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STATE OF CALIFORNIA
ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:	)	Docket No. 00-AFC-1C
	)	
	)	
GATEWAY GENERATING STATION	)	STAFF BRIEF
	)	
	)	RE: COMPLAINT PROCEEDINGS
	)	BASED ON FILINGS BY ACORN,
	)	RORY COX, AND CARE
	)	

INTRODUCTION

On June 5, 2009, the Contra Costa branch of the Association of Community Organizations for Reform Now (ACORN) filed a document entitled a "Complaint" pursuant to California Code of Regulations, Title 20, section 1237 regarding the operational status and efficiency of the Gateway Generating Station (Gateway), which is owned and operated by Pacific Gas and Electric (PG&E). On June 29, 2009, Rory Cox of the Local Clean Energy Alliance filed a document entitled "Complaint" in the same matter. On July 17, 2009, a document was submitted by CARE, Bob Sarvey, Rob Simpson, and Mike Boyd entitled "Complaint Request for Official Notice Comments on Staff Report Comments on Amendment Petition to Intervene." (The three filings are hereafter referred to as the "Complaints.")

Staff analyzed whether the "Complaints" met the statutory requirements under Title 20, California Code of Regulations section 1237. Staff noted numerous legal and factual insufficiencies in the documents filed by the complainants, and recommended that the "Complaints" be dismissed pursuant to Section 1237(e)(1). Staff further recommended that any outstanding issue that was raised by the "Complaints" be consolidated into the pending Amendment proceeding. Staff's recommendation was denied, and the parties were ordered to appear at a hearing on the "Complaints" on August 5, 2009.

On August 5, the hearing on the "Complaints" was held. During the course of the hearing, the parties were directed by the Hearing Officer to work together to reach "as much as a resolution as you can." At the end of the hearing, however, the issues remained undefined. The complainants were unable to articulate which conditions of certification were at issue and what evidence was required to demonstrate non-compliance. At the conclusion of the hearing, the parties were directed to brief what they believed were the relevant issues.

ANALYSIS

Complainants Joint Opening Brief sets forth a series of allegations arguing Gateway's non-compliance with the Energy Commission's Certification. Complainants further argue that the issue of the Prevention of Significant Deterioration (PSD) permit is before the Energy Commission, and that PG&E's failure to obtain an Authority to Construct (ATC) and Preliminary Determination of Compliance (PDOC) for the equipment that it installed violates LORS. Lastly, the Complainants argue that PG&E circumvented the Energy Commission's public participation requirements. Except for issues regarding PG&E's unauthorized installation of the diesel-fire pump, none of Complainants' arguments have any merit.

I. CONDITIONS OF CERTIFICATION

A) Applicable Conditions

Complainants are correct in their assertion that "PG&E should have received approval from the commission for (the) modifications before beginning construction of these modifications and commencing operation." (Complaint, p.10) Those modifications include two equipment changes: the installation of a different size dewpoint heater, and the installation of a diesel fire pump in place of the electric fire pump.

Complainants also allege violations of AQ-38 (requiring contact with the District within 180 days of the issuance of the ATC); AQ-24, AQ-39, and AQ-40 (regarding emission reduction credits); and AQ-29, AQ-30, AQ-32 (requiring source testing). The evidence does not support a finding that PG&E has violated these conditions.

In accordance with Title 20, section 1769(a)(3) of the California Code of Regulations, the Energy Commission may approve project modifications if specific findings are met. As to the applicable Conditions of Certification (as discussed below), the Energy Commission found that there were no new or additional unmitigated significant environmental impacts associated with the approved changes; that compliance with proposed changes to conditions of certification would ensure compliance with all applicable LORS; that the facility design changes were beneficial to PG&E and the public; and that there has been a substantial change in circumstances since the Energy Commission's original Certification justifying the modification to equipment and Air Quality conditions of certification that were not contemplated during the certification process.

1) AQ-24, AQ-47, AQ-SC5 (Change to the Dewpoint Heater)

The project owner included in its May 8, 2009 Petition to Amend a request to approve the substitution of a smaller gas heater unit (called a dewpoint heater) for the previously

permitted gas-fired pre-heater units, and to increase the operating hours to 24 hrs/day.[1] At the August 26, 2009 Business Meeting, the Commission's Order brought the project decision into agreement with the project as built and still compliant with the air district's rules. All emissions from the heater have been included in the facility's total emissions, which were mitigated with emission reduction credits. While the revision to the condition allowed for an increase in operations from 16 hours per day up to 24 hours per day, the significant reduction in size (from 12 MMBtu/hr to 6.5 MMBtu/hr) reduces the emission rate and total daily emissions.

The Energy Commission's original decision contemplated a gas-fired heater to preheat fuel. Staff notes that the dewpoint heater satisfies the expectation that fuel would be pre-heated prior to entering the turbine, and does so with an overall reduction in emissions even with an increase in permitted operations from 16 hours per day to 24 hours per day. While PG&E now argues that a Petition to Amend was not necessary to install the dewpoint heater, such a petition was nevertheless submitted in good faith and approved by the Energy Commission.

Inherent in the Energy Commission's approval of the change to a smaller dewpoint heater is the finding by the Commission that that this change does not pose any risk to public health and safety, in large part due to an overall reduction in emissions. Therefore, staff concludes that there was no violation of these applicable conditions of certification with respect to the dewpoint heater.

2) AQ-SC6 through AQ-SC11 (Change to Diesel Fire Pump)

At the August 26 Business Meeting, the Energy Commission has also approved the substitution of a diesel fuel-fired fire pump engine for the previously permitted electrical motor driven fire pump to improve the facility's safety in case of emergency and to meet the requirements of the local fire marshall. While the project owner installed the diesel engine without a permit from the Energy Commission, once the engine was identified as unpermitted, the owner has not operated the engine and has worked to secure the permits.

Staff's analysis showed that the project owner's calculated maximum incremental cancer risk from operating the added diesel fire pump is 0.82 in one million, which is significantly below staff's significance criterion of 10 in one million. Even when conservatively added[2] to the risk of 0.86 in a million as calculated for project operations, the resulting risk of 1.68 in one million would be insignificant according to staff's significance criterion. The indices of risks of noncancer impacts are similarly insignificant according to staff's assessment criteria. Staff verified the reliability of the

[1] Staff notes that the dewpoint heater is exempt from BAAQMD rules and expects that equipment specific conditions will be deleted from the district permit. The August 26, 2009 Order adopted by the Energy Commission retained the specific conditions in the Decision.

[2] Staff notes that adding the cancer risks will over-estimate the project risk. However, given the low risks that were being added, staff did not see a need for refined analysis.

applicant's risk modeling and calculations and found that the added diesel fire pump would not pose a significant public health hazard with regard to the noncriteria pollutants generally considered in the Energy Commission's Public Health analyses.

The original Certification contemplated the use of an electric fire pump generator, rather than the diesel fuel-fired fire pump engine that was installed without authorization. The Energy Commission's approval of the Petition to Amend reflects that there are no significant impacts from this change. Nevertheless, the project owner failed to obtain approval from the Energy Commission, with input from BAAQMD, prior to the installation of the diesel fire pump engine, thus violating these specific conditions.

3) AQ-38 (Contact BAAQMD within 180 days re: equipment)

AQ-38 requires the project owner contact BAAQMD within 180 days after issuance of the ATC to determine monitoring of its equipment. The evidence demonstrates that PG&E did contact BAAQMD within 180 days of the issuance of the original certification, which as described below, serves as the authority to construct.

4) AQ-24, AQ-39, AQ-40 (Emission Reduction Credits)

Complainants allege that "PG&E failed to demonstrate valid ERC's prior to constructing and commencing operations of the facility as modified." (Complainant's Brief, p. 10) Complainants overlook the fact that the Gateway facility did surrender emission reduction credits in accordance with its 2001 certification. Complainants also overlook the fact that the Gateway facility was approved by the Energy Commission to convert to dry cooling in 2007 and that the switch to dry cooling (through use of an air cooled condenser unit rather than a cooling tower) lowered the facility's particulate matter emissions. Facility permit limits and requirements for emission reduction credits were adjusted downward accordingly.

Indeed, the installed dewpoint natural gas heater that was the subject of the May 8, 2009 Petition to Amend emits less emissions per hour, per day and per year than what is otherwise allowed under the original conditions of certification, and could result in lower facility emission limits and emission reductions accordingly. Additionally, the diesel fire pump engine that is installed is not operating, pending final review by BAAQMD. As approved by the Energy Commission, that diesel fire pump engine has unit-specific emission and operating limits (for testing and maintenance only) and is expected to operate under the existing overall facility emission limits. Neither the dewpoint natural gas heater nor the diesel fire pump engine would require additional ERC's.

Complainants provide no evidence how the several changes that have resulted in overall emissions reductions would require the surrender of additional ERC's by PG&E. Exhibit 318 demonstrates that the required ERC's were surrendered to BAAQMD as required. The allegations regarding ERC's are therefore without merit and should be dismissed.

5) AQ-29, AQ-30, AQ-32 (Source Testing)

Complainants allege a violation of these specific conditions due to the PG&E's failure to conduct source testing within 60 days of commencing operations. However, complainants also acknowledge that PG&E entered into a compliance agreement with BAAQMD that allowed additional time to complete the source testing. (Ex. 315) Because the compliance agreement adequately addressed this issue, staff believes that there is no violation of these conditions of certification.

B) Inapplicable Conditions

In an attempt to justify their "complaints" against the Gateway facility, complainants rely heavily on conditions that have retained vestiges of the original Conditions of Certification that were rendered inapplicable through the Energy Commission's prior approval of the 2007 Petition to Amend. The Energy Commission granted that Petition on August 1, 2007, thereby authorizing the installation of dry cooling in place of the use of San Joaquin River water, and changing certain conditions of certification related to that change.

Complainants suggest that any difference between the wording of certain conditions of certification and the project as built results in a violation of that Condition. This simplistic view ignores the Commission's approval of dry cooling as a modification of the originally certified project and argues that any noncompliance with those provisions, even though they clearly do not apply to dry cooling, results in a violation. While substantive differences between the language of the condition and the project as built could indeed result in a violation of that condition, requirements that are inconsistent with the Commission's approval of dry cooling, but inadvertently remain in a condition because of administrative oversight, should be viewed as inapplicable.

1) Definition of Commissioning Period

Complainants claim a "Violation of Definitional Condition of Certification" because PG&E did not remove the phrase "and has initiated sales to the power exchange" during the commissioning period. However, complainants acknowledge that the "power exchange" to which the definition refers is no longer in existence. This fact renders the last eight words of the definition impossible to perform, impossible to enforce, and therefore inapplicable.

2) AQ-6 (CO_2 Monitoring during commissioning)

Complainants point out on page 9 of their brief that Condition AQ-6 required CO_2 monitoring during the commissioning period. Complainants disregard Exhibit 316, which shows that a typographical error in the original license incorrectly required the original owner use a CO_2 monitor, rather than what was intended, an O_2 monitor. The incorrect reference to a CO_2 monitor remained in the condition through oversight, and has now been corrected through the recent Amendment approved on August 26, 2009.

3) AQ-20, AQ26, AQ30 (Steam Injection Power Augmentation)

The expectation that the project owner would use Steam Injection Power Augmentation was eliminated in the Energy Commission's Order on August 1, 2007. Any references to Steam Injection Power Augmentation that were found in the conditions AQ-20, AQ26, and AQ30 remained only because of an administrative oversight, and are therefore inapplicable.

Steam Injection Power Augmentation increases emissions. Staff's analysis indicated that the elimination of this requirement resulted in a net *reduction* in emissions in the facility. This is not an issue that negatively affects public health and safety, and is another example of the complainant's approach of "form over substance."

4) AQ-24 (Cooling Tower/Fuel-gas preheater)

Here, complainants argue that the project owner's failure to measure emissions from the non-existent cooling tower, as well as the fuel-gas preheater that was not installed, somehow results in a violation of this condition.

AQ-24 was intended to limit the total combined emissions from the facility. The language in AQ-24 referring to the cooling tower is a vestige of the original license. The removal of the cooling tower from the project resulted in a reduction in emissions. Also, the smaller dewpoint preheater is exempt from district rules, so it did not and will not require a source test. However, it is exempt for a reason – it is small and has generally known emissions performance. Emissions are capped for the facility, and the emissions from the smaller dewpoint preheater are included in the annual facility emissions, which are fully mitigated and offset.

There are a number of environmental benefits from dry cooing over wet cooling, including no PM10 emission and no consumptive water use. This is not an issue that affects public health and safety. PG&E has amended the project to ensure the project permit agrees with the project as built, removing all outdated references within the conditions of certification.

5) AQ-41 (Significant Revision to Major Facility Review Permit)

Complainants allege a violation of this condition based on PG&E's withdraw of its permit from BAAQMD, and connect this issue with the pending proceeding before the USEPA regarding the PSD permit. As discussed below, this is an issue that should be raised before the USEPA, not the Energy Commission.

6) AQ-42 (Title IV Acid Rain Permit)

Complainants allege a violation of AQ-42 regarding the Title IV Acid Rain Permit. However, the evidence demonstrates that this Federal Permit was properly filed with the agencies with the appropriate jurisdiction to enforce such a permit. As pointed out by the project

owner on page 20 of their brief, "[n]either BAAQMD nor USEPA – both of whom received this application – have raised any objections regarding the issue in the 31 months since the application was filed." If complainants wish to raise enforcement issues or address perceived defects in the Title IV Acid Rain Permit, those are matters that should be brought before the appropriate agency, the USEPA, as discussed below.

8) AQ-2, AQ-7, AQ-19, AQ-20, AQ-26 (NOx Excesses)

Complainants have alleged violations of specific violations regarding NOx excesses, and provided documentary evidence that suggested that these violations had occurred in January and March 2009. However, additional evidence has been submitted by PG&E with their reply brief that demonstrates that no violation occurred.

The Notice of Violation (NOV) is issued as a part of a process of monitoring under the District's authority. It is a process, and not a one-time event. An NOV identifies the non-compliant event or equipment, and then seeks clarification or resolution. As a result of the NOV process, BAAQMD may identify a penalty based on intent or frequency or duration of any non-compliance. An NOV may result in a non-event, as there may have not even been a violation. From the evidence presented, it appears that on the two dates in question no violation occurred. Staff sees no need to insert the Energy Commission into the NOV process that is adequate and appropriate to solve this type of issue.

II. APPLICABLE LAWS, ORDINANCES, REGULATIONS, AND STANDARDS

A) Validity of the Prevention of Significant Deterioration (PSD) permit

Complainants attempt to bring the issue of the PSD permit before the Energy Commission. Staff notes that PG&E is working with the US Environmental Protection Agency (USEPA) to obtain an updated PSD permit as required by the 2001 Certification. Furthermore, even if the project currently lacked a PSD permit, which is a federal permit, its absence would not invalidate the Energy Commission's certification. There is no prerequisite that the applicant obtain all applicable federal permits under Public Resources Code section 25500 before the Commission's certification is considered valid. Similarly, if a federal permit is legally challenged, the challenge does not invalidate the Energy Commission's certification.

The enforcement authority over the specific terms and conditions of a PSD permit, including BACT, are with the USEPA, not with the Energy Commission. Complainants acknowledge on page 15 of their brief that "the Commission is not the primary agency responsible for enforcing air quality laws," yet nevertheless assume the Committee must hear the issue of the PSD permit in this proceeding. That issue is to be decided in the proper forum, before the USEPA.

B) Final Determination Of Compliance (FDOC)

Complainants assert that "PG&E does not have a final determination of compliance from the air district." Complainants' assertions regarding the FDOC reflect a misunderstanding of post-certification amendments and the original application proceeding.

Complainants cite section 1744.5 of the Energy Commission's regulations to claim that the facility as built lacks a determination of compliance as required by that section. However, complainants' assertion overlooks the fact that section 1744.5 applies to the application proceeding, not to post-certification amendments. Section 1744.5 states in pertinent part, "The local air pollution control officer shall conduct, *for the commission's certification process*, a determination of compliance review of the application in order to determine whether the proposed facility meets the requirements of the applicable new source review rule and all other applicable district regulations." (Cal. Code Regs., tit. 20, § 1744.5, subd. (b); emphasis added.) Because the application process has been completed and resulted in a certification that remains valid, section 1744.5 ceases to apply to the constructed Gateway facility. What governs post-certification amendments is section 1769 of the Commission's regulations. (Cal. Code Regs., tit. 20, § 1769.) Indeed, on August 26, 2009, at the regularly scheduled Business Meeting, the Energy Commission approved the Petition to Amend the Gateway facility filed by PG&E in accordance with section 1769.

Here, the FDOC was initially released on February 6, 2001 during the Energy Commission's Application for Certification proceeding. Staff notes that the owner has requested and received modifications from BAAQMD to the FDOC since its initial release. Staff is aware of the current application for modification to the FDOC regarding the diesel fire pump and the smaller dewpoint heater is pending at BAAQMD. Thus, the claim that the project owner did not obtain an FDOC is incorrect.

C) Authority To Construct (ATC)

With respect to an authority to construct (ATC), Public Resources Code Section 25500 vests with the Energy Commission the "exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility." Section 25500 further provides that:

> The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law…and shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.

The Energy Commission's certification is issued in lieu of other required permits, such as the ATC. The Energy Commission's final decision, containing the conditions prescribed in the FDOC, serves as the authority to construct.[3] The district's issuance of an ATC for a

[3] Exhibit 1, Memorandum of Understanding between ARB and Energy Commission, pages 7 - 8

project under the Energy Commission's jurisdiction is a ministerial act to ensure the Commission's decision, in fact, incorporates the district's conditions in its FDOC.

Here the ATC was originally issued on July 24, 2001. Staff notes that the owner has requested and received modifications from BAAQMD to the ATC since the initial release of that document. Also, a current application for modification to ATC regarding the diesel fire pump engine is pending at BAAQMD, and that proposed modification also identifies the current, installed smaller dewpoint heater. Thus, the claim that the project owner did not obtain an ATC is incorrect.

III. PUBLIC PARTICIPATION

Gateway was certified by the Energy Commission on May 30, 2001. Pursuant to Public Resources Code section 25523, the Energy Commission prepared a written decision in this matter, which was adopted at a regularly scheduled and publicly noticed business meeting. An amendment switching to dry cooling was approved in 2007 by the Energy Commission after the required public process, at which time the public was afforded the opportunity to participate. (Ex. 5)

In January 2008, PG&E filed the first of two amendments that covered substantially the same matters. (Ex.'s 6, 14). Staff published a Public Notice for each of these proposed amendments. The first Petition to Amend was withdrawn on February 13, 2009. (Ex. 13) The second Petition to Amend was filed on May 8, 2009, and was heard at the regularly scheduled business meeting on August 26, 2009, at which time the Energy Commission approved the requested changes. The latest Petition to Amend was approved only after the public had been afforded the opportunity to participate, not only in the instant proceeding, but from the time that the original petition was filed in January 2008.

Complainants were afforded the opportunity to participate in each and every one of the Amendment proceedings. However, as discussed above, most of the issues now raised by the complainants are either not relevant (such as their reliance on inapplicable conditions of certification), or concern matters that are outside the Energy Commission's jurisdiction (such as the PSD permit). On those issues that may have some technical merit, the issues of the dewpoint pre-heater and the required diesel fire pump, the Energy Commission has already approved of those changes in its August 26, 2009 Order. Given the above, claim that PG&E circumvented the Energy Commission's public participation requirements "in the certification process" is without merit.

CONCLUSION

Staff maintains that none of the original "Complaints" filed by the parties under Title 20, California Code of Regulations, section 1237, were legally or factually sufficient. It was not until after the hearing on August 5 that any specific conditions of certification were identified as required pursuant to section 1237(a)(4), which requires "a statement indicating the statute, regulation, order, decision or condition of certification upon which

the complaint is based." Even now, a review of the Brief filed by the complainants demonstrates a lack of a rational explanation as to how the majority of those specific conditions of certification identified therein have been violated in a meaningful way. With exception to the specific conditions of certification discussed above, the "complaints" should be dismissed, therefore, for insufficiency and for lack of merit.

Through these proceedings, evidence was introduced demonstrating violations of conditions of certification relating to the unauthorized installation of the diesel fire pump generator, specifically conditions AQ-SC6, AQ-SC7, AQ-SC8, AQ-SC9, AQ-SC10, and AQ-SC11. Staff therefore concludes that PG&E was in violation of the terms of these conditions of certification.

Date: October 1, 2009

Respectfully Submitted,

Kevin W. Bell /s/
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Senior Staff Counsel

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA
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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, Janet Preis, declare that on October 1, 2009, I served and filed copies of the attached Staff Brief re Complaint Proceedings Based on Filings by Acorn, Rory Cox, and CARE. 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 both 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:

(*Check all that Apply*)

For service to all other parties:

_X_ sent electronically to all email addresses on the Proof of Service list;

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_X_ sending an original paper copy and one electronic copy, mailed and emailed respectively, to the address below **(preferred method);**

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

__/s/ Janet Preis__
Janet Preis