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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 HAYWARD BY TIERRA ENERGY	DOCKET NO. 06-AFC-6 (AFC Accepted 11/8/06)

EASTSHORE ENERGY CENTER'S BRIEF SUPPORTING OVERRIDE OF LORS NONCOMPLIANCE

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As discussed in detail in Eastshore's February 11, 2008 Opening Brief On Contested Subject Areas, ("Opening Brief") the evidentiary record in this matter amply demonstrates that any Project impacts will be mitigated to ensure the Project will be built and operated to protect environmental quality and assure public safety. California Energy Commission ("Commission") Staff's Final Staff Assessment (FSA) suggests, however, that the Eastshore Energy Center Project ("Project") may be inconsistent with certain local transportation and land use-related laws, ordinances, regulations and standards (LORS) because of perceived concerns over the Project's location near the Hayward Executive Airport; the City of Hayward ("Hayward") and other local agencies have expressed similar concern. Eastshore addressed this concern by presenting abundant and convincing scientifically grounded evidence to show that no genuine safety concerns arise from the Project's location. But should the Commission defer to local agencies' contention that the Project's airport proximity, and what the evidence shows to be a miniscule risk to aviation, constitute inconsistency with local land use LORS, the Commission should override that inconsistency in favor of the compelling and strongly countervailing need to develop energy resources in accordance with well-established state policy, as well as obvious local and statewide need.

A. <u>No LORS Inconsistencies Exist Because Eastshore Has Demonstrated the Project Will Not Create Safety Risks</u>[1]

The FSA asserted that turbulence caused by thermal plumes from the Project's stacks could create a hazard to aircraft. This single assumption underlies all of the concerns expressed

[1] Eastshore hereby incorporates those portions of its Opening Brief On Contested Subject Areas ("Opening Brief") that present the record evidence demonstrating that its Project creates no safety risk to aviation. *See* § II, Traffic and Transportation, pp. 4-19. The present brief summarizes that discussion.

by Staff and local agencies regarding consistency with Land Use and Transportation LORS. On examination, the assumption is entirely unfounded.

First, the possibility of aircraft ever encountering a plume from the Eastshore facility is extremely remote; statistics show that almost no aircraft will ever fly over the Eastshore Project at altitudes and distances potentially impacted by the plume. (Ex. 20, M. Graves Testimony at 2 ["there is a . . . 15 in one billion chance that an aircraft will encounter a thermal plume from Eastshore"].) Second, actual physical measurements from overflights of a comparable facility show that, for those few aircraft that may fly over the plumes, the plumes create insufficient turbulence to disturb those flights. (Ex. 20, Final Report on Turbulence Felt In a Light Helicopter Caused by a Power Plant Thermal Plume at 11.) Third, a panel of Federal Aviation Administration (FAA) safety experts concluded that "the risk associated with plumes is deemed acceptable without restriction, limitation or further mitigation." (Ex. 39 at ii.)

The only potentially substantial evidence in the record to support a concern about airport safety is Staff's modeling of the potential impact of thermal plumes. (Ex. 200 at 4.10-43.) This modeling, however, is fatally flawed and must be disregarded, having unrealistically exaggerated the effects of updrafts from radiator fans. (Ex. 200 at 4.10-43.) Staff's flawed modeling actually concluded that impacts from the fans would exceed those from the stacks. (*Id.*) The fly-over test, however, demonstrated that this conclusion is wrong, and that any turbulence from fans is not only minimal but for purposes of the measurements used in that test, non-existent. (12/18/2007 RT 247:23-25, 248: 1-23; 12/18/2007 RT 259:4.) In addition, Staff's modeling analysis improperly employed only selected elements of an Australian methodology in piecemeal fashion. (Ex. 20 [Corbin and Darvin testimony] at 10.) All of the witnesses who testified against

certification on aviation safety grounds based their testimony on this flawed analysis. (Opening Brief, p.10, fn. 1 and citations to the record cited therein.)

In light of the concrete evidence demonstrating the safety of the Project and the inadequacies of the FSA's contrary analysis and conclusion, no safety issue exists to create an inconsistency with any land-use related LORS. From that perspective, of course, there is nothing for the Commission to override.

II. THE ONLY POSSIBLE LORS INCONSISTENCY TO SUGGEST THE NEED FOR AN OVERRIDE STEMS FROM THE PROJECT'S PROXIMITY TO THE HAYWARD EXECUTIVE AIRPORT AND THE RELATED SPECULATION THAT AN AVIATION SAFETY ISSUE MIGHT ARISE IN RELATION TO SEVERAL LOCAL LAND USE LORS

A. A Remote Risk To Aviation Safety Should Not Qualify As A LORS Inconsistency

Staff has identified six instances of local LORS with whose provisions the Project may in one way or another be inconsistent, in each case based on a concern for aviation safety:

- City of Hayward Airport Approach Zoning Regulations, Hayward Municipal Code, § 10-600);
- Alameda County ALUC Airport Plan;
- Alameda County Airport Plan Expansion Policy;
- Hayward Municipal Code § 10-1.140 (Exclusionary Zoning Ordinance);
- Hayward Municipal Code § 1001.3200 *et seq.*
- Hayward General Plan (Resolution No. 07-028).[2]

[2] As discussed at length in Eastshore's Opening Brief, Staff correctly determined that the Project is consistent with the City's General Plan. (Opening Brief at 28-30.) That discussion also details the inconsistencies and inaccuracies

(*See generally* Ex. 200 at 4.5-1 *et seq.*) With respect to the first three items, Staff's unfounded concerns about thermal plume safety led to the conclusion that the Project could interfere with existing and future airport and air traffic safety, and would therefore be inconsistent with those LORS. Staff reasoned that safety concerns would similarly obviate Hayward's approval of a conditional use permit under the combination of §§ 10-1.140 and 1001.3200 *et seq.* and therefore found the Project inconsistent with those ordinances. Again, however, no genuine safety issue exists.

For that reason, and in light of the inconsistent way Hayward has interpreted its General Plan, the existence of a LORS inconsistency here is highly problematic. In the usual case, local authorities are entitled to deference in interpreting local LORS, but that deference has its limits. In this instance Hayward has acted inconsistently to invoke diametrically opposed interpretations of the same LORS on two power plants in very close proximity and the exercise of deference would result in inequitable and prejudicial treatment.

B. In Deciding What Deference It Should Afford Local Agencies' LORS Interpretations, The Commission Should Strongly Consider Local Authorities' Inconsistent (And Apparently Targeted) Interpretations Of LORS

As a general matter, courts apply the arbitrary and capricious standard when evaluating challenges to a municipality's determination that a proposed project is (or, is not) consistent with the municipality's general plan. *Endangered Habitats League v. Orange County (Rutter Development)* (2005) 131 Cal.App.4th 777, 782. So long as the determination is supported by evidence, courts will defer to the municipality's consistency determination. *Id.*

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contained in Hayward's Resolution 07-028, which further undercut any possibility that the Project could be inconsistent with the General Plan.

A municipality does not, however, have unfettered discretion to apply—or not apply—policies in its general plan whenever it sees fit. First, section 65852 of the Government Code demonstrates the Legislature's intent that municipalities treat land uses within land use zones uniformly.

> All . . . regulations shall be uniform for each class or kind of building or use of land throughout each zone, but the regulation in one type of zone may differ from those in other types of zones.

Cal. Gov't Code § 65852.

In this case, both the Russell City Energy Center ("RCEC") and the Project are located in an area zoned "industrial." Thus, the same General Plan regulations must be applied to both projects. It is contrary to the policy in section 65852 for Hayward to apply the General Plan's statement favoring information-based industry, as opposed to manufacturing-based industry, to the Project, but not to RCEC. Although Hayward may attempt to argue that its favoritism for information-based industry is a mere "policy" instead of a regulation, such an argument would be disingenuous. Hayward is treating the policy as a hard-and-fast requirement by interpreting it in a manner that would exclude the Project from the industrial zone.

Moreover, the Hayward's inconsistent General Plan interpretations are constitutionally questionable. An agency's inconsistent enforcement of land use laws, where equal conditions exist, is subject to review under the due process and equal protection clauses of the United States Constitution. *See, e.g., City of Banning v. Desert Outdoor Advertising, Inc.* (1962) 209 Cal.App.2d 152, 154 (unequal treatment of those who are entitled to be treated alike is unconstitutional if there is an element of intentional discrimination); *Kuzinich v. County of Santa Clara* (9th Cir. 1982) 689 F.2d 1345, 1349 (stating that inequitable application of a law between

persons in similar circumstances can give rise to a constitutional claim if the plaintiff proves a prima facie case).

C. A Finding of LORS Inconsistency Based on Project Location Will Require Extraordinary Deference to Highly Strained Interpretations of Local Land Use Regulations

Despite the record evidence and legal limitations described above and in Eastshore's Opening Brief, the Commission conceivably could defer to local authorities' interpretations of local LORS. In that event, however, the record leaves local authorities with no basis for an inconsistency apart from one based on a miniscule aviation risk, which is the most the present record can possibly admit of. Theoretically, local authorities are free to construe their land use regulations to mean that, for example, a prohibited risk to airport safety must mean *any risk whatsoever*, no matter how slight. The inevitable strain such a construction places on the balance between something like ideal safety conditions, on the one hand, and real-world land uses on the other -- particularly in the face of an indisputable energy shortage -- creates a tension that sound statewide energy policy simply cannot sustain. Deference may suggest that the Commission try to countenance a local interpretation of this sort, but if so reason, policy, and common sense all dictate the need for an override determination.

D. Staff Correctly Concluded That LORS Issues Raised By Intervenors Are Unfounded[3]

Staff correctly determined that the Project will not violate the LORS related to, or cause significant environmental impacts on, air quality, public health, or environmental justice. Likewise, Staff properly concluded that the Eastshore Project will not interfere with the General Plan's policies to maintain the appearance of the industrial corridor and encourage information-related business development.

- Air Quality: The FSA explains that, with appropriate mitigation measures, the Eastshore Project will conform to all applicable air quality LORS and will not cause significant air quality-related impacts. (Ex. 200 at 4.1-1.)

- Environmental Justice: As stated in the FSA, the Eastshore Project "is not considered to have a disproportional impact on an environmental justice population" because any impacts related to the Eastshore Project will "affect all people, regardless of ethnicity or economic status." (*Id.* at 1-5.) Intervenors' contrary testimony at the public hearing was unreliable. (Staff's Opening Brief at 12.)

[3] In keeping with Staff's analysis, Eastshore Energy, LLC chose to brief only those issues related to aviation without addressing non-aviation-related issues in this brief, which only intervenors (not Staff) raised. (*See* County of Alameda's Opening Evidentiary Brief at 20-22 (arguing that the Eastshore Project will cause significant NO_2 and particulate matter impacts); Opening Brief of Robert Sarvey at 2-8 (asserting that the Eastshore Project's air quality mitigation measures will not comply with the Bar Area Air Quality Management District's best available control technology requirements); Group Intervenors' Opening Brief on Contested Issues at 6-17 (claiming that toxic air contaminant impacts will cause a significant non-cancer health risk); Chabot-Las Positas Community College District Intervenors' Post-Hearing Brief at 6-13 (arguing that the Eastshore Project will have significant environmental justice impacts); County of Alameda's Opening Evidentiary Brief at 28-33 (applying a modified environmental justice standard and arguing that the Eastshore Project will result in significant environmental justice impacts); City of Hayward's Opening Brief at 17-19 (arguing that the Eastshore Project's location is inconsistent with the General Plan because it will erode aesthetics in the area and is contrary to the City's policy encouraging development of an information-related economy in the industrial corridor).) Eastshore Energy, LLC will brief these issues in its reply brief on disputed topics.

- Public Health: Staff's health risk assessment shows that "emissions from [the Eastshore Project] would not contribute significantly to morbidity or mortality in any age or ethnic group residing in the project area." (Ex. 200 at 4.7-1.) Although the County of Alameda's witness disagreed with Staff's conclusions, the witness failed to identify any flaws in the Staff's assessment or submit an alternate assessment. (Staff's Opening Brief at 8-9.)

- General Plan Consistency: Staff correctly characterized Hayward's non-aviation-related arguments regarding the inconsistency of the Project and the General Plan as "arbitrary." (Staff's Opening Brief at 17.) Given the Project's distance from residential areas (one-third mile) and the current manufacturing uses neighboring the Project site, Staff concluded that there will be no significant visual impacts. (*Id.*) The Project also will not undermine the General Plan's objective to encourage an information-based economy in the industrial corridor. "[A]lthough the City has identified that objective as a policy, it has not taken any of the implementation steps identified in the General Plan to achieve this goal . . . . Until the City takes the steps to implement the policy . . . , a determination that the [Eastshore Project] is inconsistent with the policy is both premature and arbitrary." (*Id.*)

Despite the frail arguments asserted by intervenors, it is clear that the Project will not violate LORS or cause significant environmental impacts related to any of these subject areas. Therefore, it is not necessary for the Commission to override these issues when certifying the Project. Should the Commission somehow identify a LORS inconsistency based on these arguments, Eastshore Energy, LLC ("Eastshore") requests that the Commission override any

such LORS on the basis of the California Public Resources Code (PRC) section 25525 analysis set forth below.

III. THE PROJECT DIRECTLY COMPORTS WITH STATUTORY OVERRIDE CRITERIA AND IS PRECISELY SUITED TO AN OVERRIDE DETERMINATION UNDER THE COMMISSION'S PREVIOUS DECISIONS

A. Statutory and Regulatory Override Authorities

The Commission override standard, as set forth in PRC section 25525 and applied in the three licensing cases described below, calls for the Commission to consider whether a project is required for public convenience and necessity and whether there are not more prudent and feasible means of achieving such public convenience and necessity. The public convenience and necessity element looks to whether the project in question would provide a local benefit to the community and add reliability to the statewide system. The more prudent and feasible means element looks at whether the project, as proposed, is at least as prudent and feasible a means as the alternatives for achieving these benefits. This has been interpreted to require the Commission to consider the project's environmental impacts, efficiency, consumer benefits and contribution to electric system reliability.

PRC section 25525 presents the statutory standard for override:

> The commission may not certify a facility contained in the application when it finds . . . that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity. In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability.

B. Commission Override Decisions Unhesitatingly Apply These Standards to Further State Energy Policies and Otherwise Meet Public Need for Electricity

1. Commission Override Decisions Consistently Apply California Public Utilities Code (PUC) § 1001 As An Aid To Defining "Public Convenience And Necessity"

In the absence of judicial decisions interpreting § 25525, the Commission has repeatedly resorted to PUC § 1001 as a tool for interpreting the phrase "convenience and necessity." (*E.g.*, El Segundo Decision at 296.) The Commission has observed:

> In this context, "necessity" is not used in the sense of something that is indispensably requisite. Rather, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary.

(*Id.*) As Staff's Brief On Override Issues ("Staff's Brief") points out, in determining convenience and necessity, the Commission has broad discretion, (Staff Brief on Override Issues, 12/07/07, p. 4 (citing *California Motor Transport Co.*, 28 Cal.Rptr. at pp. 871-872)) so long as that discretion is exercised consistently with the policies and purposes of the Warren-Alquist Act. Staff's Brief correctly states that "[i]f the Commission determines that the construction and operation of a facility will assist in meeting these policies, it may determine that the project is required for the public convenience and necessity." (*Id.*)

2. Commission Override Decisions Consistently Reflect The Exercise Of Discretion In Favor Of Furthering State Energy Policies

In each of its three most recent override decisions, the Commission has taken as its starting point for finding public convenience and necessity the extent to which a project is reasonably related to the goals of the Warren-Alquist Act, which expressly recognizes that electric energy is essential to the health, safety, and welfare of the people of California, and to the state's economy. (Metcalf Energy Center (MEC) Decision at 463; El Segundo Power

Redevelopment Project (El Segundo) Decision at 296; Los Esteros Critical Energy Facility, Phase 2 (Los Esteros) Decision 367-368.) Moreover, the Warren-Alquist Act declares it is the responsibility of state government to ensure the state is provided with an adequate and reliable supply of electrical energy. (Los Esteros Decision at 368 (citing Public Resources Code § 25001).) In applying § 25525 override criteria, the Commission has consistently held that determining "public convenience and necessity" must rely on the totality of the evidence of record and consider environmental impacts, consumer benefits, and electrical system reliability – hewing precisely to the criteria set forth in that statute. (*E.g.*, Decision to Certify the Metcalf Energy Center, (MEC) at 461.)

3. In Determining Whether There Are Not "More Prudent And Feasible Means" To Achieve Public Convenience And Necessity, Commission Decisions Consistently Balance Project Benefits Against LORS Inconsistency

Applying the "more prudent and feasible means" criterion, the Commission stated in its MEC Decision, "In essence, the lack of conformity of a project with LORS is to be balanced against its benefits." (*Id.*) Staff has observed that this involves not just a simple balancing test, but as a means to limit overrides to limited circumstances, the Commission should "consider all relevant factors reasonably related to the statutory purposes that guide the Commission in determining whether 'there are . . . more prudent and feasible means of achieving [the] public convenience and necessity,' and weigh them, giving substantial – but not controlling – weight to the objective of avoiding LORS noncompliance."[4] (Staff's Brief at p. 10.) Staff correctly observes that the statutory override scheme favors LORS compliance where that can be

[4] The City of Hayward's "Brief Regarding . . . § 25525" appears to argue that the statute creates a rebuttable presumption against determining an override. (Hayward Brief, 12/7/07 at p. 3.) The statute simply does not say this. California law is replete with instances in which the Legislature has imposed rebuttable presumptions, using those exact words. Staff probably correctly gauges the intent of the override scheme by characterizing its underlying intent as favoring LORS compliance. That is a far different matter from a presumption against overrides.

achieved. Nothing in the law suggests, however, that this aspect of the Commission's task is intended to affect the statutory override criteria or to dilute the Commission's authority and responsibility to give full effect to the Warren-Alquist Act and related state energy policies.

4. Commission Overrides Have Consistently Turned On The Straightforward Issue Of Need For Electricity

High load areas in California inevitably present more complex land use issues for site locations. In a direct reflection of California's critical need for greater supply, however, the Commission's previous override decisions present no especially complex analysis: in essence, where high demand areas have been shown to need additional local electricity generation and that providing that generation addresses the statewide need for more supply, the Commission has not hesitated to override local land use LORS.

a. The Metcalf Energy Center (MEC) Decision

In the MEC Decision, for example, the Commission found the evidence of record conclusively established that:

- The MEC project would generate electrical energy, and that energy would be consumed in the local area.
- The San Jose area uses much more electrical energy than is generated locally and, consequently, there is a need for more generation to address both demand and reliability concerns.
- The hallmark industries in the San Jose/Silicon Valley area are heavily dependent upon a reliable and adequate supply of electrical energy.

(MEC Decision at 464-465.) The Commission concluded: "Since the MEC will provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy, we conclude that this project is required for public convenience and necessity within the meaning of section 25525." (*Id.*) With respect to whether "more prudent and feasible"

alternatives existed, the Commission referenced its Alternatives discussion and pointed out that no better alternatives were available since each alternative presented LORS inconsistencies of its own and/or adverse environmental impacts. (*Id.* at 468.) Finally, the Commission noted that timing was a critical consideration. (*Id.*)

b. **The Los Esteros Decision**

In the Los Esteros Decision, the Commission made three points regarding public convenience and necessity. First, the Decision stated the evidence conclusively established that the project would meet the goals and policies of the Warren-Alquist act by generating electrical energy and having that energy consumed in the local area. (Los Esteros Decision at 368.)

Second, the evidence established that the San Jose area uses much more electrical energy than is generated locally, and consequently, there was a need for more generation to address both demand and reliability concerns. (*Id.*)

Third, the Decision noted the enabling statute focuses on electricity's essential nature to the welfare of the state as a whole and substantial additions to the state's generating system are needed. "Since the LECEF will provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy, we conclude that this project is required for public convenience and necessity within the meaning of section 25525." (*Id.*)

In discussing the lack of more prudent and feasible means, the Commission straightforwardly applied the balancing test described above, taking into account the project's impacts upon the environment, consumer benefits, and electric system reliability as specified in § 25525, while giving substantial but not overwhelming weight to avoiding LORS noncompliance. (*Id.* at 369.)

The Commission found the project would not create any significant direct or cumulative adverse environmental impacts. Furthermore, there were numerous mitigation measures and Conditions of Certification in place to ensure all of the project's impacts were reduced to below levels of significance. In fact, the project could provide environmental benefits by displacing or encouraging the retirement of older plants which do not meet current environmental performance standards. (*Id.*)

c. The El Segundo Decision

In its El Segundo Decision, as in the other override analyses, the Commission began by assessing whether the El Segundo project was reasonably related to the goals and policies of the enabling legislation (the Warren-Alquist Act). The El Segundo project satisfied this objective in that it would generate electricity, which would be available for consumption in the local area. (El Segundo Decision at 296.)

In addition, the Decision noted the El Segundo project would provide electricity to the state as a whole. "The evidence establishes that the El Segundo project's duct-firing capability will provide the electrical system with flexible peaking capacity that is necessary to keep the electrical grid stable." (*Id.* at 297.) The Commission then explained the need for increased supplies of electrical energy in Southern California and throughout the state over the next several years. In fact, the Commission found the retirement of several aging power plants in the South Coast region, along with continued economic and population growth, were contributing to a tight supply-demand situation. (*Id.*)

With respect to its alternative means analysis, the Commission stated that the net result of the potential use of any of the alternative sites or alternative cooling options appeared to be reasonably likely to create potential problems at least comparable to or greater than those

encountered by the proposed project. Therefore, none of the various alternative proposals provided a more prudent and feasible means of achieving public convenience and necessity. (*Id.*)

In sum, previous override decisions have laid heavy emphasis on the need for electric energy generation, in keeping with the Commission's charge under the Warren-Alquist act. While each site considered presented its distinct land use issues – and the Commission considered both consumer benefit and mitigation evidence in far more detail than presented above – the core analysis in each override decision pivots on the question of whether the project can supply a need that is recognized under state energy policy. And in each instance, the Commission has not hesitated to make the decision to further this policy.

5. In Furtherance Of State Energy Policy, The Commission Has Overridden More Significant LORS Than Any At Issue Here

While the LORS Hayward seeks to protect may cause local concern, relative to other LORS the Commission has addressed they are neither unique nor especially pressing. In its three most recent override decisions, the Commission chose to override LORS that were at least as important to the city or county in which those facilities were located. In fact, the MEC, Los Esteros and El Segundo Projects involved Commission overrides of either more numerous, comparable, or statewide LORS.

In its MEC Decision, the Commission chose to override a multitude of LORS, specifically "the provisions of the General Plan, zoning ordinances, and other LORS . . . which would prohibit construction and operation of the MEC project at the proposed location," including: (1) Sections of the City of San Jose 2020 General Plan, including portions of the land use/transportation diagram, the economic development major strategy, residential land use

policy, industrial land use policy, urban service area policy, urban design policy, scenic routes policy, trails and pathways policy, riparian corridor policy, noise policy and land use compatibility guidelines for community noise; (2) Section 20.20.100 of the San Jose Municipal Code "Allowed Uses and Permit Requirements"; (3) Sections of the North Coyote Valley Campus Industrial Master Development Plan including the general goals, the public improvement guidelines, the private improvement guidelines, the general development plan standards and the environmental performance standards; (4) Sections of the site design and building and fixtures design guidelines of the Riparian Corridor Policy Study; and (5) Certain policies from the Santa Clara County General Plan. (MEC Decision at 469 and App. E.) That list consists of considerably more LORS than are at issue here, yet the Commission had no trouble exercising its responsibility to override all of them in order to meet the clearly countervailing demands of public convenience and necessity.

In its Los Esteros Decision, the Commission specifically overrode the conflicting provisions of the City of San Jose's zoning ordinances which "would prohibit construction and operation of the [Los Esteros] project at the site discussed herein." (Los Esteros Decision at 372). The land use section of the decision found that the Los Esteros project required a zoning change, specifically an amendment to the then-existing Planned Development Zone. (Los Esteros Decision at 365.) The Los Esteros project's conflict with the City of San Jose LORS was considerably more acute than the Eastshore Project's conflict with the City of Hayward LORS. Yet, in the Los Esteros Decision, the Commission again chose to override the conflicting City of San Jose LORS in favor of supplying an important need for local electricity generation.

Finally, in the El Segundo Decision, the Commission expressly overrode applicable provisions of the California Coastal Act and the City of El Segundo's Local Coastal Program.

(El Segundo Decision at 295.) The Commission decision to override a California state law shows that Hayward's concerns and its LORS are certainly no weightier than what the Commission has previously set aside as a means to achieve more significant statewide ends.

IV. PRC § 25525 CRITERIA: THE EASTSHORE PROJECT RESULTS IN NO UNMITIGATED ENVIRONMENTAL IMPACTS

A. A Perceived Safety Risk Is Not An Environmental Impact

Staff has identified only one unmitigated impact from the Eastshore Project, which crosses over between Land Use and Transportation: a perceived risk to aviation safety arising from the Project's proximity to the Hayward Executive Airport. Eastshore has addressed this issue in its Opening Brief and, in less detail, in the discussion at section I.A., above. In short, the record evidence demonstrates overwhelmingly that no such risk, and no such environmental impact, will result from construction or operation of the Eastshore Project.

In considering environmental impacts under PRC § 25525, the Commission's task is guided by Cal. Admin. Code, Title 20, § 1755(c),[5] which prohibits project certification unless significant adverse environmental effects have been effectively mitigated, and additionally provides, in relevant part:

> (d) If the commission cannot make both the findings required under subsection (c), then it may not certify the project unless it specifically finds both of the following:
>
> (1) That specific economic, social, or other considerations make infeasible the mitigation measures or project alternatives identified in the application proceeding; and
>
> (2) That the benefits of the project outweigh the unavoidable significant adverse environmental effects that may be caused by the construction and operation of the facility.

[5] 20 CCR § 1755 becomes relevant to the override analysis under Pub. Res. Code § 25525's requirement that the override analysis consider "the impacts of the facility on the environment."

As noted above, in the context of overriding local LORS the Commission may to some extent feel bound to defer to local authorities' interpretations of those LORS. In this matter, that deference would require the Commission to acquiesce in Hayward's and the County of Alameda's construction of relevant land use regulations to mean that any risk whatsoever to aviation, however miniscule, runs afoul of such regulations. With respect to identifying environmental impacts under 20 CCR 1755 and the California Environmental Quality Act (CEQA), however, the Commission is the lead agency for the environmental review of this Project and is itself responsible for the impacts analysis.[6] In short, out of extreme deference the Commission may find a LORS inconsistency, but that does not compel the Commission to identify a nearly non-existent safety risk as a "significant environmental effect."[7]

Staff's analysis of aviation safety preceded the hearing and other introduction of evidence into the present record; the analysis must be reviewed by the Commission in that light. In consideration of "the entire record of the proceeding" under PRC § 25525, the Commission should find that the Eastshore Project's proximity to the Hayward Executive Airport creates no significant environmental effect. Again, it is free to do so even if it decides that the Project's operation violates local LORS.

Should the Commission determine that the Project does create land use and transportation impacts, Eastshore requests that the Commission make the findings specified in 20 CCR §

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[6] The Commission has the exclusive authority to license the Project under PRC § 25500 and is designated the CEQA lead agency under PRC § 25519(c).

[7] As the Commission recognized in its MEC Decision, "[t]he statute (§ 25525) recognizes that a LORS noncompliance does not necessarily equate with the creation of a significant adverse environmental impact under CEQA." (MEC Decision, p. 463.)

1755(d), and override those impacts for all of the reasons set forth below in the discussion of PRC § 25525 override criteria.[8]

V. PRC § 25525 CRITERIA: THE RECORD REFLECTS AMPLE CONSUMER BENEFITS FROM THE PROJECT

In previous override decisions, the Commission has identified "Consumer Benefits" primarily in terms of lower energy prices. (*E.g.*, MEC Decision, at 467.) The Project fully meets that standard.

A. The FSA Identifies A Number Of Consumer Benefits Of the Project

Staff identified the Project's reduction of transmission system losses as a source of savings to ratepayers of between $11.4 million and $16.3 million (present value) over 20 years of operation. (Ex. 200, at 5.6-6.) In addition, Eastshore would help reduce congestion and overloads in the Bay Area bulk power system. (*Id.* at 5.6-3.) Staff also identified important collateral benefits of Eastshore's system loss reductions, including "a related decrease in fuel use, water use, and air emissions by reducing the need for additional generation sources." (*Id.* at 1-9.) And while system reliability may technically be a separate category of discussion, the FSA does point out Project reliability features that unmistakably benefit consumers. Most significantly, Staff reported that "[u]nder certain outage conditions, the Eastshore project could be the only major generator providing electricity to the Hayward area." (*Id.* at 5.6-2.)

B. The Eastshore Project Will Provide Additional Benefits Not Adequately Addressed In the FSA

As discussed more fully in Eastshore's Opening Brief, Peter Mackin, Eastshore's Local System Effects expert, confirmed the benefits to the system in removing transmission losses on a

[8] Apparently, the standard in 20 CRR § 1755 (d)(2) (project benefits outweigh adverse impacts) sets a somewhat higher bar than PRC § 25525, which only requires a finding that no better alternatives exist. Eastshore's position is that the Project benefits so clearly outweigh any miniscule safety risk that the record overwhelming supports a favorable finding under either standard.

percentage basis for the Eastshore Project are the same as those for the Metcalf Energy Center in San Jose, (1/14/2008 RT 29: 1-4), which the Commission determined to be essential to San Jose's needs in its MEC Decision. As Mr. Mackin testified, the only difference is the size of the facility. Additionally, Staff estimated a zero value for reduced plant emissions -- while acknowledging this is a very conservative assumption. In contrast, James Westbrook, Eastshore's Air Quality Expert, valued reduced emissions at approximately $115,000 to $150,000. (Ex. 15 at 4.) Mr. Westbrook added that annual carbon dioxide (CO2) emission reduction would amount to approximately 9,000 to 12,000 tons per year and that the value of avoided air toxic emissions were not considered in Staff's calculations.[9] (*Id.*) Finally, Eastshore's benefits were understated in the FSA because Staff estimated the benefits of the nearby RCEC first, even though Eastshore is first in the CAISO queue. (*Id.*; 1/14/2008 RT 23: 18-25, RT 24: 1; RT 22:25, RT 23: 1-2.)

Under the standard applied in previous Commission override decisions, the record here strongly supports a finding that its substantial contribution to consumer benefits makes the Project one that is required for public convenience and necessity.

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[9] D. 04-12-048 assigned a value of between 8 and 25 dollars a ton to CO2. (D. 04-12-048, p. 216.) These values equate to a savings of between $72,000 and $300,000 per year. In D. 05-04-024 the CPUC adopted a CO2 adder of 8 dollars a ton for 2004 with an escalation at 5% per year. (See D. 05-04-024, COL. 7, p. 47 and FOF 5, p. 45).

VI. THE PROJECT WILL CONTRIBUTE SUBSTANTIALLY TO ESSENTIAL ELEMENTS OF LOCAL AND STATEWIDE ELECTRIC SYSTEM RELIABILITY

A. The Project Has Its Genesis In California's Recognized Need For Electric System Reliability, A Recognition Firmly Rooted In Legislative Enactments As Well As California Public Utility Commission ("CPUC") and Commission Policies And Decisions

1. California's Energy Need Is Urgent And Immediate

Pacific Gas and Electric Company's (PG&E) Request for Offer (RFO) and its resulting contract with Eastshore grew directly out of the State Energy Action Plan, PG&E's Long-Term Procurement Plan (LTPP), and related CPUC decisions. Each of these, in turn, evolved out of the larger backdrop of the state Energy Action Plans and the Commission Independent Energy Policy Reports. Put another way, the Eastshore contract and the Eastshore Project form part of a larger regional and statewide process of electric energy procurement grounded in PUC § 454.5, which ensures that IOUs can recover their investment costs in that procurement effort.

In its *Opinion On New Generation And Long-Term Contract Proposals And Cost Allocation* (D. 06-07-029 (July, 2006)) the CPUC summarized California energy policy in the simplest possible terms:

> The State's energy policies - as noted in the Commission's and the California Energy Commission's (Commission) Energy Action Plan II (EAP II) and the Commission's Integrated Energy Policy Report (IEPR) - uniformly point to the need for the State to invest in new generation in both northern and southern California.

(D. 06-07-029, p.6 (footnote omitted).) In the referenced Energy Action Plan II (EAP II, 2005), the CPUC and the Commission jointly stated:

> Significant capital investments are needed to augment existing facilities, replace aging infrastructure, and ensure that California's electrical supplies will meet current and future needs at reasonable prices and without over-reliance on a single fuel source." *Even with the emphasis on energy efficiency, demand response, renewable resources, and*

> *distributed generation, investments in conventional power plants will be needed. The State will work to establish a regulatory climate that encourages investment in environmentally-sound conventional electricity.* Key Actions 3 and 4 implementing "Electricity Adequacy, Reliability and Infrastructure" state we will "encourage the development of cost-effective, highly-efficient, and environmentally-sound supply resources [after incorporating higher loading order resources] to provide reliability and consistency with the State's energy priorities," and "establish appropriate incentives for the development and operation of new generation to replace the least efficient and least environmentally sound of California's aging power plants."

(EAP II, 2005, p.7 (emphasis added).) In its "Need Determination" discussion in D. 06-07-029, the CPUC underscored the acute nature of this need:

> *We reaffirm the already established immediate and urgent need for new resources.* This is not, however, an exact science and we heed the cautions proffered by so many parties that if we are going to take this bold interim step, that we not use over-inflated estimates of need, but use conservative estimates until a record supports a larger increase. We will proceed using the need numbers from our last LTPP decision, D.04-12-048, and/or the numbers further supported by the Commission's 2005 IEPR.

(D. 06-07-029 at 36 (emphasis added).) Thus, even by this self-described conservative estimation, the CPUC could not have been more emphatic in describing California's electricity generation deficit. And as a critical element of meeting this need, the CPUC specifically focused on supplying *local* generation:

> For both SCE and PG&E, *we urge the utilities to consider to be mindful of the need for resources that address the need for local reliability*, as discussed in Phase I of R.05-12-013. In that docket, we are in the process of implementing local RAR. To the extent that the IOUs are going to procure new resources on behalf of all customers, we expect that they will give high priority (if not outright preference) to resources that meet local RA obligations. *The IOUs should justify why any new contract procured on behalf of the entire system does not address local RA requirements.*

(*Id.* at 40 [emphasis added].)

2. Meeting California's Energy Needs Turns On Developing More Efficient Gas-Fired Facilities To Complement Increased Renewables

Not surprisingly, the direction of energy policy described in the Commission's Integrated Energy Policy Reports (EIPR) closely parallels the EAP discussion and CPUC decisions. In the 2007 IEPR, focused in large part on the challenges of meeting the goals of developing renewable energy under Assembly Bill (AB) 32, the Commission observed:

> Even as California increases its use of preferred strategies of efficiency and renewable resources, conventional resources -natural gas, nuclear, coal and large hydroelectric - will continue to be the mainstay of the state's resource mix for the immediate future. Non-renewable generation resources and large hydroelectric currently account for 89 percent of the state's electricity supply. Even when California's 33 percent renewable target is met, two-thirds of the state's electricity will still come from conventional sources - the vast majority of those will be natural gas-fired. Of the nearly 24,000 megawatts of new capacity licensed since 1998, 36 plants - 12,910 megawatts - have been built and are in operation. An additional 2,278 megawatts are currently under construction, and 18 additional plants, totaling 8,361 megawatts, have been approved, but construction has not moved forward. Of these megawatts, 99 percent are fueled by natural gas and 1 percent by geothermal. While nuclear and "clean" coal-fired generation offer the potential to generate electricity with lower CO_2 emissions, the Energy Commission does not expect them to contribute significantly to the state's near-term AB 32 goals given the economic, environmental, and regulatory barriers these technologies face.

(2007 IEPR, p. 7.)

3. Flexible, Gas-Fired Generation Is Required To Replace Aging Facilities And To Integrate Renewables

Probably most significant for the Committee's consideration in the present matter, the 2007 IEPR is replete with specific references to the need for resources to meet peak demand. The Report states that statewide annual peak demand is projected to grow, on average, 850 MW per year for the next 10 years, or 1.35 percent annually. Population growth in California's drier, warmer areas increases peak demand more than it increases annual energy consumption. (*Id.* at 44.) But even in the Bay Area, North and Central Coast Region, peak demand is projected to

increase by approximately 1,600 MW between 2007 and 2018, (*Id.* at 47, Fig. 2-8) as even more temperate climates become increasingly dependent on air conditioning. As the Report points out, the area from Santa Rosa to San Jose now has a central air conditioning saturation of nearly 50 percent, which is double previous estimates. (*Id.* at 95.) Moreover, "More than 75 percent of new single-family homes in the area are projected to have central air conditioning. These trends foretell a continuing reduction in the state's load factor and continuing concern about meeting peak energy needs." (*Id.*)

The 2007 Report goes on to consider effective means of meeting the challenge of increasing peak demand – and complementing the increase in renewables -- with a heavy emphasis on increasing the efficiency and flexibility of conventional generation.

> Existing coal and nuclear plants and some recently built gas-fired baseload plants cannot ramp up and down as rapidly as needed to meet the increased peakiness of California's electricity load and the expected increased use of intermittent and must-take renewables to achieve 33 percent renewable electricity by 2020. . . . To meet the growing demand for air conditioning, California needs greater quantities of electricity that can ramp up quickly.

(*Id.* at 146.) The Report points to newer natural gas power plants, which are more efficient than older gas power plants and which "can ramp up and down more quickly to provide electricity to meet peak demand and system regulation requirements." The Report cautions that price volatility for natural gas can be problematic, but nevertheless concludes that California most likely will continue to build new natural gas power plants for years to come:

> Natural gas power plants are also the best complement to renewable resources since they have the ability to come on line quickly when wind or solar resources lose output due to lack of wind or sunshine. Natural gas power plants have proven to be reliable providers of electricity for California.

(*Id.* at 218.) Continuing in this vein, the Report observes that newer natural gas electricity

generation technologies provide efficiency and environmental benefits by reducing greenhouse gas emissions as they reduce the amount of natural gas used. (*Id.* at 239.) Newer, more efficient gas-fired plants are needed to replace aging, inefficient[10] facilities: "A]s electricity demand grows, California remains dependent on these older plants for summertime peak power. California must take serious steps to retire these aging facilities that are being misused as peakers and replace them with newer technology that can more effectively provide electricity when needed without added emissions." (*Id.* at 240.)

The Commission's 2005 IEPR took much the same approach to the challenges of meeting peak demand, noting that an additional problem in this area is that most new gas-fired power plants are combined cycle units designed to run at high load factors where they are most efficient, but unable to ramp up or down quickly enough to meet peak demand. "While some utilities have invested in simple-cycle peaking plants that run just a few hours each year, most of the state's new power plants are combined-cycle and are not well matched with swings in system demand. *California must quickly and thoughtfully craft solutions for meeting this increasingly 'peaky' demand.*" (2005 IEPR, p. 50 (emphasis added).) And even before AB 32, the Commission's attention was tuned to the challenge of adding renewables to California's energy portfolio, given that the availability of intermittent renewable sources simply doesn't track peak demand. "With significant wind energy in the mix, the need for controllable generation is larger." (*Id.* at 114.)[11]

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[10] Aging facilities can be between 25 and 62 years old, operate at only 33% efficiency, and remain idled during low-demand hours, burning natural gas and emitting greenhouse gas emissions without producing electricity. (*Id.* at 240.)

[11] The Commission's 2008 Update to the EAP II echoes this now-familiar refrain: "Even with energy efficiency, demand response, and renewable resources, investments in conventional power plants and transmission and distribution infrastructure will still be needed." (EAP II, 2008 Update at 15.) And again, "Finally, we recognize that some new fossil-fueled generation is

B. PG&E's LTPP And Subsequent RFO, Along With The Commission And CPUC Decisions Approving These, Are Integrally Related To Current Commission And CPUC Energy Policies And Strategies

PG&E's LTPP was assessed in minute detail for CPUC approval in terms of its consistency with very specific elements of state forecast and procurement criteria. PG&E used the Commission-adopted load forecast trends from the 2003 IEPR, adjusted for the statewide economic recovery in 2002 and 2003, in creating the LTPP that provided the basis for its RFO. (D.04-12-048 p.29.) Specifically, the CPUC concluded, "[w]e find all three LTPPs consistent with the 2003 IEPR, are reasonable for planning purposes and that the medium, preferred case should be followed . . ." (D.04-13-048, COL 3, p. 227.)

After establishing the load forecasts, the CPUC required PG&E to first apply existing resources and policy preferred resources consistent with the loading order established in EAP II prior to identifying the "need" or "net open position" for new generation. (*Id.* FOF 4, p.195 & pp. 31-32.) And the CPUC found PG&E's LTPP consistent with the loading order established in EAP II: "[w]e find that the IOU filings comply with the direction provided in the EAP because they included the EAP targets established in the RPS, DR and EE proceedings . . ." (*Id.* FOF 23, p. 200.)

Only after ensuring PG&E's LTPP was consistent with the Commission-approved 2003 IEPR, was consistent with the loading order established and adopted by both the Commission and the CPUC in EAP II, and was consistent with the CPUC adopted targets for renewable portfolio standard, demand response and energy efficiency set in earlier CPUC proceedings, did the CPUC approve PG&E's request to add capacity and new peaking generation.

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probably in our future as well. Over the last decade and at present, the majority of such generation under development is natural gas." (*Id.* at 16.)

> We find that PG&E's LTPP plan is reasonable and we approve PG&E's strategy of adding 1,200 megawatt (MW) of capacity and new peaking generation in 2008 and an additional 1,000 MW of new peaking and dispatchable generation in 2010 through RFOs because it is compatible with PG&E's medium resource needs, does not crowd out policy-preferred resources, and is a reasonable level of commitment given load uncertainty.

(*Id.* Order 4, p.238.)

Moreover, when the CPUC approved PG&E's 2004 Long-Term Procurement Plan, it recognized the importance of a diversified utility resource portfolio:

> Because there is no way to predict the energy demand/supply situation with any certainty, especially in the face of changing load situations, the IOUs should include a mix of resources, fuel types, contract terms and types, with some baseload, peaking, shaping and intermediate capacity, with a healthy margin of built-in flexibility and sufficient resource adequacy in their procurement portfolios.

(D.04-120-048, FOF 17, p.231.) This call for flexibility to meet uncertain demand is key to the discussions described above in both the EAP II and the 2007 IEPR. In its 2006 LTPP, PG&E responded by specifically including as one of five key elements of that Plan procuring up to 2,300 MW in new dispatchable and operationally flexible generation resources. (D. 07-12-052, 12/20/07, (Order Adopting LTPPs), App. B, p. 3.) PG&E followed up with its Application for CPUC approval of its 2006 RFO proposal, which was developed around and included projects capable of meeting this need. In its Application, PG&E described the projects it accepted pursuant to its RFO in terms that echo the strategic thinking underlying both the EAP II and the IEPRs:

> The proposed new projects constitute an impressive portfolio of highly efficient peaking, load-following and intermediate generation technologies that will provide PG&E with the capability to cost-effectively serve and reliably follow its customer load variations and more efficiently integrate its growing portfolio of renewable resources. These new facilities are geographically diverse and some are strategically located in local area load

> pockets in the Bay Area and North Coast. This benefits PG&E's customers and others in the region by reducing local area resource adequacy costs in these constrained regions.

(PG&E Application for Contract Approvals, 4/11/06 (Prepared Testimony), p. 1-2.) Both the LTPP and the Application for Approval of RFO's were approved.

As the Commission is aware, of the seven contracts included in PG&E's 2006 RFO, three have been licensed, one has been suspended. (Galati Testimony, 1/14/08, RT 351: 9-15.) As PG&E's Scott Galati testified, in response to the question whether the process has taken longer than PG&E expected, "It certainly has." (Galati Testimony, 1/14/08, RT 351:19-22.) Mr. Galati also testified unambiguously regarding the need for this procurement. Mr. Galati was asked, specifically in regard to the override issue, if PG&E's strategy had been to contract for more facilities than needed as a hedge against contingencies. Galati replied:

> "That I can answer pretty straightforward. No, we are not allowed to over-procure. And in fact one of the decisions from the PUC this time is any project that did not make it through is automatically allowed for us to purchase those megawatts. *Those megawatts are needed. There is no question that they are needed. The PUC determined that the megawatts were needed prior and the PUC has reaffirmed that the megawatts are needed for our system.* So we will purchase those megawatts."

(Galati Testimony, 1/14/08, RT 364: 1-20 [emphasis added].)

C. <u>The Project And Projects Like It Significantly Advance California Energy Policy Implementation, And It Is Therefore Required For Public Convenience And Necessity</u>

As the discussion above should make abundantly clear, it is no coincidence that the Eastshore Project is slated for a high-load center with inadequate local generation, that it is a flexible, quickly ramping, simple-cycle, fuel-efficient, low-emission plant capable of contributing substantially to meeting growing East Bay peak demand. PG&E's selection of the Project to supply much-needed Hayward area load is directly responsive to current California

energy policy. Because advancing statewide energy policy is fundamental to Commission override decisions, it is hardly surprising, either, that the important contributions of the Project precisely track the project elements impelling the overrides in the MEC, Los Esteros and El Segundo decisions.

First and foremost, the Project will provide a local generation facility. The local community imports the vast majority of its power, resulting in transmission losses, inflexibility, and reliance on older, more polluting, less efficient plants. Eastshore will make a major contribution to local supply, in certain outage conditions providing the only major generation to the Hayward area. Local generation was a critical component of the "public convenience and necessity" analyses in both the MEC and Los Esteros decisions. As noted above, Eastshore will make an even greater proportional contribution to local supply for Hayward than did MEC for the San Jose area. As Mr. Mackin testified, "on a percentage basis Eastshore is much bigger relative to the area it is serving than Metcalf was." (1/14/2008 RT 29: 24-25, RT 30:1.)

Reliability was essential to previous override decisions, and Eastshore ably meets reliability criteria. The Project will increase reactive margins in the southern East Bay area and the San Francisco Peninsula, thereby improving voltage stability and system reliability. Adding reactive power is essential to avoiding rolling blackouts and even uncontrolled loss of load associated with voltage collapse. In addition, from every indication the Project will reliably connect to the CAISO-controlled grid with no modifications to that system and without violating any planning standards or reliability criteria. (Opening Brief, pp. 80-81.)

Finally, the Project will provide much needed operational flexibility to PG&E and the CAISO. As the undisputed testimony makes clear, operational experience shows that one or more elements of the power system are usually out of service. (Ex. 14, at 3.) Mr. Mackin

testified that the Project's ability to add generation in the load center will increase the load serving capability of the system overall, providing the additional flexibility to deal with unanticipated contingencies or higher than expected load levels. (Ex. 14 at 3-4.)

Whether the Project is viewed in light of the various – but universally agreed on – articulations of California energy policy, in light of specific decisions of the CPUC, or in light of criteria applied in the Commission's override decisions, there is simply no question that the Project is required for public convenience and necessity. As the difficulties and delays facing PG&E's procurement effort multiply, it is clear that the Project should be brought online as quickly as possible. No previous project the Commission has considered for an override has presented qualifications more compelling than Eastshore's.

VII. NO PRUDENT AND FEASIBLE ALTERNATIVES TO THE EASTSHORE PROJECT EXIST

PRC § 25525 requires Eastshore to show that no better (more feasible and prudent) alternatives to the proposed Project exist. As discussed in detail in Eastshore's Opening Brief, and as the FSA concluded, not only are there no better alternatives -- no genuine alternatives are available at all. (Opening Brief, § VIII ("Alternatives").) After its initial screening, Staff proceeded to consider five alternative locations. (Ex. 200, at 6-7.) One site is simply unavailable. Three fail to demonstrably improve conditions that have given rise to concerns about an airport-proximate location, and pose additional possible environmental consequences; two of these would require significantly longer transmission lines to meet project objectives. But most importantly, all five of the alternatives considered would require Eastshore to start its

project development from scratch, without any assurance of success, and from that perspective each 'alternative' is both imprudent and infeasible.[12]

Staff has acknowledged that any relocation to an alternative site at this juncture would require Eastshore to submit a new Application for Certification (AFC), including revised engineering and environmental analyses. (Ex. 200 at 6-1.) Preparing a new AFC for Commission approval and participating in public workshops and an evidentiary hearing to approve the alternative site would delay the project well beyond Eastshore's contracted delivery date of May 2009. (Ex. 10, at 3.) The best outcome for a relocation would result in a delay of at least 16 to 18 months. (Ex. 16, at 2.)

The only alternative location identified by Staff (Alternative Site D) as possibly reducing transportation and land use impacts would fail to meet the project objective of connecting to the Eastshore Substation. As a result, not only would preparation of a new AFC be required, but a new System Impact Study and a new Facilities Study, as well – without any assurance that the results of the study would be useful or acceptable. (Ex. 10, at 7.) Eastshore would lose its place in the transmission queue and would need to restart the System Impact Study (SIS) process from the beginning. (1/14/08 RT 24: 22-25; RT 25: 1-7.) Alternative substations were not part of PG&E's original bid evaluation. (*Id.*) Other bidders to the RFO could legitimately argue that PG&E's unilateral acceptance of an alternate substation deprived other bidders of the opportunity to similarly modify their bids. Any attempt by Eastshore to retool its analysis and to change the interconnection location would create sufficient complication, delay, and uncertainty to eliminate the Project for all practical purposes.

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[12] *See* Opening Brief, § VIII. "Alternatives," at 70-75.

When the Commission considered alternatives to the MEC project in making its override determination there, it noted that "timing is a critical consideration." (MEC Decision, at 468.) As that decision pointed out:

> The net result of the potential use of any of the alternative sites thus appears to us to be reasonably likely to create potential problems at least comparable to those encountered by the proposed project. Moreover, the evidence shows that the area's supply-demand imbalance and the need to augment electrical system reliability in the south Bay and the greater Bay Area require prompt action. The evidence establishes that the MEC is a substantial positive step in this regard, and is in fact the only identified major generation project capable of becoming reality within the near-term future. Development of a hypothetical project at an alternative site would logically, at a minimum, postpone any system benefits offered by the MEC. On balance, these circumstances do not, in our estimation, equate with a more prudent and feasible means of achieving public convenience and necessity.

(*Id.* at 468-469.) In the present matter, delay is not simply a matter of postponing benefits, but potentially puts in doubt realizing those benefits at all. As discussed above, PG&E's procurement schedule already appears nearly as doubtful as its need to provide significant new generation is certain. Failing to license the Project would exacerbate that uncertainty and undercut a procurement strategy that addresses, as previously noted, an "urgent and immediate" need. With an impact on local load comparable to that of the MEC project, Eastshore's generation cannot be any less critical to that same strategy, one that led the Commission to override significant LORS in San Jose to ensure local reliability. Here, as in the MEC project, the "need to augment electrical system reliability in the south Bay and the greater Bay Area requires prompt action." On that basis alone, there can be no serious question that no feasible or prudent alternatives to the Project exist.

The Commission should not hesitate to exercise its override authority here. Without a genuine practical alternative, the Commission's task of balancing is really reduced to a choice between either moving forward on a significant element of California energy development

strategy, or rationalizing a retreat from that objective in terms of a perceived impact of the Project which has no genuine factual, scientific or analytical basis. The Commission's charge under the Warren-Alquist Act makes the first option the Commission's only imaginable choice.

VIII. CONCLUSION

It is no exaggeration to point out that new gas-fired projects like Eastshore constitute a highly significant element of statewide energy policy and energy procurement strategy. On balance, they provide positive environmental benefits and are no less than essential to the integration of intermittent renewables into California's energy mix. The Hayward area needs Eastshore's reliability and flexibility *now*. If any LORS inconsistency truly exists here, a highly doubtful proposition, the Commission should exercise its statutory responsibility to override it.

DATED: February 21, 2008 DOWNEY BRAND LLP

By: Jane E. Luckhardt

Jane E. Luckhardt

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 (AFC Accepted 11/8/06) **PROOF OF SERVICE** (Revised 1/18/08)

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

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DECLARATION OF SERVICE

I, Lois Navarrot, declare that on February 21, 2008, I deposited copies of the attached **EASTSHORE ENERGY CENTER'S BRIEF SUPPORTING OVERRIDE OF LORS NONCOMPLIANCE** in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of the 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.

Lois Navarrot

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