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April 28, 2008

File No. 039610-0001

VIA FEDEX

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 07-AFC-1
1516 Ninth Street, MS-4
Sacramento, California 95814-5512

DOCKET 07-AFC-1	
DATE	APR 28 2008
RECD.	APR 28 2008

Re: Victorville 2 Hybrid Power Project: Docket No. 07-AFC-1

Dear Sir/Madam:

Pursuant to California Code of Regulations, title 20, sections 1209, 1209.5, and 1210, enclosed herewith for filing please find Applicant's Reply Brief.

Please note that the enclosed submittal was filed today via electronic mail to your attention and to all parties on the CEC's current electronic proof of service list.

Very truly yours,



Paul E. Kihm
Senior Paralegal

Enclosure

cc: CEC 07-AFC-1 Proof of Service List (w/encl. via e-mail)
Michael J. Carroll, Esq. (w/encl.)

**STATE OF CALIFORNIA
BEFORE THE
ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 07-AFC-1
)	
Application for Certification for the)	
VICTORVILLE 2 HYBRID POWER)	APPLICANT'S REPLY BRIEF
PROJECT by Inland Energy, Inc.)	
_____)	

In accordance with the briefing schedule established by the Committee at the close of the Evidentiary Hearing on April 3, 2008, the City of Victorville ("Applicant") hereby submits its Reply Brief responding to the Opening Brief filed on April 21, 2008, by the California Unions for Reliable Energy ("CURE") in the above-captioned certification proceeding for the Victorville 2 Hybrid Power Project ("Project").

I. INTRODUCTION

CURE claims that the California Energy Commission ("CEC" or the "Commission") cannot approve CEC Staff's recommendation for Applicant to offset the Project's PM10 emissions pursuant to Mojave Desert Air Quality Management District (the "District") Rule 1406, which authorizes PM10 emission reduction credits ("ERCs") for new sources from the paving of unpaved roads. CURE contends that Applicant cannot rely on Rule 1406 to generate ERCs because the U.S. Environmental Protection Agency ("EPA") has not yet approved Rule 1406 for inclusion in California's state implementation plan ("SIP"), as required under the federal Clean Air Act. As discussed herein, CURE has based its arguments on a flawed interpretation of both federal law and District rules. Pursuant to federal law, Applicant may properly generate required emissions offsets under a District rule for which EPA approval is

pending, and the District's rules do not require Applicant to obtain federally enforceable offsets prior to commencing construction of the Project.

II. DISCUSSION

A. Applicant's PM10 Offset Proposal Complies with District Rule 1302.

District Rule 1302 sets forth the permitting procedures for all new or modified emissions sources and requires that any District-issued authority to construct ("ATC") permit ensure that all offsets are secured prior to commencing project construction.¹ Rule 1302 already is part of the California SIP.

Applicant agrees that Rule 1302 is a federally enforceable rule requiring Applicant to obtain and surrender to the District the required PM10 offsets before commencing construction of the Project. Applicant disagrees, however, with CURE's claim that Applicant may not generate those offsets under Rule 1406 unless the EPA approves Rule 1406 as part of the SIP.² While it is true that Rule 1302 requires Applicant to secure offsets prior to commencing construction, nothing in the rule requires that the offsets be federally enforceable. Rule 1406, which the District formally approved and adopted on August 27, 2007, is a legitimate District regulation that may be used as a means for generating offsetting ERCs. Although offsets obtained pursuant to Rule 1406 will not be federally enforceable until EPA approves Rule 1406, such offsets are valid for purposes of compliance with District Rule 1302. Consequently, Applicant's proposal to secure the required PM10 offsets by paving certain unpaved roads prior

¹ Mohave Desert Air Quality Management District Rule 1302(D)(5)(b)(ii), available at http://www.mdaqmd.ca.gov/rules_plans/documents/1302_000.pdf (last visited Apr. 22, 2008).

² CURE Br. at 3.

to commencing construction of the Project is fully consistent with the requirements of Rule 1302.

B. Applicant's PM10 Offset Proposal Meets the Requisite Federal Requirements.

CURE repeatedly states that Rule 1406 is not federally enforceable under the Clean Air Act because it still is undergoing EPA review for adoption into the SIP; each argument in CURE's Opening Brief is based on this premise.³ CURE's fixation on this point is perplexing, as this issue is undisputed. Applicant never has argued that Rule 1406 has received EPA approval for inclusion in the SIP, nor has Applicant claimed that EPA approval of the rule is unnecessary prior to commencing operation of the Project.

CURE's arguments are built upon an incorrect understanding of federal law and District rules. As discussed in Applicant's Opening Brief, the plain language of the Clean Air Act states that permits to construct and operate may be issued if, "by the time the source is to commence operation, sufficient offsetting emissions reductions have been attained"⁴ Where EPA-approval of an offset generating rule is forthcoming, an ATC permit may be issued if the source of offsets has been identified sufficiently, and the project will not commence operation until the offsets are federally enforceable.⁵ In other words, federal law does not require final EPA approval of Rule 1406 before the rule can be used to generate emission offsets for the Project or before the District can issue an ATC permit for the Project.

³ *Id.* at 1-2, 3, 4, 5, 6, 7, 8.

⁴ Applicant's Br. at 3 (citing 42 U.S.C. § 7503(a)(1)(A) (2008)) (emphasis added).

⁵ *See, e.g.*, Memorandum Regarding Offsets Required Prior to Permit Issuance, from John S. Seitz, Director, EPA Office of Air Quality Planning and Standards to Regional Directors (June 14, 1994) (The EPA "understands that in particular circumstances States have been prompted to

Even CURE agrees that the Clean Air Act “simply requires that offsets be federally enforceable prior to project operations.”⁶ In light of this acknowledgement, CURE’s related arguments are especially bewildering. CURE inexplicably and frequently quotes an EPA letter informing the District that “there are still outstanding issues related to the PM SIP that must also be resolved before the rule can be considered for SIP approval.”⁷ Specifically, CURE belabors the “specific legal deficiencies” currently precluding Rule 1406 from SIP inclusion: the EPA must approve the District’s PM10 maintenance plan and an economic incentive program consistent with EPS policy.⁸ As even CURE has admitted, however, the Clean Air Act requires only that these outstanding issues are resolved prior to the Project commencing operation. In accordance with established EPA policy, Applicant has identified the source of offsets and agreed that the project will not commence operation until such offsets are federally enforceable. It is, therefore, irrelevant whether Rule 1406 has been adopted into the SIP prior to the Project commencing construction.

Finally, it is disingenuous to assert as CURE has done, that Applicant has “acknowledged that any PM10 offsets generated pursuant to Rule 1406 would not be legal until EPA approves the rule into the SIP.”⁹ In support of such contention, CURE cites the Evidentiary Hearing Transcript at page 70, lines 18-22. In fact, lines 18-22 read as follows: “If one looks at Clean Air Act section 173, it’s 42 U.S. 7503, it makes it very clear that from the federal perspective,

adopt SIP measures to generate . . . offsets, and that the only step remaining to ensure that EPA can enforce the measures is EPA approval of the SIP submission.”).

⁶ CURE Br. at 4.

⁷ *Id.* at 4, 6.

⁸ *Id.* at 5-8.

⁹ *Id.* at 4.

offsets do not need to be enforceable and in place until the project commences operation.”¹⁰

Applicant fails to see any plausible or logical connection between the statement in the record and CURE’s claim that, in making the statement, Applicant acknowledged that offsets generated pursuant to Rule 1406 would not be legal until the rule is part of the SIP. Applicant can conclude only that CURE is grasping at straws in an effort to find support for an argument that ignores the plain language of the statute and EPA policy.

III. CONCLUSION

For the foregoing reasons, Applicant respectfully requests that the Commission continue to advance the AFC process while the District and EPA complete the administrative process for adopting Rule 1406 into the SIP.

Dated: April 28, 2008

Respectfully submitted,



Shannon D. Torgerson
of LATHAM & WATKINS LLP

¹⁰ Moreover, the lines immediately following read: “The specific language states that by the time the source is to commence operation sufficient offsetting emission reductions have been obtained. So we do not believe that there is any inconsistency with federal law at this time. And, in fact, we have roughly two years in which to obtain final approval of a PM10 plan, and with 1406 by EPA.” Evid. Hearing Transcript at 70: 23-25; 71:1-6.

**STATE OF CALIFORNIA
ENERGY RESOURCES
CONSERVATION AND DEVELOPMENT COMMISSION**

In the Matter of:)	Docket No. 07-AFC-1
)	
Application for Certification,)	ELECTRONIC PROOF OF SERVICE
for the VICTORVILLE 2)	LIST
HYBRID POWER PROJECT)	
by the City of Victorville)	(revised September 6, 2007)
)	
_____)	

Transmission via electronic mail and by depositing one original signed document with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the following:

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VICTORVILLE II HYBRID POWER PROJECT
CEC Docket No. 07-AFC-1

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DECLARATION OF SERVICE

I, Paul Kihm, declare that on April 28, 2008, I deposited a copy of the attached:

APPLICANT'S REPLY BRIEF

with FedEx overnight mail delivery service at Costa Mesa, California with delivery fees thereon fully prepaid and addressed to the California Energy Commission. I further declare that transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210. All electronic copies were sent to all those identified on the Proof of Service List above.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 28, 2008, at Costa Mesa, California.



Paul Kihm