

**DOCKET**

**00-AFC-1C**

DATE FEB 04 2010

RECD. FEB 08 2010

Robert Sarvey  
501 W. Grantline Rd.  
Tracy, Ca. 95376

**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**

**Complaints Against** )  
**The Gateway Generating Station** ) **Docket No. 00-AFC-1C**  
**Brought by ACORN, LCEA, and CARE** )  
)  
) Petition of Robert Sarvey for  
) Full Commission Review  
) of the Proposed Order of the  
) Siting Committee

Introduction

Pursuant to California Code of Regulations, Title 20, Section 1237 (f) Robert Sarvey petitions for full Commission review of the siting Committee’s ruling which was circulated on January 25, 2010. The petition for review is based on procedural, factual and legal conclusions that are contained in the order as more fully explained below.

Background

On July 17, 2009 I filed a complaint at the Energy Commission, alleging Gateway’s noncompliance with various aspects of the project’s CEC license and other laws. Two other parties also filed similar complaints. On July 27, 2009, the Commission’s Siting Committee consolidated all three complaints into a single proceeding and bifurcated the proceeding into two phases. The first phase was limited to whether there was noncompliance with the projects conditions of certification, and the second phase was to determine the appropriate penalty, if the Committee found noncompliance.

The Committee held an evidentiary hearing on August 5, 2009. As stated above, the first hearing was limited to whether the Gateway Project was in compliance with the Commission’s 2001 decision and subsequent amendments filed by the project owner. The appellants, including myself, withheld evidence on the appropriate penalty until the first phase was completed, as the Committee order stated that the appropriate penalty would be determined in a second phase of the hearings after non compliance was determined. On January 21, 2010 I

received notice from Maggie Read of the Commission's hearing office that the Committee had reached a decision. That decision concluded that PG&E was in fact out of compliance with the conditions of certification for the Gateway Project. The decision cancelled the second phase of the hearings and assessed a \$10,000 fine on PG&E without conducting a second hearing to allow the petitioners to present their evidence on PG&E's willful non compliance with the Commission's 2001 decision. I do not disagree with the committee's findings of non compliance. This petition seeks full commission review of the Committee's decision to assess a paltry \$10,000 fine and cancel the penalty phase of the proceeding. PG&E's actions were willful and deliberate, and these actions extended not only to noncompliance of the Energy Commission Conditions of Certification but also to the requirements of the BAAQMD and the EPA. In the following paragraphs I will address each element of the decision that I believe should be rejected by the full Commission.

### Issues

The committee ruled that PG&E was not compliant with the project's conditions of certification and found the following:

1. *Gateway was constructed with a preheater different from the preheater approved in the Decision. This is true, and therefore, there is a violation. PG&E was required to obtain an amendment to the Decision before constructing the project with the new preheater. However, there is no substantive harm from the violation because the new preheater has fewer emissions than the preheater approved in the Decision.*

I agree that this was in fact a violation and I also agree that there is "no substantive harm" to the environment. The fact is that PG&E filed for CEC approval for this new preheater on January 23, 2008.<sup>1</sup> PG&E was fully aware that Commission approval was necessary for installation of the new preheater. On February 13, 2009 PG&E withdrew the amendment after the facility began operation.<sup>2</sup> This was an intentional flaunting of Section 1769. Allowing a corporation to flaunt the Commission rules and regulations and escape with a slap on the wrist (i.e. \$10,000) erodes the public's confidence and sends the wrong signal to other power plant developers. It creates an uneven playing field for law abiding power producers.

2. *Gateway was constructed with a diesel engine instead of the electric engine approved in the Decision. "This is true, and therefore there is a violation. However, the violation appears to have been in good faith because the different*

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<sup>1</sup> [http://www.energy.ca.gov/sitingcases/gateway/compliance/200815\\_PETITION\\_TO\\_AMEND\\_AIR\\_QUALITY\\_CONDITIONS.PDF](http://www.energy.ca.gov/sitingcases/gateway/compliance/200815_PETITION_TO_AMEND_AIR_QUALITY_CONDITIONS.PDF) page 4 Exhibit 6

<sup>2</sup> [http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-06-01-Withdrawal\\_of\\_Petition\\_to\\_Amend\\_Air\\_Quality\\_Conditions\\_TN-50406.pdf](http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-06-01-Withdrawal_of_Petition_to_Amend_Air_Quality_Conditions_TN-50406.pdf)

*engine was installed in order to meet the directives of the local fire marshal. Moreover, although the diesel engine will probably cause greater adverse environmental impacts than the electric engine would have, the difference is not significant.”*

I agree that PG&E violated Section 1769 because they did not receive approval of the equipment change. I do not agree that the violation was in “good faith” because PG&E filed for CEC approval for this new fire pump on January 23, 2008.<sup>3</sup> On February 13, 2009 PG&E withdrew the amendment after the facility began operation.<sup>4</sup>

Good faith would require that PG&E be diligent in seeking the Commission’s approval to permit the new fire pump. As stated above, PG&E filed for the modification, constructed the modification, and then withdrew the amendment application.

Good faith would be demonstrated if there were factors beyond PG&E’s control that prevented them from receiving approval. PG&E had over a year to get Commission approval for the modifications. Subsequently after they withdrew their amendment

\ application it took from May 7, 2009<sup>5</sup> to September 1, 2009;<sup>6</sup> less than four months to permit the fire pump and the dewpoint heater. We can say with confidence PG&E could have easily received approval for the fire pump. There were no obstacles to keep PG&E from securing the Commission’s approval.

Good faith would be demonstrated if this was the only noncompliance PG&E has with this project. The fact is, the Commission found that this project has no FDOC and no ATC.<sup>7</sup> The EPA has determined the project has no PSD permit. The project is operating without a permit to operate.

Moreover, it appears that PG&E consciously chose to operate this project without the appropriate permits since they had full confidence that no one, not the Commission, BAAQMD, or the EPA, would require them to shut down the project. Even better, the Commission chose to reward their behavior with a meager \$10,000 fine, which is a fraction of the money they made while operating the project without the Commission’s, BAAQMD’s, or EPA’s approval. Their approach is evident in Attachment 1, which is minutes from a meeting PG&E had with the BAAQMD. During that meeting it was suggested by PG&E’s consultant that a PSD permit would be moot if they just went ahead and operated the project and became subject to compliance action from the EPA rather than obtaining a valid PSD permit. Ultimately that is exactly what PG&E did.

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<sup>3</sup> [http://www.energy.ca.gov/sitingcases/gateway/compliance/200815\\_PETITION\\_TO\\_AMEND\\_AIR\\_QUALITY\\_CONDITIONS.PDF](http://www.energy.ca.gov/sitingcases/gateway/compliance/200815_PETITION_TO_AMEND_AIR_QUALITY_CONDITIONS.PDF) page 4 Exhibit

<sup>4</sup> [http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-06-01-Withdrawal\\_of\\_Petition\\_to\\_Amend\\_Air\\_Quality\\_Conditions\\_TN-50406.pdf](http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-06-01-Withdrawal_of_Petition_to_Amend_Air_Quality_Conditions_TN-50406.pdf)

<sup>5</sup> [http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-05-07\\_PETITION\\_TO\\_AMEND\\_CONDITIONS\\_OF\\_CERTIFICATION\\_TN-51498.PDF](http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-05-07_PETITION_TO_AMEND_CONDITIONS_OF_CERTIFICATION_TN-51498.PDF)

<sup>6</sup> [http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-09-01\\_Order\\_Amending\\_the\\_CEC\\_Decision\\_TN-53025.pdf](http://www.energy.ca.gov/sitingcases/gateway/compliance/2009-09-01_Order_Amending_the_CEC_Decision_TN-53025.pdf)

<sup>7</sup> COMMISSION ORDER PROPOSED DECISION OF THE SITING COMMITTEE page 4.

***“Gary noted that under EPA policy, once a facility starts up, a non-major amendment no longer requires PSD review and public notice, so if amendment issuance were to be delayed until after startup the PSD issues could be moot. However, District would appear to be circumventing the regulatory process if it were to delay. If GGS were to withdraw permit amendment until after commissioning it would be hard for District staff to support, and the Hearing Board to grant, a variance” .<sup>8</sup>***

3. *“Gateway did not obtain a Final Determination of Compliance (“FDOC”) or an Authority to Construct (“ATC”) before construction. These allegations are true, but there is no violation. The Gateway facility required neither an FDOC nor an ATC, as both were subsumed in the Energy Commission’s exclusive “one-stop” certificate.”*

I agree with the Commission that PG&E did not have a final FDOC or an Authority to Construct before they began operation. They also received an NOV for not having an ATC for the diesel fire pump.<sup>9</sup> PG&E also lacks a Permit to Operate. I don’t believe the Energy Commission’s exclusive “one stop” certificate was designed to circumvent the rules of the BAAQMD and other responsible agencies.

5. *Gateway did not have a Prevention of Significant Deterioration (“PSD”) permit before construction. The parties dispute whether this allegation is true, but we need not (and arguably should not) resolve the dispute here. The PSD permit is a federal requirement, so it is for the appropriate federal authorities, not us, to determine whether Gateway was constructed or is operating in violation of PSD requirements. Indeed, there is a pending federal complaint to this effect.*

Gateway did not have a valid PSD permit. This has been confirmed by the US EPA.<sup>10</sup> I believe that the Commission has the duty to the public and under the Warren Alquist Act to find that the project is in compliance with **All** Laws, Ordinances Regulation and Standards before it grants a license or an amendment to a license. This committee ruling actually condones the applicant’s misconduct at the EPA and the BAAQMD.

7. *There was an inadequate opportunity for public participation. This allegation is not true. Moreover, the matter is irrelevant. Any allegations of procedural unfairness in an Energy Commission proceeding are properly adjudicated via a lawsuit against the Commission, not in a complaint proceeding*

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<sup>8</sup> Attachment 1 page 2 lines 15-20

<sup>9</sup> Exhibit 26

<sup>10</sup> Exhibit 31



# Attachment 1

**Alexander Crockett**

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**From:** Brian Lusher  
**Sent:** Thursday, August 07, 2008 11:59 AM  
**To:** Alexander Crockett  
**Cc:** Brian Bateman; Bob Nishimura  
**Subject:** FW: Follow up GGS Air Permit  
**Attachments:** BAAQMD teleconference notes 080408.doc

FYI

-----Original Message-----

**From:** Allen, Thomas [mailto:HTA1@PGE.COM]  
**Sent:** Wednesday, August 06, 2008 10:51 AM  
**To:** Allen, Thomas; Royall, Steve; Nancy L. Matthews; Gary Rubenstein; sgalati@gb-LLP.com; Andrea@agrenier.com; Maring, Jon; Royall, Steve; Espiritu, Angel B; Brian Lusher; Phung, Hoc  
**Cc:** Farabee, David R.  
**Subject:** RE: Follow up GGS Air Permit

<<BAAQMD teleconference notes 080408.doc>>

All

Here are notes from our previous meeting that Nancy prepared. Let Nancy and me know if there are questions or comments

Tom Allen  
Project Manager  
Gateway Generating Station  
925-459-7201 cell 415-317-4463

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**From:** Allen, Thomas  
**Sent:** Thursday, March 03, 2005 12:17 PM  
**To:** Royall, Steve; 'Nancy L. Matthews'; 'Gary Rubenstein'; 'Scott Galati (sgalati@gb-LLP.com)'; 'Andrea@agrenier.com'; Maring, Jon; Royall, Steve; Espiritu, Angel B; 'blusher@baaqmd.gov'; Phung, Hoc  
**Cc:** Farabee, David R.  
**Subject:** Follow up GGS Air Permit  
**When:** Wednesday, August 06, 2008 11:00 AM-11:30 AM (GMT-08:00) Pacific Time (US & Canada).  
**Where:** GGS Conference Callin: 866-257-0480 \*4159735105\*

Gateway Generating Station Teleconference Notes  
August 4, 2008

Participants:

BAAQMD	Alexander (Sandy) Crockett (staff attorney) Brian Bateman (head of Permit Services) Bob Nishimura (senior permitting engineer) Brian Lusher (permit engineer)
PG&E	Tom Allen Steve Royall Hoc Phung Angel Espiritu Teresa DeBono
Latham & Watkins	David Farabee
Sierra Research	Gary Rubenstein Nancy Matthews

Meeting Notes:

1. Discussion of Environmental Appeals Board Decision in the Russell City Energy Center licensing proceeding.

Sandy Crockett provided a summary of the EAB decision on the Russell City Energy Center PSD permit amendment and the timing implications of an EAB appeal for GGS. District was taken to task by EAB for not complying with noticing requirements of 40 CFR 124 and is concerned that the notice provided for the GGS amendment might also be viewed by EAB as deficient. Sandy is concerned that the EAB plaintiff in the RCEC case would appeal the GGS permit to the EAB on the same grounds. He indicated that the RCEC plaintiff had been in contact with Bob Sarvey, who had submitted public comments on the GGS draft permit. He noted that power plant project opponents such as Sarvey appear to have discovered that the EAB appeal process is an effective means of delaying projects since an EAB appeal stays the PSD permit for 6 months or more even if EAB ultimately rejects the appeal.

2. Renoticing under Section Title 40 Part 124 requirements. Area lists of interested parties by Region.

District believes that it may be preferable to renotice the amendment using a District-wide rather than a countywide notice list, resulting in a 30-day delay for issuance of the amended PSD permit but eliminating the RCEC plaintiff's ability to appeal this issue to the EAB.

Gary Rubenstein indicated that we expect the permit to be appealed to the EAB by Sarvey anyway. He stated that since the time-critical element for PG&E was the commission-related permit conditions, and since an appeal would stay the permit whether it had any merit or not, it's not clear that any time would be saved by renoticing the draft



permit. Sandy suggested that it may be easier for the EAB to dismiss the appeal without the notice issue.

3. Public Meeting may be required under Title 40 Part 124.

District also noted that if amendment is renoticed, comments could request a public hearing. Gary and David Farabee recommended that if the permit is renoticed, PG&E should request a public hearing so the hearing notice period could run concurrently with the comment period, avoiding additional delays.

4. AC amendment considered a non-major modification of PSD permit.

There was a discussion of the need for amended CO emission limits during commissioning. Gary and Steve Royall explained that the limits in the current permit are not adequate; if amendment is delayed beyond project startup, GGS may need to request variance from Hearing Board. Gary and Tom Allen indicated that GGS is exploring ways of reducing CO emissions during commissioning to comply with current limits, such as installing oxidation catalyst before first fire. Gary noted that under EPA policy, once a facility starts up, a non-major amendment no longer requires PSD review and public notice, so if amendment issuance were to be delayed until after startup the PSD issues could be moot. However, District could appear to be circumventing the regulatory process if it were to delay. If GGS were to withdraw permit amendment until after commissioning it would be hard for District staff to support, and the Hearing Board to grant, a variance.

5. Basis of revised annual CO limit.

Brian Lusher said he had received information from Sierra on this topic; it appeared to address his questions and he will contact Sierra directly if he had additional questions.

6. Additional discussion on fast start/rapid start technology and the possible implementation of this technology for this project.

District staff believe they need to address startup BACT in response to comments. Brian Lusher noted that he had received some information from Sierra to address this. Gary noted that EPA had addressed this issue in the Colusa PSD permit; Brian will look at the information PG&E has already submitted, and may request additional information, to assist in preparing his response. There was a general discussion of the physical changes necessary to implement fast start technology – software changes alone are not adequate-- and why this is not feasible for GGS at this point in project development.

Brian would like to include a warm startup time limit in the GGS permit as one way to address the BACT issue. There was a general discussion regarding the need to maintain the 900 lb/hr CO limit—that the hourly limits could not be lowered. The District understands this issue.

#### 7. NH<sub>3</sub> Slip/Secondary PM

Brian Lusher indicated that the CEC staff was pressuring the BAAQMD staff on the proposal to raise the ammonia slip limit to 10 ppm. He had reviewed the District's studies on the contribution of ammonia to secondary particulate. Although previous District statements were that ammonia did not contribute to secondary particulate in the BAAQMD, some staff members were now reevaluating that position. He noted that many recent projects had accepted 5 ppm ammonia slip limits.

Gary pointed out that the 5 ppm slip limits for recent projects were proposed or accepted for other reasons, including BACT determinations (San Luis Obispo County APCD and SCAQMD), and these reasons are not relevant to GGS. He said that the District staff had been consistent in its position regarding the contribution of ammonia slip to secondary PM in the Bay Area, and that if the District staff changed the technical conclusions regarding atmospheric chemistry, GGS would accept that determination. However, the BAAQMD staff, not the CEC staff, were the experts on this air quality issue.

#### 8. Excursion Language Necessary? Justification for Excursion Language?

Brian Lusher asked for some justification for the requested excursion language in the draft permit. Gary indicated that Sierra was working on an analysis of acid rain monitoring data to address the question, and that a summary of the analysis would be provided to the District when it was completed later this week.

#### 9. CO<sub>2</sub> BACT

Brian Lusher said the District believes that CO<sub>2</sub> emissions need to be addressed in permit evaluations. Gary warned against including CO<sub>2</sub> emissions in a PSD permit evaluation because that could lead to making every project a major facility for CO<sub>2</sub>. Sandy Crockett agreed with this concern.

Brian also indicated that the District was considering whether the modeling results for other non-PSD pollutants needed to be included in the public notice and engineering evaluation. Gary expressed concern that this could make it appear as if the entire PSD permit was subject to public notice, and not just the requested amendment. The District staff indicated that this was their intent, as a fallback position. Gary indicated that while PG&E could figure out a way to deal with delays related to the pending permit amendment, if there was even a slight chance that the public notice for the amendment could be construed as a renofice of the entire PSD permit, and hence an appeal could stay the effectiveness of the initial PSD permit, PG&E would withdraw the amendment request.

The District staff agreed to continue to review these issues internally. A follow-up conference call was scheduled for 11 am Wednesday, August 6.

**DECLARATION OF SERVICE**

I, Robert Sarvey, declare that on February 4, 2010, I served and filed copies of the attached Petition of Robert Sarvey for Full Commission Review of the Proposed Order of the Siting Committee, dated February 4, 2010. 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:**

sent electronically to all email addresses on the Proof of Service list;  
 by personal delivery or by depositing in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed as provided on the Proof of Service list above to those addresses **NOT** marked "email preferred."

**AND**

**For filing with the Energy Commission:**

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

**OR**

depositing in the mail an original and 12 paper copies, as follows:

**CALIFORNIA ENERGY COMMISSION**

Attn: Docket No. 00-AFC-1C  
1516 Ninth Street, MS-4  
Sacramento, CA 95814-5512  
[docket@energy.state.ca.us](mailto:docket@energy.state.ca.us)

**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](http://WWW.ENERGY.CA.GOV)  
IN THE MATTER OF THE COMPLAINT AGAINST  
Docket No. 00-AFC-1C  
GATEWAY GENERATING STATION PROOF OF SERVICE**

*(Revised January 25, 2010)*

**PROJECT OWNER**

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Gateway Generating Station  
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