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STATE OF CALIFORNIA
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In the Matter of: APPLICATION FOR CERTIFICATION FOR THE EASTSHORE ENERGY CENTER	Docket No. 06-AFC-6 CITY OF HAYWARD REPLY BRIEF REGARDING THE EASTSHORE ENERGY CENTER REQUEST FOR OVERRIDE

TABLE OF CONTENTS

PAGE

I. EASTSHORE DID NOT MEET ITS BURDEN TO DEMONSTRATE THAT THE EEC COMPLIES WITH LORS OR CEQA 1

A. The Helicopter Flyover Test Provides Limited Evidence of the EEC's Potential to Interfere with the Airport 2

B. FAA Evidence and Testimony Urge Disapproval of the EEC 3

C. Prior Approval of the Russell City Energy Center Does Not Support Approval of the EEC 4

II. EASTSHORE DID NOT MEET ITS BURDEN TO DEMONSTRATE THAT THE CEC SHOULD OVERRIDE LORS AND APPROVE THE EEC 6

A. Eastshore has not demonstrated that the EEC is required for public convenience and necessity 7

1. CEC precedents do not support approval of the EEC. 8

a. The Metcalf Energy Center 8

b. Los Esteros 9

c. El Segundo 10

2. Based on the evidence in the record, the EEC is not required for public convenience and necessity 10

B. Eastshore Did Not Demonstrate That All Other Alternatives Are Infeasible 12

C. Eastshore Did Not Demonstrate That The EEC's Benefits Outweigh the Unavoidable Significant Environmental Risks 14

III. THE CEC CANNOT OVERRIDE FEDERAL LAW 15

IV. CONCLUSION 16

Intervener City of Hayward ("City") submits this brief in reply to Eastshore Energy L.L.C.'s ("Eastshore") briefs requesting that the California Energy Commission ("CEC") certify the Eastshore Energy Center ("EEC"). *See* Eastshore Energy Center's Opening Brief on Contested Subject Areas, February 11, 2008 ("Eastshore 2/11/08 Brief"); Eastshore Energy Center's Brief Supporting Override of LORS Noncompliance, February 21, 2008 ("Eastshore 2/21/08 Brief"). As described in the City's brief submitted on February 11, 2008 ("City's Opening Brief") the EEC does not comply with applicable laws, ordinances, regulations, and standards ("LORS") and results in a significant impact under the California Environmental Quality Act ("CEQA"), Pub. Res. Code §§ 21000-21178. *See also* Title 14 Cal. Code Regs. §§ 1500-15387 ("CEQA Guidelines").

As described herein, Eastshore has not met its burden to demonstrate that the EEC: (1) complies with applicable LORS; (2) will not have a significant environmental impact; and, (3) should be approved despite such noncompliance.

I. EASTSHORE DID NOT MEET ITS BURDEN TO DEMONSTRATE THAT THE EEC COMPLIES WITH LORS OR CEQA

A pivotal issue in this certification proceeding is the significance of the EEC's impact on the Hayward Municipal Airport ("Airport").[1] As the applicant, Eastshore has the burden to demonstrate that the EEC will comply with applicable LORS and that it will not have a significant impact on the Airport. 20 Cal. Code Regs. § 1723.5(a). Despite Eastshore's unsupported assertions, the EEC's effect on the Airport and associated public safety are both LORS violations and adverse environmental affects as defined by CEQA. CEQA Guidelines § 15125. Further, the EEC's failure to comply with the City's General Plan, the City's Airport Master Plan, the City's Airport Approach Zoning Ordinance and

[1] The City maintains its argument that the EEC fails to comply with the City's land use LORS. The City also maintains that the EEC will create a significant effect on the environment as defined by CEQA. Pub. Res. Code § 21068. For the sake of brevity, the City will not repeat its arguments here, but relies on the presentation of evidence in the City's Opening Brief at pages 15-21.

the Airport Land Use Policy Plan are all significant impacts as defined by CEQA. CEQA Guidelines § 15125(d) (requiring analysis of "any inconsistencies between the proposed project and applicable general plans and regional plans.").

Eastshore attempts to satisfy its burden to demonstrate compliance by relying almost exclusively on anecdotal evidence that a power plant will not disrupt aircraft, in the form of a flyover test of the 118 MW Barrick Western 102 Power Plant, east of Reno, Nevada ("Barrick Plant"). Exh. 20, Final Report on Turbulence Felt in a Light Helicopter Caused by a Power Plant Thermal Plume ("Flyover Test"); Eastshore 2/11/08 Brief, pp. 6-9, 13, 16-21, 25, 27. Eastshore also relies on the report published by the Federal Aviation Administration ("FAA"), "Safety Risk Analysis of Aircraft Overflight of Industrial Exhaust Plumes" (hereinafter referred to as "FAA Report"), but does so inconsistently by completely ignoring the FAA Report's safety recommendations and FAA testimony. Eastshore 2/11/08 Brief, p. 14.

A. <u>The Helicopter Flyover Test Provides Limited Evidence of the EEC's Potential to Interfere with the Airport</u>

Despite Eastshore's characterizations, the Flyover Test does not provide conclusive evidence that the EEC will not affect the Airport. On the contrary, the Flyover Test established that thermal plumes generate turbulence. 12/18/07 RT, pp. 77, 248. The degree of turbulence, or the effect of the turbulence on the various pilots of different skill levels using the Airport is unknown, and Eastshore presented no evidence to the contrary. In addition, the Flyover Test was hardly a "worst-case" simulation (as characterized by Eastshore) because of the significant differences between the Barrick Plant and the EEC: (1) the Barrick Plant stacks are only 55 feet high, in contrast to the EEC's 70-foot stacks; (2) the Barrick Plant stacks are arranged in clusters stacks instead of a line; (3) only 11 out of 14 units were operating during the Flyover Test; (4) the Barrick Plant has 430 fans, in contrast to the EEC's 504 fans; (5) the Barrick Plant's fans were only operating at 45% during the Flyover Test. Exh. 20, STI Report, pp.5-7; 12/18/07 RT, pp. 240-242, 256-259. Finally, the Flyover Test consisted of only 12 passes over the facility made during a

45-minute period on a single day, with no other distractions (e.g., other aircraft in a traffic pattern). Exh. 20, STI Report p. 7. The Flyover Test, at best, is the experience of one pilot, at certain skill level, during a single type of weather condition flying over a similar — but by no means identical — facility operating at partial capacity. Thus, the Flyover Test should be afforded no more weight than the flyover conducted by Mr. Gary Cathey or the many reports collected by CEC Staff from pilots of all skill levels, in all aircraft, during various weather conditions flying over the Blythe facility. 12/18/07 RT, pp. 122-124, 154-155; Exh. 728.

Standing alone, the anecdotal evidence of the Flyover Test does not lead to the conclusion that the EEC will not create a significant effect on the Airport. The Flyover Test certainly was not rigorous or comprehensive enough to rebut the substantial evidence in the record that the EEC will interfere with aircraft and the Airport. City's Opening Brief, pp. 3-11; CEQA Guidelines, App. G.XV.c (an impact to a traffic pattern is a significant impact under the CEQA Guidelines).

B. <u>FAA Evidence and Testimony Urge Disapproval of the EEC</u>

The Eastshore brief also inconsistently applies the testimony from the FAA. First, Eastshore incorrectly asserts that the FAA Report is a "determination [of] the level of risk caused by the Eastshore Project." Eastshore 2/11/08 Brief, p. 14. This is incorrect. The FAA study does not apply to any specific facility; it is a data analysis of the accident/incident rate for overflights of plumes. Exhs. 39, p. iv; 204; 12/18/07 RT, p. 115. Eastshore acknowledges that the FAA Report is not specific to the EEC because Eastshore attempts to reject the safety recommendations of the FAA Report, asserting that "[t]he record in no way suggests that the FAA considered the specific conditions at the Eastshore Project when identifying these generic safety recommendations." Eastshore 2/11/08 Brief, p. 14. Eastshore does not have the luxury of relying on certain information from the FAA Report but rejecting the conclusions. The FAA Report does not address the specific conditions at the EEC or any particular facility in reaching any of its conclusions or recommendations. The FAA Report nevertheless makes several specific safety

recommendations to continue to minimize the risk to aircraft from thermal plumes. Exh. 29, pp. 16-17. The recommendations are so important that the FAA Report proposes that they be codified as regulations. *Id.* Such regulations would result in disapproval of the EEC. Therefore, the evidence given by the FAA should not be taken lightly; indeed, the FAA's evidence provides ample grounds to deny certification to the EEC.

C. Prior Approval of the Russell City Energy Center Does Not Support Approval of the EEC

Eastshore also relies heavily on the prior approval of the Russell City Energy Center ("RCEC") to support its arguments that the EEC will not impact the Airport and that the EEC will be in compliance with the City's LORS. Eastshore 2/11/08 Brief, pp. 16, 25, 28, 29. Prior approval of a facility, with all of its attendant mitigations and site specific conditions, does not provide any evidence that the EEC, sited in a different location, should also be approved. 1/14/08 RT, pp, 229-230.

In approving the nearby RCEC, the CEC imposed mitigation to alert and discourage pilots "from flying over or in the proximity to the RCEC" to respond to concerns raised by CEC Staff and the FAA. Russell City Energy Center, Final Commission Decision, 01-AFC-7C, Oct. 2, 2007 ("RCEC Decision"), TRANS-10 pp. 190-191. The CEC determined that approval of the RCEC, with this mitigation, was appropriate because "[t]he FAA does not complain about the loss of navigable airspace; as the agency responsible for the designation of air routes and air traffic control, its lack of concern in this regard is telling." RCEC Decision, p. 186. Therefore, at minimum, based on its determination for the RCEC, the CEC would need to impose an overflight restriction in order to approve the EEC. However, it is uncontested by Eastshore that an overflight restriction is an infeasible mitigation because of the EEC's proximity to the Airport. Therefore, if prior CEC decisions are to have any weight, then the RCEC Decision should persuade the CEC to deny certification to the EEC.

From the City's perspective, the EEC is an entirely different facility than the RCEC. Eastshore continues to ignore that the City has consistently found the EEC inconsistent with

its General Plan and with the standards applicable to Conditional Use Permits because of the location of the EEC. City's Opening Brief, pp. 15-19. The EEC's inconsistency is a violation of both LORS and CEQA. *See National Parks & Conserv. Ass'n v. County of Riverside* (1999) 71 Cal. App. 4th 1341, 1358 (the court upheld use of county's noise standards as a standard to assess project's impact). Eastshore claims that the EEC is consistent with surrounding uses, not based on the characteristics of the EEC, but because the EEC will be "a less intensive land use" based on the relative size of the EEC as compared to the RCEC. Eastshore 2/11/08 Brief, pp. 24-25. Evaluation of intensity of a use is meaningless unless evaluated in context. CEQA Guidelines § 15064(b) ("the significance of an activity may vary with the setting"); 1/14/08 RT, pp. 105-106, 210, 227-230. The RCEC is located in a heavy industrial area, adjacent to other heavy industrial uses, while the EEC is closer to commercial businesses, residences, schools and the Airport. Exh. 401. Therefore, the EEC will be objectionable at its proposed location.

As demonstrated by the record, the EEC both fails to comply with LORS and will have significant environmental affect on the Airport that cannot be mitigated. For these reasons, and the reasons set forth in the City's Opening Brief, the CEC should deny certification to the EEC.

II. EASTSHORE DID NOT MEET ITS BURDEN TO DEMONSTRATE THAT THE CEC SHOULD OVERRIDE LORS AND APPROVE THE EEC

Despite the EEC's unavoidable impacts, the CEC has the discretion to approve the EEC pursuant to the CEC's override authority. *See* Pub. Res. Code § 25525 ("Section 25525").

Section 25525 provides:

> "The commission ***may not certify a facility*** contained in the application when it finds, pursuant to subdivision (d) of Section 25523, 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. The commission may not make a finding in conflict with applicable federal law or regulation.*** The basis for these findings shall be reduced to writing and submitted as part of the record pursuant to Section 25523."

(*Emphasis added*).

Section 25525 begins with the general admonition that the CEC "may not certify a facility" that does not comply with LORS. Thus, in order to certify the EEC, despite noncompliance, Eastshore must provide evidence for the CEC to make all of the findings required by Section 25525 and the implementing regulations at Title 20 Cal. Code Regs. §§ 1741, 1752 and 1755. It follows that, as a consequence of the extensive findings required to demonstrate compliance with LORS and the structure of the regulatory scheme, the CEC should approach its override analysis with a presumption against certification. It is Eastshore's duty to overcome this burden. Title 20 Cal. Code Regs. § 1748(d).

To exercise its authority to override LORS and unavoidable effects on the environment (e.g., the Airport and navigable airspace), the CEC, by virtue of its own regulations, is required to make findings that (1) the EEC is required for public convenience and necessity; (2) all other alternatives are infeasible; and, (3) the benefits of the EEC

outweigh the unavoidable significant adverse environmental effects.[2] Pub. Res. Code § 25519; 14 Cal. Code Regs. 15093(a); Title 20 Cal. Code Regs. §§ 1741, 1752, 1755. As demonstrated by the City's Opening Brief and briefs from CEC Staff and Interveners submitted on February 11, 2008, the EEC will result in significant unavoidable impacts.

Eastshore has not presented evidence to outweigh the gravity of the EEC's impacts and support certification of the EEC. Eastshore does not present evidence as to why the EEC is required at the proposed location, nor does Eastshore present evidence as to why alternatives are infeasible. Therefore, Eastshore has not met its burden to support a decision to override LORS and CEQA and the CEC should deny certification to the EEC.

A. Eastshore has not demonstrated that the EEC is required for public convenience and necessity

Section 25525 first requires Eastshore to demonstrate that the EEC "is required for public convenience and necessity." In previous override decisions, the CEC has supported the finding that a facility "is required for public convenience and necessity" by citing to the CEC's general purpose to approve facilities to provide electricity to California. *See Commission Decision, Los Esteros Critical Energy Facility II, Phase II,* 03-AFC-2, Oct. 2006, ("Los Esteros Decision") pp. 367-368.[3] However, that statutory mandate alone is not enough. *See Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal. 3d 506 (holding, in a case decided under CEQA, that a mere recitation of statutory language alone does not provide the necessary factual basis to approve a facility). Eastshore must present facts from the record that demonstrate that the EEC, at its proposed

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[2] The City hereby incorporates its brief submitted on December 7, 2007 that sets forth the laws, regulations and standards that the CEC must apply in making an override determination.

[3] *See also Commission Decision, El Segundo Power Redevelopment Project,* 00-AFC-14, Feb. 2005 ("El Segundo Decision"), p.296; *3rd Revised Presiding Member's Proposed Decision, Morro Bay Power Plant Project*, 00-AFC-12, June 2004 ("Morro Bay Decision"), p.593; *Commission Decision, Metcalf Energy Center,* 99-AFC-3, Sept. 2001 ("MEC Decision"), p.464.

location, is required. CEQA Guidelines § 15093; *Topanga*, 11 Cal. 3d. at 515 (findings must be grounding in the evidence and trace the "analytic route" from raw evidence to conclusions). Eastshore instead relies on the few recent CEC precedents and cites only to general arguments as to California's need for electricity to support its argument that an override is appropriate for the EEC.

1. CEC precedents do not support approval of the EEC.

The EEC is a far different facility with far different impacts than the previous facilities approved by the CEC by use of its override authority. As described below, the CEC has previously used its override authority: (1) to override LORS noncompliance, not CEQA noncompliance, (2) to provide power to cities with much larger local demand than the City; (3) to provide power where little local generation currently existed; and (4) where the applicant demonstrated that alternatives were technologically infeasible or would create greater environmental impacts than the proposed facility. There is no evidence in this record to support the findings for the EEC that the CEC previously relied upon in prior approvals.

a. The Metcalf Energy Center

The CEC approved the Metcalf Energy Center ("MEC") by exercising its authority to override noncompliance with LORS. Importantly, the CEC found that the MEC would not create any significant adverse environmental effects and only a LORS override was necessary. MEC Decision, p. 462. Here, in addition to noncompliance with LORS, the EEC will also create a significant adverse environmental effect and significant cumulative risk to the Airport. City's Opening Brief, pp. 3-4, 20. Therefore, the override requested by Eastshore is of far greater magnitude than that requested by the MEC.

The facts that persuaded the CEC to approve the MEC do not apply to the EEC. The MEC is a 602 MW plant and the first large power facility located in the City of San Jose ("San Jose") or the Silicon Valley. MEC Decision, pp. 86-87. San Jose is the third largest City in California (behind Los Angeles and San Diego) with a population of approximately 898,000. *See United States Census Bureau,* 2003. While the City is making

strides to improve its business base and attract high-tech industries, San Jose has already established itself as a hub of high-tech industries. *See* City of San Jose, City Facts Publication, p. 3 ("The San Jose area is home to the largest concentration of technology expertise in the world—more than 6,600 technology companies employing more than 254,000 people."). At the time of the MEC decision, San Jose generated only 14 percent of the electricity used locally. MEC Decision, pp. 86-87 (It is also significant that at that same time, Los Angeles generated 87 percent of its demand and San Diego generated 100 percent.) Therefore, San Jose was a considerable drain on the State's energy resources and was not shouldering its burden to provide the local generation reasonably expected of the State's third largest city. Finally, all alternatives evaluated for the MEC would have themselves required zoning changes or created significant environmental impacts.

In contrast, the City is home to approximately 140,000 people. *See United States Census Bureau*, 2003. The City, significantly smaller with significantly less industry, has just supported the approval of the 600 MW RCEC. The RCEC will provide both the City and other Bay Area communities with a reliable supply of electricity. Because the purpose of the EEC is to provide electricity to a wider geographic area, there are other potential alternative sites to accomplish that goal. Exh. 200, p. 3-1. While the alternatives may not satisfy Eastshore's plans of locating at the Eastshore substation, there is no evidence, as there was for the MEC, that the suggested alternative sites will be in conflict with applicable LORS or result in unavoidable environmental impacts. Exh. 200, pp. 6-1 – 6-17. Therefore, Eastshore's assertion that the MEC and the EEC are similar is wholly unsupported by the facts.

b. Los Esteros

The facts supporting the Los Esteros override decision are similar to the MEC Decision in that Los Esteros primarily serves San Jose and the plant does not create unavoidable significant environmental impacts. Los Esteros Decision, pp. 368-369. Further, the Los Esteros record demonstrated that, in order to overcome LORS noncompliance, the applicant had applied for a zoning change from the city, city staff had

indicated that the zoning change would occur, but the city created new regulatory hurdles to delay the zoning change. *Id.* At pp. 365-366.

In contrast, the City informed Eastshore from the earliest days that the EEC does not comply with its General Plan. 1/14/08 RT, pp. 210-213. The City has not erected new barriers to siting the EEC, but applied existing standards. Finally, Los Esteros, like the MEC, was vital to satisfy San Jose's significant local demand. Eastshore has presented no evidence that the EEC is necessary for demand within the City.

c. El Segundo

The El Segundo decision has little application to the decision for the EEC because El Segundo was a project to redevelop an existing facility. The major impacts of the EEC stem from its location, whereas the objections to El Segundo stemmed from the proposed technology. El Segundo Decision, p. 298. As with the other CEC override decisions, the CEC determined that any of the alternatives proposed for El Segundo would result in potentially greater environmental impacts or be technologically infeasible. *Id.* Contrary to Eastshore's assertions regarding CEC standards for finding infeasibility, the CEC has never determined that alternatives are infeasible simply because the alternative project would require the applicant to go through additional regulatory approvals.[4]

2. Based on the evidence in the record, the EEC is not required for public convenience and necessity

The only evidence supporting Eastshore's claim that the EEC "is required for public convenience and necessity" is the Local System Effects analysis. Eastshore 2/11/08 Brief, pp. 75-81. In sum, Eastshore argues that the Bay Area is in need of electricity and that the

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[4] The CEC decision approving the Morro Bay Power Plant Project ("Morro Bay") was similar to the El Segundo Decision in that it applied to an existing facility. The CEC determined that Morro Bay complied with LORS and did not result in a significant environmental impact. However, in an abundance of caution, the decision discussed how the project could also have been approved using the CEC's override authority. Morro Bay Decision, pp. 590-600. Because Morro Bay, like El Segundo, involved retrofitting an existing facility, it has no relevance to the EEC.

EEC will provide such electricity. This appears to be more of a general statement than a compelling argument to approve the EEC.

The City does not dispute that California's demand for electricity is greater than supplied in-State. California imports approximately 22 percent of its electricity and the State's demand for electricity is growing. *See* California Energy Commission 2007, *2007 Integrated Energy Policy Report*, CEC-100-2007-008-CMF ("IEPR"), pp. 24, 35. The City does not dispute that there is demand for electricity, that the EEC will provide electricity, and that in-state generation results in fewer transmission losses and potential cost-savings to rate-payers. The City acknowledged these circumstances in supporting the new 600 MW RCEC. However, these general statements do not provide evidence as to why the EEC itself is required for public convenience and necessity. *Topanga*, 11 Cal. 3d. 506. If these general statements were enough evidence to support an override, then the CEC's power to mitigate impacts or disapprove certification is rendered meaningless.

Eastshore argues that PG&E's long term procurement plan ("LTPP") that gave rise to the EEC "was assessed in minute detail for [California Public Utilities Commission] CPUC approval in terms of its consistency with very specific elements of state forecast and procurement criteria." Eastshore 2/21/08 Brief, p. 26. However, the record before the CEC shows that this "minute detail" did not specify that PG&E was required to add capacity in the City. 1/14/08 RT, p. 345.[5] Nor did this "minute detail" include any analysis as to whether the proposed projects chosen by PG&E would be in compliance with LORS or CEQA. 1/14/08 RT, p. 348. Finally, the CEC was not at all involved in PG&E's procurement process and has no duty to approve a project based on the procurement process that took place outside of the CEC's proceedings.

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[5] HEARING OFFICER GEFTER: . . . Could you represent that to us, that the letter which says that during the 2004 RFO process PG&E was looking for capacity into the Bay Area but did not specify that it had to come through the Eastshore substation.

MR. GALATI: Yes, that is our official position.

1/14/08 RT, pp. 344-345.

Were the general facts of California's energy needs enough to support an override determination, then the CEC process has minimal utility. Based on Eastshore's logic, regardless of the noncompliance with LORS and regardless of unavoidable environmental impacts, for as long as demand for electricity exceeds in-state supply, every facility should automatically be approved. Of course, this cannot be correct. More importantly, Eastshore has submitted no evidence that clarifies why the EEC is required at this location to serve the needs of this particular community.

B. Eastshore Did Not Demonstrate That All Other Alternatives Are Infeasible

Even if Eastshore can demonstrate that the EEC "is required for public convenience and necessity," Eastshore must also demonstrate that "there are not more prudent and feasible means of achieving public convenience and necessity." The City maintains that there are viable alternatives to the EEC, notably Alternative D, suggested by CEC Staff. Exh. 200, pp. 1-9, 6-9, 6-17.

Eastshore has rejected, without site-specific analysis, any and all potential alternatives to the project as proposed. As an initial matter, there is no evidence that all of the proposed project alternatives are infeasible, only that the alternatives do not meet the project objectives identified by Eastshore and set forth, without amendment or modification, in the Final Staff Assessment. The project objectives are:

- To safely construct and operate a nominal 115.5 MW(net), natural-gas-fired, intermediate/peaking load generating facility;
- To deliver electricity to the PG&E Eastshore Substation at 115 kV without the need for system upgrades; and
- To provide voltage support to the regional 230 kV transmission system.

Exhs. 1, p. 1-4; 200, p. 6-3. Because Eastshore has identified the project objectives in terms of its preferred location, i.e., near the Eastshore substation, it has foreclosed on the potential to use an alternative site. One cannot defeat the need for legitimate consideration of alternative sites by defining the project so narrowly that only one single site would do. *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal. App. 3d 692, 736

(alternatives may not be artificially limited by applicant's prior commitments relating to the project as proposed). Eastshore has not submitted evidence that an alternative site would be infeasible or would not meet the first or third objective.

Eastshore complains that the regulatory process itself makes any alternatives infeasible. Eastshore argues that any alternative site would (1) require Eastshore to undergo a new CEC's certification process and (2) result in a breach of its contract with PG&E – a contract entered into prior to any other governmental approvals for the EEC. 1/14/08 RT, pp. 75, 210-213. Because of these burdens, Eastshore argues that the CEC should approve the EEC. However, if the CEC were to follow this logic, the CEC would be required to approve every application for certification.

First, Eastshore's concerns regarding submitting a new AFC are not physical or technical limitations to a potentially viable alternative, but an objection to the structure of the applicable regulatory system. The City has repeatedly objected to the structure of the regulatory system in that the City has been excluded from most of Eastshore's siting process and continues to lack any real jurisdiction over the EEC. 12/18/07 RT, p. 131, 132; 1/14/08 RT, pp. 210-213, 312. Like the City, Eastshore has to take the regulatory system as it is. As mandated by the regulatory system, the CEC is the final step in the approval process for the EEC. This does not mean that the CEC is required to approve the EEC simply because Eastshore has expended time and money into developing its project. As demonstrated by testimony, Eastshore did not perform due diligence in developing this project, in that it did not contact any of the local government agencies prior to committing its resources to a project that is not appropriate for the proposed location. 1/14/08 RT, pp. 75, 210-213.

Second, Eastshore's potential contractual obligations with PG&E are irrelevant to this proceeding. A contract does not supersede state laws or regulations, and procurement contracts often fail to result in final projects. *See Building a "Margin of Safety" Into Renewable Energy Procurements: A Review of Experience with Contract Failure,* California Energy Commission CEC-300-2006-004, January 2006. Nor did Eastshore

present a witness from PG&E to testify on its behalf as to the potential consequences of Eastshore breaching its contract. The Committee, for its own information, heard testimony from Mr. Scott Galati with PG&E. 1/14/08 RT, pp. 344-367. While Mr. Galati testified that California needs more electricity, he also clarified that it was not crucial for those megawatts to be generated at the Eastshore Substation in the City. 1/14/08 RT, pp. 345-346; *see also* 11/26/07 RT, pp. 69-710. According to Mr. Galati, PG&E asked only for generation in the Bay Area, but did not specify that generation needed to be located in the City; nor did PG&E, as part of its evaluation process, research whether the Bay Area would be equally or better served were generation located elsewhere. 11/26/07 RT, pp. 69-70. Finally, Mr. Galati also noted that not all of the projects that PG&E contracted for at the same time as the EEC will likely be developed. 1/14/08 RT, pp. 349-351. Therefore, although parts of the contract between PG&E and Eastshore are confidential, PG&E certainly must have mechanisms to handle Eastshore's contract should the CEC not certify the EEC. 1/14/08 RT, p. 348. Neither Eastshore nor PG&E have submitted evidence that an alternative site, one that complies with LORS and CEQA, cannot just as adequately supply the needed electricity to the Bay Area.

C. Eastshore Did Not Demonstrate that the EEC's Benefits Outweigh the Unavoidable Significant Environmental Risks

Lastly, even if the CEC could make the necessary findings to determine that the EEC is required for public convenience and necessity and there are not more prudent and feasible means of achieving public convenience and necessity, Eastshore still must demonstrate that the "benefits of the project outweigh the unavoidable significant adverse environmental effects." Title 20 Cal. Code Regs. § 1755(c) (implementing the CEC's responsibilities pursuant to CEQA).

The balancing of the potential benefits of the EEC to its harms is a simple comparison and one which easily supports denial of the EEC. Eastshore asserts that the 115 MW intermittently supplied by the EEC are of such paramount importance to California's energy needs that the EEC must be approved. The City asserts, among other

things, that the risk the EEC poses to the safe operation of the Airport requires the CEC to deny certification to the EEC.

Eastshore has argued that "common sense" dictates that "ideal safety conditions" for the Airport are unimportant as compared to approval of the EEC which would implement "sound statewide energy policy." Eastshore 2/21/08 Brief, p. 6. Respectfully, this turns "common sense" on its head. The City believes that common sense, as Eastshore puts it, requires ideal safety conditions for the Airport. The potential economic and social harms to the City in the event that the EEC affects aircraft safety, Airport operation or Airport expansion, are immeasurable and may involve loss of human life. Exhs. 203, 204, 206, 416, 511, 520, 711, 712-715, 727, 729, 731. 12/18/07 RT, pp. 111-218. The City urges, with support from the California Department of Transportation, Division of Aeronautics, and the FAA, that ensuring ideal safety conditions for an airport is extremely sound policy, also with statewide and national import. Exhs. 203, 204, 416. The degree of risk from the EEC to aircraft is unknown. However, the potential harm is loss of life. In the face of such potentially severe consequences, the City urges the CEC to deny certification to the EEC.

III. THE CEC CANNOT OVERRIDE FEDERAL LAW

Finally, Section 25525 prohibits the CEC from certifying a facility if such certification would be in conflict with federal law.[6] First, had the FAA promulgated regulations implementing the FAA Report's recommendations, Section 25525 would compel the CEC to deny certification. The City acknowledges that at this time no federal law or regulation explicitly prohibits certification of the EEC. This is a result of the structure of FAA regulation. Rather than imposing federal law on the land surrounding airports, the FAA has created a system where it is the airport owner's obligation, through federal contract, to ensure safe, unrestricted airspace. Exh. 411. The record is clear that the FAA is holding the City to its contractual obligations and pressing the City to oppose the

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[6] "The commission may not make a finding in conflict with applicable federal law or regulation." Pub. Res. Code § 25525.

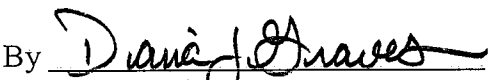
EEC or risk breaching the federal contracts. City's Opening Brief, pp. 4-8. Therefore, while the EEC may not be in violation of federal law, per se, its construction may result in the City being in breach of its federal contractual obligations. Section 25525 prohibits the CEC from acting in conflict with federal law. If the CEC approves the EEC, it will be acting in conflict with the intent of Section 25525.

IV. CONCLUSION

Eastshore has not met its burden to demonstrate that the EEC will comply with LORS or avoid significant environmental effects. Eastshore has also not met its burden to demonstrate that the EEC is required for public convenience and necessity and that the potential harm to the City, its residents, its businesses and the Airport are outweighed by the potential value of the EEC. We submit this case presents a sound and compelling record for the CEC to deny certification to the EEC.

DATED: March 3, 2008

MICHAEL LAWSON,
City Attorney

By 
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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)**

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, Michael R. Wilson, declare that on March 3, 2008, I transmitted vial electronic mail, consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5, and 1210, the City of Hayward Reply Brief Regarding The Eastshore Energy Center Request for Override. 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.

MRWilson