment without the Commission's approval should be rejected. *See* PG&E Rebut. at p. 9. In addition to the issues discussed above, PG&E's argument is also factually unavailing because equipment at a power plant is interconnected, and a change in one piece of equipment is likely to impact the operation of other equipment. This is particularly true for pre-heaters whose goal is to increase the thermal efficiency of the entire plant.[3] Therefore, the calculation of the environmental impact from a change to a piece of equipment cannot be done in isolation.

PG&E apparently believes that it must comply with the Fire Marshal orders, but that compliance with the Commission's requirements is optional. PG&E's reliance on the Fire Marshal's requirement to excuse its construction of the fire pump without Commission approval is erroneous and unconvincing. *See* PG&E Rebut. at pp. 10-11. Delay of regulatory approval is not an excuse to violate the law. The facts demonstrate that PG&E significantly delayed seeking

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docket does not list an October 2008 filing, and PG&E has not included it as an exhibit.

approval for the fire pump, not that PG&E is without fault. PG&E learned that it needed to change its fire pump in March 2007. *See* Ex. 26 (PG&E Gateway Diesel Fire Pump Notice of Violation Timeline). PG&E waited over two years before it submitted the May 2009 petition (it also petitioned to add the fire pump in January 2008, but this was withdrawn in February 2009). *See* Ex. 6, 14. Despite not having regulatory approval, PG&E installed the fire pump in April 2008 and operated it in May 2008 without permission. *See* Ex. 26.

Likewise, PG&E cannot now blame the Commission for its failure to diligently apply for changes to its certification. This situation is similar to PG&E's delay in the Tesla case:

> After several years of no action, the Commission Staff met with FPL – and PG&E – in 2008 to discuss strategies for amending the project. (7/20/09 RT 66 - 68.) There is no evidence explaining why FPL (or PG&E) still took no action then, or why PG&E waited to file its Petition until April 24, 2009, less than two months before the construction deadline.

See Tesla Decision, Order 09-923-11 at p. 4 (Sept. 23, 2009). Here, PG&E should not be excused from its failure to comply with this Commission's requirements when it waited many months before seeking permission for the installation of the fire pump engine.

3. PG&E's Noncompliance Is Significant Because PG&E Is Violating Several Air Quality Requirements, Including the Requirement to Install the Best Available Control Technology.

PG&E's violations are significant because it has disregarded important air quality requirements requiring, among other things, the installation of the Best Available Control Technology (BACT). Indeed, PG&E is currently emitting tons of harmful air pollutants without a valid authority to construct, operating permit, or Prevention of Significant Deterioration (PSD) permit. This failure is a violation of PG&E's certification conditions and the Commission's requirements. *See* Opening Br. at pp. 14-18.

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[3] *See* U.S. EPA, Air Pollution Training Institute, Course SI 428A, Introduction to Boiler Operation at I-13-I-14 (Oct. 1984), *available at* http://yosemite.epa.gov/ (generally defining the purpose of a preheater).

Despite the significance of these violations, PG&E fails to meet the charges and offers no explanations. PG&E also fails to respond to Complainants' description of how PG&E's noncompliance with air quality requirements violated Commission rules and its certification. *See* Opening Br. at pp. 14-18 (citing Pub. Resources Code, § 25525, Cal. Code Regs., tit. 20, § 1744.5, AQ Conditions 13-15, 17, 18, 19, 20-23, 26, 27, 30, 31).

Further, PG&E's argument that it somehow has a PSD permit is nonsensical. PG&E Rebut. at 13. PG&E rests its argument on an incorrect reading of 40 C.F.R. § 52.21(r), which it infers only applies to delays in "phases" of construction. *See* PG&E Rebut. at 13. This is contrary to the plain language of the regulatory provision stating that PSD permits expire after an 18 month "delay" in construction. *See* 40 C.F.R. § 52.21(r). Even according to PG&E's own timeline, well over 18 months elapsed between the stoppage of construction and the restart of construction. *See* PG&E Rebut. at Attachment A (admitting construction delay from August 2002[4] to February 2007).

In addition, PG&E claims that its state-issued authority to construct permit was extended in 2003; yet, it offers no evidence in support. The document that PG&E points to, Ex. 316, never mentions an extension of the authority to construct in 2003. Nevertheless, this is not an issue that needs to be resolved to determine whether PG&E's PSD permit is valid since BAAQMD, as illustrated by PG&E's timeline, did not have authority over the federal PSD program from March 2003 until June 2004. *See* PG&E Rebut. at Attachment A. In sum, PG&E's failure to properly obtain valid air permits resulted in violations of the Commission's requirements and its

[4] PG&E is now stating that construction was suspended in August 2002. This is contrary to PG&E's January 15, 2008 submission to the Commission in which it stated that "[c]onstruction began in late 2001 but was suspended by Mirant in February 2002." It also contradicts assertions made in connection with the change to eliminate the use of the San Joaquin River as a source. *See* Ex. 5 ("[c]onstruction of the facility started late in 2001 and was suspended in February 2002 due to financial difficulties").

conditions of certification, which should have been updated to reflect these requirements[5]. *See* Opening Br. at pp. 15-18. (Air District has stated that PG&E does not have required air permit).

D. PG&E's "Affirmative Defenses" to the Complaints Fail.

PG&E reasserts three "affirmative defenses" that purport to preclude the Commission from adjudicating the complaints. PG&E Rebut. at pp. 2-5. These arguments, on which PG&E bears the burden of proof, *see, e.g., Gomez v. Lincare, Inc.* (2003) 173 Cal.App.4th 508, 515 (defendants bear burden of proof for affirmative defenses), fail because the post-certification complaint was timely, the Complainants specifically identified the conditions of certification that PG&E did not comply with, and the Commission has jurisdiction to determine whether PG&E is in compliance with the conditions of certification pertaining to air quality.

1. The Post-Certification Complaint Was Timely.

PG&E misconstrues the complaints as a Petition for Reconsideration of the 2001 certification under section 25530, and then argues that it is barred by the 30-day statute of limitations for bringing that type of motion. *See* PG&E Rebut. at pp. 2-3. This case is not challenging the validity of the original certification; this case challenges PG&E's failure to seek a post-certification amendment before finishing construction and beginning operation.

ACORN diligently filed its post-certification complaint within 30 days of PG&E's May 7, 2009 filing, which alerted the public, and ACORN, to the extent of noncompliance at GGS. Because complaints of noncompliance with the conditions of certification brought pursuant to section 1237, like ACORN's, are not restricted to section 25530's time limit, PG&E's defense fails. *See* Cal. Code Regs., tit. 20, § 1237, subd. (a).

[5] Complainants are aware that an EPA complaint against PG&E and a proposed consent decree were lodged in federal district court last week. Like many of PG&E's actions in this case, PG&E failed to inform the Commission and the Complainants when this occurred even though the Complaint was filed before PG&E's rebuttal brief.

2. The Complaint Specifically Alleged the Facts Supporting PG&E's Noncompliance.

PG&E contends that the complaint did not comply with section 1237 of the siting regulations because it did not "state facts demonstrating that an Applicant is in noncompliance with the Commission Decision." PG&E Rebut. at p. 4. Section 1237 requires that post-certification complaints provide "a statement of facts upon which the complaint is based." Cal. Code. Regs., tit. 20, § 1237, subd. (a)(3). ACORN's complaint indeed contains the requisite factual statement (Complaint at pp. 2-9), and specifically cites to the evidence (mostly consisting of publicly available documents submitted to the Commission and BAAQMD by PG&E) supporting each allegation. (These documents supporting Complainants' allegations have since been entered into evidence in this proceeding as Exhibits 1-35.) Therefore, the complaint complies with section 1237's procedural requirements.

3. The Commission Has Jurisdiction to Determine PG&E's Compliance with the LORs and Air Quality Conditions of Certification.

PG&E argues that the Commission does not have jurisdiction to determine the validity of GGS's PSD permit. Complainants do not ask the Commission to adjudicate the validity of the PSD permit. *See* Opening Brief at pp. 15-17. Rather, Complainants simply request that the Commission determine whether PG&E is in compliance with the applicable LORs and air quality conditions that are contingent on PG&E having a valid PSD permit and complying with BACT. In any case, the determination of whether PG&E has a valid PSD permit has already been made by EPA, who found that PG&E is in violation of the requirement for GGS to have a PSD permit. *See* Ex. 325 (EPA Notice of Violation); *see also supra* n. 5 (describing recent filing of court case by EPA).

III. 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: October 1, 2009 Respectfully Submitted,

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IN THE MATTER OF THE COMPLAINT AGAINST

GATEWAY GENERATING STATION

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

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DECLARATION OF SERVICE

I, Lucas Williams, declare that on October 1, 2009, I served and filed copies of the attached **JOINT REPLY BRIEF OF COMPLAINANTS**. 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
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Courtesy paper copies to the following:

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

/s/ Lucas Williams