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STATE OF CALIFORNIA

Energy Resources Conservation And Development Commission

In the Matter of:	)	Docket No. 06-AFC-6
	)	
Application for Certification for the Eastshore Energy Center in Hayward by Tierra Energy of Texas	)	
	)	

Staff's Reply Brief

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INTRODUCTION

On January 14, 2008, the Eastshore Energy Center (EEC) AFC Committee (Committee) issued a Committee Order addressing scheduling. Consistent with that Order, all parties to the proceeding filed Opening Briefs on February 11, 2008, addressing environmental issues and identifying laws, ordinances, regulations, and standards (LORS) that would be violated should the project be permitted as proposed. On February 21, 2008, the applicant filed a brief in support of its recommendation that the Committee issue affirmative findings regarding project benefits pursuant to Public Resources Code section 25525, should such finding be required for project certification (Applicant's Override Brief). This is Staff's Reply Brief, addressing the applicant's override brief as well as the parties' February 11 Opening Briefs. The brief includes discussion of the following subjects:

- Air Quality
- Public Health
- Environmental Justice
- Traffic and Transportation
- Socioeconomics
- Noticing Requirements
- Override

Issues raised in parties' Opening Briefs regarding Land Use and Noise were fully addressed in Staff's Opening Brief and will not be included in this Reply Brief.

ARGUMENT

I. AIR QUALITY

Only three parties raised air quality issues in their Opening Briefs: Intervener Robert Sarvey, the County of Alameda (County), and the applicant. Although the staff's Opening Brief addressed some of the issues raised by these parties, we summarize our conclusions again here in order to ensure that the record is complete. In addition, we provide rebuttal to issues raised for the first time in the parties' Opening Briefs.

Intervener Sarvey correctly points out in his Opening Brief that the EEC project will cause higher particulate matter impacts than other projects recently certified by the Commission. (Sarvey Opening Brief, p. 1.) This is not a disputed fact. (*See*, RT, 12/17/07, p. 28, lines 6-14.) The applicant has selected reciprocating piston engines rather than gas turbines, as the generating technology. As the uncontroverted evidence in the record indicates, these engines have certain advantages that turbines lack. (Exh. 1, p. 1-1 – 1-2.) Staff did not find that the applicant's choice of technology was inappropriate and instead focused its efforts on ensuring that the air quality impacts caused by the EEC would be fully mitigated. (RT, 12/17/07, p. 28, lines 15-17.) Intervener Sarvey challenges staff's proposed mitigation because the sources of the emission reduction credits (ERCs) that would be required to mitigate particulate matter impacts would be located "miles from the project site." (Sarvey Opening Brief, p. 2.) Intervener Sarvey apparently believes that the mitigation for the project should be solely focused on ensuring local benefits. However, his conclusions ignore the testimony of the Bay Area Air Quality Management District (BAAQMD) that particulate matter impacts can be both local and regional. (RT 12/17/07, p. 156, line 25.) In order to ensure that local as well as the regional impacts are mitigated, staff has recommended that the ERCs that are provided be upwind of the facility. (Exh. 200, p. 4.1-26.) In addition, to the extent that the mitigation is provided through implementation of a fireplace retrofit program, geographical limitations are imposed to ensure that the mitigation addresses both local and regional impacts. (*See*, AQ-SC 8, Exh. 200, p. 4.1-46.)

Intervener Sarvey also raises new issues for the first time in his brief, arguing that the EEC will violate a new state NO2 standard that is not yet in effect, that SO2 emission estimates used for analysis of the EEC are unrealistic, and that the staff proposal to mitigate ammonia emissions through requiring SOx emission

reductions credits is flawed. (Sarvey Opening Brief, p. 4-6.) These arguments contain no citations to any analysis in the record of this proceeding, and should be summarily rejected. Intervener Sarvey is an experienced participant in Energy Commission proceedings and had ample opportunity to address these issues in his written testimony or upon cross-examination of other witnesses. He chose not to do so and should not be allowed to raise them and make factual assertions for the first time now.

The County of Alameda (County) also challenged the staff's conclusions on air quality, and recommended that the Commission find that the project would cause a violation of the NO2 standard, based both on the testimony of its witness, Dr. Zannetti, and the fact that modeling results for the EEC are close to the state one-hour standard. (County of Alameda Opening Brief, p. 20-21.) However, Dr. Zannetti's own admission that he is unfamiliar with the BAAQMD modeling protocols (RT 12/17/08, p. 150, lines 8-10) undermines this conclusion, as does the lack of any analysis presented by the County about the significance of the modeling result relative to the standard. The applicant and the staff analyses -- performed in accordance with established regulatory protocols -- indicate that the EEC project emissions will not violate the standard. The County has presented no evidence to refute that conclusion.

As does Intervener Sarvey, the County recommends that the Commission treat the project's particulate matter emissions solely as a local impact. (County of Alameda Opening Brief, p. 21.) As noted above, this approach ignores the fact that particulate matter impacts are both regional and local in nature. (RT 12/17/07, p. 156, line 25.) Moreover, the staff's proposed mitigation does contain geographical limitations to ensure that the mitigation appropriately addresses both types of impacts. (*See*, AQ-SC 8, Exh. 200, p. 4.1-46.) The County challenges the use of inter-pollutant trading of SO2 ERCs for particulate matter ERCs to address these impacts, and claims that the inter-pollutant trading may not comply with the BAAQMD's own requirements. Of course, since the BAAQMD requires *no* particulate matter ERCs for the EEC, the County's criticism is misplaced. Nonetheless, as it did with the recently-certified Russell City Energy Center amendment, staff presented an analysis demonstrating the effectiveness of inter-pollutant trading and supporting the 5.3:1 ratio included in the staff-proposed mitigation. (Exh. 200, p, 4.1-66.) The County's unsupported statements that it disagrees with staff do not support a rejection of the staff's analysis. Finally, the County challenges the staff's proposed woodstove retrofit program, in part because the BAAQMD plans to adopt regulations limiting the use of wood burning fireplaces and stoves, making the staff mitigation

redundant. (County of Alameda's Opening Brief, p. 24.) However, staff testified that rules limiting the use of wood burning fireplaces and stoves typically address new installations, whereas staff's proposed mitigation would address existing units; in addition, the staff program would begin immediately upon certification, whereas the BAAQMD rule would not go into effect until late 2008. (RT, 12/17/07, p. 59, lines 5-8.) In sum, the County has failed to provide any justification for rejecting the staff analysis or the staff-proposed mitigation.

The applicant also included a discussion of air quality issues in its Opening Brief. However, its arguments with staff's analysis and conclusions were fully addressed in the staff's Opening Brief. Therefore, we do not repeat the staff's position here, but simply reference our Opening Brief for an explanation of the staff's position on those issues.

II. PUBLIC HEALTH

In the area of Public Health, two main arguments were made by the parties. First, Group Petitioners challenged the staff's assessment of impacts associated with the project's acrolein emissions. This issue is addressed below. Second, several parties argued that staff's public health analysis does not adequately assess health impacts on environmental justice populations. These arguments are addressed below in the Environmental Justice section of this Reply Brief.

Group Petitioners make a series of claims about the impacts of the project's acrolein emissions. Group Petitioners offered public comment on acrolein impacts during the hearings, claiming that staff should have used a value provided by the US Environmental Protection Agency (USEPA) rather than a value provided by the Air Resources Board (ARB), but did not provide an expert witness on the subject. Their brief cites several ARB and USEPA reports (unsponsored by any expert witness), but no analysis of the issue. In contrast, the staff did provide an expert witness who testified why the acrolein emission factor he used is appropriate and how he addressed the uncertainty associated with the differing values provided by the two agencies. (RT, 12/17/07, p. 200, line 23 – p. 203, line 1.) Group Petitioners may disagree with the staff's conclusion, but in order to support a finding that acrolein impacts are significant, they need more than their own opinion – they need to point to evidence in the record that the staff's approach is scientifically flawed, another approach is supported by professional standards, and that use of the alternative method demonstrates that the acrolein impact is significant. They have failed to do so.

III. ENVIRONMENTAL JUSTICE

The issues raised regarding environmental justice in Opening Briefs fall into one basic category: claims that the staff's environmental justice analysis fails to comply with applicable legal requirements because it does not adequately characterize and analyze the characteristics of the affected population. (*See*, Chabot-Las Positas Community College District's Opening Brief, p. 12, County of Alameda's Opening Brief, p. 30.)

Staff provided abundant evidence that it conducted a very conservative health risk analysis of the EEC's impacts on the most sensitive members of the population affected by the project. The method used identifies the project's toxic emission impacts, using a method developed by the California Air Resources Board, and compares those impacts to threshold exposure levels established by the Office of Environmental Health Hazard. (Exh. 200, p. 4.7-5.) Both the method for estimating the levels of exposure and the method for establishing thresholds, below which no health impact is likely, contain multiple conservative assumptions in order to ensure that health impacts are not underestimated. (RT, 12/17/07, p. 236, lines 3-12.) Among those conservative factors is that the thresholds that are used protect individuals who are more sensitive than members of the general population to toxic substances, due to age or the existence of medical conditions. (RT, 12/17/07, p. 195, lines 20-21.)

Fundamentally, the Chabot-Las Positas Community College District (District) and the County of Alameda (County) argue that staff's evaluation of the EEC's effect on sensitive receptors (which was conducted pursuant to adopted regulatory protocols) is insufficient because impacts on environmental justice populations may be different than impacts on sensitive receptors. However, both parties failed to identify what these differences or additional impacts might be. For example, although the County's Public Health witness testified that the community that will be affected by the EEC already suffers from higher death and hospitalization rates due to air-pollution-associated diseases than the County as a whole (Exh. 532, p. 3), she completely failed to explain how staff's use of thresholds identifying impacts to individuals with pre-existing health conditions would fail to protect members of that community. Staff agrees that low income and minority populations frequently face higher levels of pre-existing health conditions and greater lack of access to health care than do other populations. However, by using an analytical method that identifies whether a project will create adverse health effects on those already suffering from disease,

staff's conclusions take into account the fact that the affected community may already be at greater risk for health impacts.

Similarly, the District chastises the staff for failing to explicitly take into account language abilities, housing conditions, and income in its public health assessment. (District Opening Brief, p. 9.) Although the District claims that environmental justice populations do not have the same "thresholds" as non-environmental justice populations, it does not state how language ability, housing conditions, and income would create a different or a greater risk of impacts from toxic air pollutants than would the factors of age and pre-existing disease that are included in the staff's analysis.

In sum, by using thresholds for toxic air pollutants that provide protection for the most sensitive members of the population, staff has taken into account that the project may have impacts on environmental justice populations. Our analysis, which is replete with multiple conservative assumptions, indicates that no member of the community will experience significant adverse impacts from those pollutants. The County and the District disagree with that conclusion, but the record simply does not support their contention that there are unidentified impacts to environmental justice populations that are not included in the staff's assessment.

Similarly, the County's contention that the staff's use of a one-mile radius for evaluating impacts fails to correlate to where the affected population is shows a fundamental misunderstanding of the nature of a health risk assessment. (County of Alameda Opening Brief, p. 31.) Staff identifies the maximum impact and the area of the impact in order to determine whether it is significant or not. Where there is no impact, there is nothing to evaluate, and, in this case, the impact falls off very quickly from the area of maximum impact immediately adjacent to the site. (RT, 12/17/07, p. 207, lines 14-18.) Obviously, the point that there may be environmental justice communities outside of the area of impact does not change the area of the impact. Staff's analysis is correctly based on the geographical limits of the impact. The existence of environmental justice populations outside the areas affected by the project changes neither the analysis nor the conclusions.

Staff also notes that neither party challenging the staff's assessment proposed any alternative method to capture the impacts they claim escaped the staff's assessment. For example, although the County's Public Health witness called for an evaluation of the synergistic effects of various emissions, she also conceded

that she is unaware of any approved regulatory models for doing so. (RT, 12/17/08, p. 374, lines 14-17.) Staff, on the other hand, provided a detailed explanation of how it incorporated the possibility of synergistic effects in its Public Health analysis. (Exh. 200, p. 4.7-6.) Similarly, although the County states that the staff's analysis is "less robust" than that called for in the 1998 EPA Guidelines, the County does not point to any analytical step in those Guidelines that staff failed to comply with. (County of Alameda Opening Brief, p. 28.) This is understandable, because the 1998 EPA Guidelines do not require any specific analytical method. In fact, the County's claim that the 1998 EPA Guidelines are based on the "foundational concept" that "the sensitive receptor population will by definition experience significant impacts disproportionately due to the unique circumstances affecting that population" (County of Alameda Opening Brief, p. 32) is exactly the opposite of what the Guidelines require:

> The initial step in the analysis of potential effects is to assess whether there will indeed be potential physical or natural environmental impacts. If it is determined by the analytical team that there will be no environmental effects, and thus no disproportionately high and adverse effects, then this finding should be documented and no further analysis of effects is necessary.

"Final Guidance for Incorporating Environmental Justice Concerns in EPA's NEPA Compliance Analysis" (1998)

And although the District offered Dr. Sperling as an expert witness in the area of Environmental Justice, when questioned about her criticism of the staff's analysis, she testified that compliance with the "narrow" legal requirements is not her issue. (RT 12/17/07, p. 343, lines 10-14.) In fact, the National Environmental Justice Advisory Council report which she cites in her testimony has not been approved by *any* regulatory agency for use in conducting Environmental Justice analyses. Simply put, not only are the County and the District claiming that staff ignored impacts they cannot identify, they are also claiming that staff should have used analytical methods that are not required and in fact, do not exist. Their claims should be rejected.

IV. TRAFFIC AND TRANSPORTATION

The staff analysis indicates that the EEC's thermal plumes will cause a hazard and require compliance with the Federal Aviation Administration (FAA) recommendation that overflight of thermal plumes be avoided. (*See*, Exh. 20,

Testimony of Marshall Graves, Attachment 1, p. 16.) However, due to the constrained nature of the airspace in the area of the EEC project (including the restrictions in effect as a result of the recent Russell City Energy Center amendment), avoidance of overflight would increase congestion, limit pilot options, and interfere with the utility of the airport. (Exh. 200, p. 4.10-21.) These secondary effects would also create a substantial adverse effect of human beings (both pilots and passengers and the public below the congested airspace) and constitute a significant adverse impact under CEQA, and create non-conformity with local LORS. (*Ibid.*, *Id.* at p. 4.5-7 – 4.5-22, Cal. Code Regs., tit. 14, § 15065(a)(4).) Because there is no mitigation available to reduce or eliminate these impacts, staff recommends that the EEC project not be sited at the proposed location.

The applicant relies on three main arguments to challenge the staff conclusions on aviation safety. First, it claims that the possibility of an aircraft ever encountering the plumes from the EEC facility is very small. Second, it claims that even if an aircraft did encounter the plumes, they would not create conditions that could endanger the control or maneuverability of the aircraft. Finally, the applicant states that a study by the FAA supports a finding that the project will not cause a safety hazard. (Applicant's Opening Brief, p. 5.)

A. The Thermal Plumes from the EEC Constitute a Hazard to Aircraft that will Overfly the Project Site.

As a preliminary matter, staff notes that the applicant wrongly characterizes the question the Energy Commission must answer in order to make a decision on the EEC application. The question is not whether the level of *risk* created by the project is acceptable, but whether the thermal plumes from the EEC constitute a *hazard* to aircraft. If the answer to the latter question is yes, overflight of the facility should be avoided if feasible; if avoidance is infeasible, the project should not be constructed at the proposed location.

The FAA has already concluded that thermal plumes create an aviation hazard. (RT, 12/18/07, p. 85, lines 16-21.) Our modeling analysis supports that conclusion, in that it shows that the peak velocity of the plume would exceed the level at which the Australian government's Civil Aviation Safety Authority has identified as creating the possibility of aircraft airframe damage or upset to aircraft. (Exh. 200, p. 4.10-20.) The conclusion is further bolstered by the testimony of Gary Cathey of the California Department of Transportation Division of Aeronautics, who described his own experience in which

controllability and maneuverability of his aircraft was jeopardized during overflight of power plant thermal plumes. (RT, 12/18/07, p. 123, lines 1-4,) Furthermore, staff and the City of Hayward provided actual flight data showing that aircraft fly directly over the project site. (Exhs. 208, 417, 418.) These factors indicate that overflight should be avoided if feasible, and if overflight cannot be avoided, the project should not be sited at the proposed location.

Staff urges the Committee to reject the applicant's claims that the possibility of overflight is low. The penetration gates plots (Exhs. 417, 418) provide a powerful visual demonstration that EEC's assertions are false and during the life of the project, there will be hundreds, if not thousands, of instances in which aircraft fly over the project site at or below 1,000 feet above ground level. Moreover, the recommendation of the California Department of Transportation that the project not be sited at the proposed location due to concerns about the effects of thermal plumes (Exh. 203) and the concern expressed by FAA that mitigation for the EEC facility would be impractical (Exh. 204) support a conclusion that the hazard warrants prohibition of the use of this site for the EEC project.

B. Thermal Plume Modeling does not Yield Precise Results and Caution should be Employed in Interpreting Modeling Results.

With respect to the modeling of the thermal plume, it is important to note that staff does not believe that any plume modeling analysis actually produces a precise indication of likely plume velocity. There are a number of reasons for this. First, even the applicant's testimony indicates that there is no evidence that empirical testing has verified the calculation methods. Although Mr. Darvin testified that he believed there were papers evaluating the methods, he also stated that he was not familiar with whether such tests validated the method used. (RT, 12/18/07, p. 235, lines 9-12.)

In addition, staff testified that, of the many assumptions that must be made in order to conduct the analysis, some were likely overly conservative, while others were likely not conservative enough. (*Id.* at page 104, lines 4-13.) Examples of the latter include only combining seven of the fourteen engine plumes and not combining the two radiator plumes (Exhibit 200 pg. 4.10-42, 43). In addition, staff never calculated the combined effect of the merged engine and radiator plumes, which could occur due to their extreme proximity. (RT, 12/18/07, p. 108, lines 19-

25.)[1] The applicant, however, only mentions the potentially overly-conservative assumptions of the staff's analysis and ignores the others. The need to make these assumptions and the differing approaches to them underscores the uncertainty associated with the modeling results.

We would also note that the wind speeds used in both the staff's and the applicant's analyses are *hourly* averages. (Exh. 20, Testimony of William Corbin and Gregory Darvin, p. 9, Exh. 200, p. 4.10-44.) Although hourly data is what is available and therefore what was used, it is very important to realize that all wind speed hours, including those with winds less than 1 or 2 meters per second that occur almost 38 percent of annual hours (Exh. 200, p. 4.10-44), are often comprised of variable winds from calm conditions to speeds that exceed the hourly average. Thus, calm winds that can lead to peak velocity conditions can occur even when the hourly average wind speed is higher.

Finally, staff does not contest the applicant's claim that the staff's method varied from the one identified in Exhibit 26 (the Australian government's Civil Aviation Safety Authority Advisory Circular Establishing Guidelines for Conducting Plume Rise Assessments.) Staff was clear in testifying how its calculation method varied from the Australian method and explained that the reason for the variance was to reduce the mathematical discontinuities produced by the Australian method and create a more natural curve for the velocity reduction with height. (RT, 12/18/07, p. 101, line 5 – p. 103, line 3.) Similarly, staff acknowledges that the Australian method calls for consideration of average plumes velocities. However, given the uncertainties associated with the modeling, staff believes it is important to consider the peak velocity as well, which could be as high as two times the average velocities. (Exh. 200, p. 4.10-20.)

In sum, the modeling results are based on a significant amount of imprecision. However, staff's modeling indicates that peak velocities exceeding the levels that may cause aircraft airframe damage or upset to aircraft may occur at altitudes at which aircraft will be present during EEC operation. The applicant, using less

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[1] Staff notes that the applicant's witness failed to understand the facts regarding the potential merging of the plumes. Although Mr. Darvin stated that the radiators were "probably within 100 meters" (pg. 234 lines 6-7) of the engine stacks, and that the radiator plumes and engine plumes would not merge (TR 12/18/07, p. 257, lines 9 - 11), this conclusion is contradicted by Figure 1.2-3 of the AFC, which shows that the center of the engine stacks and the edge of the radiator frame are separated by approximately 24 feet (less than 8 meters) which is not much greater than the minimum separation between the center of the engines stacks of 18 feet.(Exh. 1, Figure 1.2-3.) This underscores the conservative nature of the staff's analysis.

conservative assumptions and considering only average plume velocities, reached a different conclusion. Staff believes that the uncertainty about the modeling calls for extreme caution. The results are simply not precise enough to justify the siting of a facility that could cause loss of maneuverability or control of aircraft. And, as imposition of an overflight restriction would cause significant adverse impacts and lack of conformity with local LORS (Exh. 200, 4.10-21), the project should be denied at this location.

C. The Barrick Facility Overflight Test Suffers from Significant Limitations and does not Justify the Hazard Associated with the Proposed EEC Location.

Applicant claims that its overflight of the Barrick facility in Nevada demonstrates that the EEC project will not pose an aviation hazard. (Applicant's Opening Brief, p. 6.) Staff disagrees. First, we note that the study was conducted in great haste. (See, Exh. 20, Testimony of Don Blumenthal and Clinton MacDonald, p. v, RT, 12/18/07, p. 301, lines 7-9.) As a result of the short time frame, only a helicopter was used, as the federal approval needed for an airplane test would have required an additional month. (RT, 12/18/07, p. 297, lines 3-8.) In addition, wind data was provided only by a hand-held anemometer, which the testers used for ground level wind speed measurements. (*Id.* at p. 239, lines 21-24. The applicant failed to identify the wind speeds at the level at which they were flying, although a nearby plant was recording wind speeds at heights of up to 300 feet. (*Id.* at p. 240, lines 2-10.)

In addition, although the applicant states that the overflight was conducted under "worst-case" conditions (RT, 12/18/07, p. 260, lines 10-14), this statement is inconsistent with the applicant's own plume velocity calculations. The testimony contained in Exhibit 20 clearly shows that the combined radiator stacks will have a greater calculated vertical velocity potential than the engine stacks. (Exhibit 20, Testimony of William Corbin and Gregory Darvin, p. 5, *See also*, Exh. 200, p. 4.10-43.) Yet this test was conducted during low ambient temperature conditions, resulting in low radiator fan use and heat rejection load. (RT, 12/18/07, p. 259, lines 3-19.) Clearly, in order to be a test of worst-case conditions, the conditions should have been those under which the maximum plume would be encountered, not just the maximum engine plume. Moreover, as noted in Dr. Blumenthal's testimony, the plumes were "bent" as a result of wind, indicating that the calm conditions that would be required to be considered worst case were not present. (RT, 12/18/07, p. 241, lines 13-25.)

Finally, it is important to note that there is no evidence that the flyover helicopter in fact encountered the maximum plume velocity. Dr. Blumenthal stated in his testimony that he is certain that the flights encountered the Barrick facility plumes (RT. 12/18/07, p. 249, lines 1-9), and staff does not necessarily disagree. However, without clear visual evidence (such as would be created by use of a smoke canister) staff does not believe that it can be stated with any certainty that the worst-case center peak conditions of the plumes were encountered. The applicant testified that the plume radius at 500 feet would be up to 170 feet. (Exh. 20, Testimony of William Corbin and Gregory Darvin, p. 6.) Without visual evidence, the width of the plume alone would lead to a conclusion that it is just as likely and perhaps more likely, that only the edges of the plume were encountered during these few test flights.

In sum, the significant limitations of the Barrick facility overflight test compel a finding that it should be given little weight in assessing the impact of the EEC on aviation safety. Because of the hazard that exists as a result of the EEC's thermal plumes, the Committee should exercise significant caution in making a decision on this application. Such caution dictates restricting overflight if feasible, or disapproving the proposed location if restricting overflight is not feasible. It does not justify allowing construction of a project that will create a safety hazard on the basis of a hurried and flawed test of the potential extent of that hazard.

V. SOCIOECONOMICS

Chabot-Las Positas Community College District (District) claims that the staff's socioeconomic impact assessment is flawed because it failed to assess the EEC's impact on the District. The District's conclusion apparently rests on the following analytical path: the EEC will be built, the District operates the Chabot Community College facility with 22,000 students one mile from the EEC, public comment indicates that students might perceive the EEC as having a detrimental health effect, and enrollment will therefore decline if the EEC is built, causing a socioeconomic impact that should have been examined by staff. (District Opening Brief, p 17.) It is telling that nowhere in the District's brief is there any citation to evidence in the record indicating that the EEC *will* have any health effect on Chabot Community College facility students. In fact, the evidence that *is* in the record indicates that maximum health impact of the project (which does not occur at the Chabot Community College facility) is well below the level of significance (RT 12/17/07, p. 207, lines 1-7), and is based on an assumption that an individual is continually exposed to maximum facility emissions for 70 years (*id.* at p. 207, lines 8-13.), an unlikely scenario for a student attending a two-year

community college. Nor did the District provide any evidence that college students change campuses because of perceived health threats from any industrial facilities (many of which already exist in the City of Hayward's Industrial Zone). There is simply no evidence in the record to support a credible claim that the EEC will affect the provision of public services by the District.

VI. NOTICE

The Chabot-Las Positas Community College District (District) claims that the Commission's failure to notify the District as a local interested agency constitutes prejudicial error. (District Opening Brief, p. 13.) The District claims that two separate legal provisions compel this notice. The District is wrong.

Public Resources Code section 25519, subdivision (k) states:

> The commission shall transmit a copy of the application to any governmental agency not specifically mentioned in this act, but which it finds has any information or interest in the proposed site and related facilities, and shall invite the comments and recommendations of each agency. The commission shall request any relevant laws, ordinances, or regulations that an agency has promulgated or administered.

The District claims that the section requires the Commission to provide it with notice because it is a governmental agency which has an interest in the Eastshore application. However, the District ignores the express language of the statute: "which it finds". The Commission did not find that the District had an interest in the EEC, nor would it have any reason to do so, given the distance of the District's facilities from the EEC, and the fact that the District does not have any regulatory authority over any aspect of the project nor implement laws or regulations governing issues affected by the construction or operation of the project. The District's specious claim that it will lose students who fear the EEC poses a serious health risk does not warrant a finding of interest under section 25519. Such a finding, after all, is made at the end inception of a proceeding, not at the conclusion of evidentiary hearings, as the District suggests. Therefore, the Commission was not required to send a copy of the application to the District or explicitly solicit its comments and recommendations. Contrary to the District's contention, the statute does not require the Commission to provide notice to governmental agencies whom it has not found would have any information or interest in the proposed project.

Second, the District cites Title 20, California Code of Regulations, section 1714, subd. (c) as requiring notice of the EEC project to the District. This section states:

> The executive director shall also transmit a copy of the notice or application to the Coastal Commission for any site located in the coastal zone, to the Bay Conservation and Development Commission (BCDC) for any site located in the Suisun Marsh or the jurisdiction of the BCDC, to the California Department of Fish and Game, to the Air Pollution Control District in which the project is located, to the Water Resources Control Board in which the project is located, to all federal, state, regional, and local agencies which have jurisdiction over the proposed site and related facility, or which would have such jurisdiction but for the commission's exclusive authority to certify sites and related facilities pursuant to Chapter 6 (commencing with section 25500) of Division 15 of the Public Resources Code, and to any other federal, state, regional, or local agency which has been identified as having a potential interest in the proposed site and related facility, and shall request analyses, comments, and recommendations thereon.

The only category to which the District could belong that would require notice is "other....local agenc[ies] which ha[ve] been identified as having a potential interest in the proposed site and related facility...." The District is arguing that the plain words of the regulation "which has been identified as having a potential interest", be replaced with, "which itself decides at any point during the proceeding that it has a potential interest." However, the regulation is unambiguous, and not susceptible to such revisions. As noted above, the Commission did not find that the District had an interest in the EEC, nor would it have any reason to do so. Notice to the District was not required.

Of course, the District's claim that it failed to receive notice is severely undermined by the fact that the Information Hearing and the first Data Response Workshop were held at the Chabot Campus in January 2007, with assistance from Chabot College personnel, including the Office of the President. The proceeding was well publicized, with ample opportunity for all interested persons and organizations to comment. Under these circumstances, the District's claim that the staff "failed to allow the District to participate" in the review process (District Opening Brief, p. 15) strains credulity. The District may wish it had become actively involved in the review process earlier. But its statements that it failed to receive legally- required notice and that staff failed to allow it to participate must be firmly rejected.

VII. OVERRIDE

On February 21, 2008, the applicant filed a brief in support of its recommendation that the Committee issue affirmative findings regarding project benefits pursuant to Public Resources Code section 25525. In that brief, the applicant first argues that the aviation hazard created by the project's thermal plumes does not create an inconsistency with local LORS, and that no "override findings" are required. Staff has responded to that portion of the applicant's arguments above. The applicant goes on to argue that even if the Commission disagrees and finds that an inconsistency with local LORS exists, the Commission should nonetheless certify the project pursuant to Public Resources Code section 25525, by finding that the project is required for the public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity. The applicant cites a number of project benefits, including the need for new flexible and efficient gas-fired resources to integrate renewable resources and replace reliance on aging facilities (Applicant's Brief Supporting Override, p. 23), and the reduction in transmission losses, and congestion and overloads in the Bay Area (*id.* at p. 19-20). Finally, the applicant claims that the benefits provided by the EEC are at least as great as those provided by other facilities that were found to be inconsistent with local LORS but nonetheless certified by the Commission, and that the inconsistency caused by the EEC is of a more limited magnitude than that caused by those other projects.

The applicant also provides a brief discussion of the requirements of the California Environmental Quality Act (CEQA) that are applicable when a project is found to have a significant adverse impact that cannot be avoided by mitigation or implementation of a project alternative. (Applicant's Brief Supporting Override, p. 18.) However, the applicant gives short shrift to the CEQA requirements, which are an integral part of the Commission's licensing process, focusing the vast majority of its efforts on the requirements of Public Resources Code section 25525. Staff believes this to be a fatal flaw in the applicant's approach.

Under the California Environmental Quality Act (Pub. Resources Code, section 21000 et seq.), the Energy Commission, as Lead Agency, must make certain findings before it approves a project that will cause significant adverse impacts. Specifically, it must find that specific economic, legal, social, or other considerations make infeasible any mitigation measures or alternatives identified in the proceeding, and that there are project benefits that outweigh the

unavoidable adverse impacts. (Cal. Code Regs., tit. 14, §§ 15091 – 15093; tit. 20, § 1755.) Although several of the alternatives evaluated by staff would result in avoidance or lessening of the aviation impacts created by the EEC, none would achieve the project objective of interconnecting to the Eastshore substation. (RT, 1/14/08, p. 73, lines 13-15.) In addition, staff was unable to identify any mitigation that would avoid or lessen the EEC's impacts on aviation safety. Therefore, staff concluded that there are no feasible alternative or mitigation measures that would reduce the EEC's impacts to a level that is insignificant.

Given these facts and conclusions, staff has evaluated the benefits of the EEC and weighed them against the aviation safety impact and impairment of the Hayward airspace that would be created by the EEC. After careful consideration, staff concluded that the benefits created by the EEC -- as identified in staff's testimony on Local System Effects -- are not of sufficient magnitude that they outweigh the aviation impacts created by the EEC. The loss savings are relatively modest, at 6.5 MW – 19 MW (Exh. 200, p. 5.6-6), and on a percentage basis, the savings are similar to those of other projects built within the Bay Area. (RT, 1/14/08, p. 30, line 15 – p. 31, line 4.) These loss savings are not, in staff's view, significant, nor do they, either alone, or in conjunction with the reliability benefits identified by staff, outweigh the significant adverse aviation safety impact that would be caused by the EEC. The very nature of the CEQA balancing test compels careful consideration of the unavoidable adverse impacts. Given the significant threat to public safety that would be caused by the EEC, only benefits that demonstrably improve public safety should be used to justify approval. No such benefits have been identified by staff or the applicant, and staff urges the Committee to recommend that the Commission deny the applicant's request to approve the project notwithstanding its significant adverse impacts on public safety. Moreover, because application of the CEQA balancing test to the EEC appropriately identifies the trade-offs between the creation of public safety risks and modest local system benefits, staff believes it is unnecessary to proceed to the question of LORS override. Consideration of the CEQA balancing test is sufficient to conclude that the EEC is unwarranted.

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CONCLUSION

The EEC project should not be sited at the location proposed by the applicant. Although the project would not create any environmental justice issues and its impacts are largely mitigated, the significant impacts and LORS inconsistencies created by the project's thermal plumes cannot be mitigated or resolved. Placing a project with thermal plumes so close to low-flying air traffic within the approach zone of the Hayward Executive Airport should be disallowed. Staff recommends the Committee issue a Presiding Member's Proposed Decision that reflects the evidence in the record demonstrating that the EEC is proposed for an unacceptable location.

Date: March 3, 2008

Respectfully submitted,

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

APPLICATION FOR CERTIFICATION FOR THE EASTSHORE ENERGY CENTER IN CITY OF HAYWARD BY TIERRA ENERGY

Docket No. 06-AFC-6

PROOF OF SERVICE (Revised 1/18/2008)

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DECLARATION OF SERVICE

I, **Chester Hong**, declare that on **March 3, 2008,** I deposited copies of the attached **Staff's Reply Brief** in the United States mail at Sacramento, CA, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

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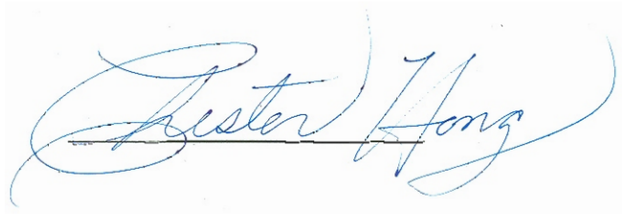
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