DOCKET
06-AFC-6
DATE MAR 03 2008
RECD. MAR 03 2008

RICHARD E. WINNIE [68048]
County Counsel
Brian Washington [146807]
Assistant County Counsel
By: Andrew Massey [240995]
Associate County Counsel
Office of County Counsel, County of Alameda
1221 Oak Street, Suite 450
Oakland, California 94612
Telephone: (510) 272-6700
Attorneys for County of Alameda

STATE OF CALIFORNIA
State Energy Resources
Conservation And Development Commission

In the Matter of:	Docket No.: **06-AFC-6**
APPLICATION FOR CERTIFICATION FOR THE EASTSHORE ENERGY CENTER	CONSOLIDATED REPLY TO APPLICANT'S OPENING EVIDENTIARY AND OVERRIDE BRIEFS

DATED: March 3, 2008

RICHARD E. WINNIE, County Counsel in and for the County of Alameda, State of California

BRIAN E. WASHINGTON,
Assistant County Counsel

By _____
Andrew Massey
Associate County Counsel

Attorneys for County of Alameda

Table of Contents

I. **INTRODUCTION** 1

II. **APPLICANT'S OPENING EVIDENTIARY BRIEF RELIES ON FLAWED EVIDENCE THAT FAILS TO REBUT SERIOUS ISSUES RAISED BY STAFF AND INTERVENERS, AND THUS APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROOF** 3

a. **Traffic & Transportation** 3

i. The Applicant's Aviation Safety Argument Relies on a FAA Safety Study the FAA Has Told the Commission Is Irrelevant 4

ii. Applicant's Unscientific Overflight of the Barrick Plant Does Not Fulfill Need for Extensive In-Flight Scientific Testing 6

iii. Eastshore's Significant Adverse Impact to Aviation Safety Cannot Be Mitigated 7

iv. The Committee Should Defer to the Unanimous Judgment of Federal, State and Local Aviation Regulatory Agencies 8

b. **Land Use** 8

i. The Applicant Failed to Present Any Evidence to Rebut the ALUC's Resolution 9

ii. The Applicant Misreads the December Draft Airport Compatible Land Use Plan 9

iii. Eastshore's Burden on Redevelopment Is Relevant as the County Will Retain Jurisdiction Even After "Islands" Annexed to the City of Hayward 10

c. **Air Quality** 11

i. The Applicant Has Failed to Demonstrate that Regional Emissions Reductions Credits Using Interpollutant Trading Will Not Exacerbate Existing PM Nonattainment in Hayward 12

ii. The Applicant Has Failed to Provide Any Evidence to Support the Use of Fireplace Retrofitting as a Form of Power Plant PM Emissions Mitigation 13

iii. The Applicant's Proposed Modifications to AQ-SC6 and AQ-SC6 Are Based on Phony Claims of "Good Science." 14

iv. The County Has Made a Reasonable Showing That Its Proposed Modifications to AQ-SC6 and AQ-SC8 Will Better Protect Human Health and the Environment 15

d. **Environmental Justice** 16

i. Applicant Inappropriately Relies on Public Health Risk Analysis as Substitute for Environmental Justice Analysis Under 1998 EPA Guidelines 16

ii. Applicant's and Staff's Attempts to Discredit Dr. Witt's Testimony Are Based on Their Misunderstanding of What Constitutes Environmental Justice Analysis 17

III. THE COMMISSION SHOULD NOT OVERRIDE STATE AND LOCAL LORS THAT PROTECT PILOTS AND THE PUBLIC FROM AVIATION HAZARDS 18

a. The Applicant's Proposed Standard of Review Ignores the Impact of AB 32 19

i. The Commission's Determination of Public Convenience and Necessity Must Take Into Account the Requirements of AB 32 20

ii. The Commission Cannot Evaluate Whether Prudent and Feasible Alternatives Exist Without Considering Other Points of Interconnection 23

iii. The Commission Must Consult and Meet With Concerned Local Agencies 26

b. The Applicant Has Not Demonstrated That Eastshore Is Required for Public Convenience and Necessity 27

i. Electricity and Peak Electricity Demand in the San Francisco Bay Region Is Relatively Lower Than Demand in Surrounding Areas 27

ii. Eastshore's Natural Gas-Burning Engines Do Not Meet the Goals of the Global Warming Solutions Act 28

c. Eastshore's Significant Burdens Outweigh its Scant Benefits 29

IV. THE APPLICANT FAILED TO REQUEST AN OVERRIDE OF EASTSHORE'S SIGNIFICANT ADVERSE AVIATION, AIR QUALITY AND ENVIRONMENTAL JUSTICE EFFECTS, REQUIRING THE COMMISSION TO DENY THE AFC 30

V. THE COMMISSION MUST NOT APPROVE THE EASTSHORE AFC SIMPLY BECAUSE A DENIAL WOULD REQUIRE THE APPLICANT TO FILE A NEW AFC 31

VI. Conclusion 31

RICHARD E. WINNIE [68048]
County Counsel
Brian Washington [146807]
Assistant County Counsel
By: Andrew Massey [240995]
Associate County Counsel
Office of County Counsel, County of Alameda
1221 Oak Street, Suite 450
Oakland, California 94612
Telephone: (510) 272-6700
Attorneys for County of Alameda

STATE OF CALIFORNIA
State Energy Resources
Conservation And Development Commission

In the Matter of:	Docket No.: **06-AFC-6**
APPLICATION FOR CERTIFICATION FOR THE EASTSHORE ENERGY CENTER	CONSOLIDATED REPLY TO APPLICANT'S OPENING EVIDENTIARY AND OVERRIDE BRIEFS Memorandum of Points and Authorities

CONSOLIDATED RESPONSE TO APPLICANT'S OPENING EVIDENTIARY AND OVERRIDE BRIEFS BY COUNTY OF ALAMEDA

Memorandum of Points and Authorities

I. INTRODUCTION

Pursuant to the Eastshore AFC Committee's ("the Committee") January 18, 2008 Order, the parties, including the Eastshore Energy Center, LLC ("the Applicant") and the County of Alameda ("the County"), filed simultaneous opening evidentiary briefs on February 11, 2008. In these briefs the parties were to "discuss the contested issues and identify the exhibits and testimony that support their respective positions." (January 18, 2008 Order, at 2.)

In its opening brief, the County demonstrated that substantial evidence supports its contention that the Applicant failed to meet its burden of proof that the Eastshore Energy Center

("Eastshore") would not cause significant adverse environmental effects under the California Environmental Quality Act, California Public Resources Code section 21000 *et seq.* ("CEQA") or fail to comply with applicable federal, state and local laws, ordinances, regulations and standards ("LORS") with respect to Traffic & Transportation, Land Use, Air Quality, and Environmental Justice. The County's opening brief explained how the evidence indicates Eastshore will cause a serious aviation hazard, burden local land use planning, deteriorate local air quality, and perpetuate the shameful legacy of environmental injustice on the local minority and low-income communities. The briefs from the California Energy Commission Staff ("the Staff") and other intervener parties largely echoed the County's positions.[1]

By contrast, the Applicant filed an opening evidentiary brief that fails to demonstrate that its position is supported by substantial evidence, or provide sufficient rebuttal to the serious issues raised by the County, the Staff, and other interveners. The Applicant's argument relies almost exclusively on the iconoclast opinions of its own paid consultants, who in turn based their testimony on questionable science and ignored copious contrary evidence. The deficiencies in the Applicant's brief alone should demonstrate to the Committee that it must deny the Eastshore AFC.

The Committee's January 18, 2008 Order also provided that the Applicant was to file a separate opening brief in support of its request for an override of aviation safety-related land use LORS of the City of Hayward and the Alameda County Airport Land Use Commission ("ALUC") pursuant to Public Resources Code section 25525. In its override brief, the Applicant contends that the Commission should override the City of Hayward and ALUC LORS in question by ignoring the threat Eastshore's thermal plumes pose to aviation safety. The Applicant's proposed standard of review also ignores the significant changes in statewide energy policy the Legislature has imposed in the form of the Global Warming Solutions Act (AB

---

[1] Like the County, the other interveners' briefs only addressed a few of the many contested issues; however, to the extent those issues overlapped, the County and its fellow interveners were largely in agreement. The Staff did not take the County's position with respect to Air Quality and Environmental Justice.

32). Finally, the Applicant argues that the Commission should approve the override to avoid the Applicant the administrative hassle of having to file another AFC.

In the present reply brief, the County will demonstrate the serious flaws in the Applicant's evidentiary analysis resulting in a failure to meet its burden of proof that requires the Committee to deny the Eastshore AFC. In addition, an override of the LORS with which Eastshore does not comply is not warranted when the LORS in question protect public safety, and the demand for further electricity generation has been tempered by the equally important need to curb the State's greenhouse gas emissions. Under these circumstances, the Committee must find the Applicant has failed to meet its evidentiary burden of proof, and that Eastshore does not warrant an override at the expense of public and pilot safety.

II. APPLICANT'S OPENING EVIDENTIARY BRIEF RELIES ON FLAWED EVIDENCE THAT FAILS TO REBUT SERIOUS ISSUES RAISED BY STAFF AND INTERVENERS, AND THUS APPLICANT HAS FAILED TO MEET ITS BURDEN OF PROOF

Throughout its opening evidentiary brief, the Applicant asks the Committee to ignore the opinions, analysis and conclusions of the Energy Commission's own Staff and dozens of public officials and regulatory agencies, all of whom agree that the evidence overwhelming points to the Committee's denial of the Eastshore AFC. Instead, the Applicant supports its arguments with a handful of paid consultants whose opinions rest on bad science, misinterpretation, and ignoring contrary evidence. These paid consultants' opinions do not outweigh the substantial evidence in this proceeding presented by the Staff and intervener parties that strongly demonstrates that the Applicant has not met its burden of proof. The Eastshore AFC must be denied.

a. Traffic & Transportation

The Applicant has gone to great lengths to convince the Committee that Eastshore's thermal plumes will not pose a hazard to safe air navigation, and thus will not impose a significant adverse impact and fail to comply with state and local LORS designed to protect public and pilot safety. The Applicant's argument rests, however, on an irrelevant Federal Aviation

Administration ("FAA") study, a purportedly "scientific" flyover, and a complete disregard for the warnings from federal, state and local aviation regulatory agencies. Moreover, the record clearly indicates that the impact from Eastshore's thermal plumes cannot be mitigated. Should a pilot encounter one of Eastshore's thermal plumes, lose control of the aircraft and crash, the outcome would be catastrophic: not only could the pilot and passengers perish, but the public would be threatened as well as this area houses several industrial facilities and a large, dense urban population. With the stakes so high, the Committee must not risk public and pilot safety; the Eastshore AFC must be denied.

i. The Applicant's Aviation Safety Argument Relies on a FAA Safety Study the FAA Has Told the Commission Is Irrelevant

Throughout the evidentiary hearings, the Applicant repeatedly referred to the FAA Safety Risk Analysis of Aircraft Overflight of Industrial Exhaust Plumes ("FAA Safety Analysis") (Ex. 39). (See e.g. Testimony of William Corbin, Ex. 20, at 3.) The Applicant argues that Eastshore's thermal plumes will not pose a threat to safe air navigation because the FAA concluded that the thermal plumes in its study "pose a risk of 1×10^{-9}" and are "deemed acceptable without restriction, limitation or further mitigation." (Ex. 39, at 16, iv.)

While seemingly on point, the FAA appeared at the evidentiary hearings and explained to the Committee that this study is completely irrelevant to the Eastshore AFC. (RT 12/18/07 113:7-115:25.) The FAA Safety Analysis is not relevant to these proceedings because it is a statistical survey of incident and crash data that does not include facilities or thermal plumes similar to Eastshore. (Id.) Instead, the study looked at data involving facilities with tall stacks that the FAA prohibits from construction near airports. (Id.) As a result, planes flying over these facilities operated at high altitudes where thermal plumes pose no risk of turbulence. (Id.) By contrast, planes at the nearby Hayward airport will be in the process of taking off and landing as they pass over Eastshore – maneuvers that take place at low altitudes and thus risk hazardous interaction with the plume. (Id.) In addition, the larger facilities included within the survey emit easily visible plumes that "pilots would avoid much as they would avoid convective weather." (RT 12/18/07 115:5-6.) As a result, the FAA's David Butterfield explained that "[s]o now we

have a situation with Eastshore that is close to an airport that emits a plume that is largely invisible and the FAA does not have statistical data specific to that kind of operation." (RT 12/18/07 115:16-20.)

In addition to lacking data relevant to the Eastshore facility, the FAA Safety Analysis was limited to a statistical study and did not review any in-flight testing. (RT 12/18/07 254:13-255:5.) Both the Mr. Butterfield and the County's witness Larry Berlin testified that in-flight testing would be absolutely crucial to understanding the potential impact of Eastshore's thermal plumes. (Id.; RT 12/18/07 164:4-165:6.) Moreover, the absence of in-flight test data review makes the FAA Safety Analysis even more irrelevant to these proceedings. Without test data, the FAA Safety Analysis simply contains a statistical survey of pilot overflights of facilities that have nothing in common with Eastshore.

Mr. Butterfield's testimony necessarily precludes the Committee's reliance on the FAA Safety Analysis. Indeed, Mr. Butterfield concluded his testimony by saying "[t]he safety risk analysis does say that the risk of catastrophic damage to an aircraft over flight of a plume is acceptably low. But you need to understand the greater context of that data that was mined from these databases." (RT 12/18/07 115:21-25.) It would be improper for the Committee to use the FAA Safety Analysis to justify approving the Eastshore AFC when the FAA has indicated its own study is completely irrelevant.

The Applicant's reliance on the FAA Safety Study is not confined to legal argument. The Applicant's paid consultants' repeatedly rely on the FAA Safety Analysis throughout their prefiled testimony. (See e.g. Testimony of Marshall Graves, Ex. 20, at 2-4, 18; Testimony of William Corbin and Gregory Darvin, Ex. 20, at 3; Testimony of Jennifer Scholl, Ex. 17, at 5.) The Applicant's paid consultants' misplaced reliance on the FAA Safety Analysis in turn prohibits the Committee from relying on their testimony in support of the Eastshore AFC. Therefore, the Applicant has failed to meet its burden of proof that Eastshore will not cause a significant adverse impact to safe air navigation and violate state and local LORS designed to protect public and pilot safety.

ii. Applicant's Unscientific Overflight of the Barrick Plant Does Not Fulfill Need for Extensive In-Flight Scientific Testing

Recognizing early on that the FAA Safety Analysis lacked any in flight testing data or analysis, the Applicant hastily assembled a helicopter overflight of the Barrick plant in rural northern Nevada. (See Ex. 20.) The Applicant argues that the "scientific" nature of the test in which the helicopter did not encounter significant turbulence resolves all doubts as to the safety risks involved with overflights of thermal plumes. The Applicant's claim has no merit: the study was not scientific, it does not necessarily apply to Eastshore, and the FAA will not accept its results.

In its opening evidentiary brief, the Applicant repeatedly trumpets the "scientific" nature of its overflight test. (See e.g. Applicant's Opening Evidentiary Brief, at 9.) The use of the word "scientific," however, does not make it so. The test involved a single pilot flying a single type of aircraft on a single day under one single set of conditions over a single power plant. The test was never repeated, its instruments never independently verified, and no other parties – including the Staff – were invited to participate or observe.

The Applicant's overflight test does not account for the impact different sets of climate conditions, different wind levels, different types of aircraft, different levels of operation of the radiators or engines, different stack arrangements, etc. To extrapolate from the Applicant's single set of data the many permutations of tests that could have been conducted discounts the very purpose for which this in-flight test was offered: to provide conclusive real-world testing to resolve conflicts between the Staff's and Applicant's theoretical modeling. (Applicant's Opening Evidentiary Brief, at 6.)

Furthermore, the Applicant's paid consultants do not even seem to understand the reason so many aviation experts thought in-flight testing was necessary. For example, in its opening evidentiary brief, the Applicant argues "the Barrick Fly-Over Test accounted for Staff's concern that the Eastshore Project's plume will likely be invisible to pilots; on the day of the Fly-Over Test, the Barrick plume was invisible." (Id., at 7.) That argument misses the point. The concern with invisible plumes stems from pilots not being able to see and avoid them – or even

knowing that plumes might be nearby – and thus flying directly through a plume where the pilot would encounter turbulence. (See Final Staff Assessment ("FSA"), Ex. 200, at 4.10-21.) By contrast, the pilot flying over the Barrick plant knew the purpose of the experiment, and knew to watch out for thermal plumes. (RT 12/18/07 71:22-72:3.) Therefore, the Applicant's overflight test did not demonstrate how unsuspecting pilots would react to thermal plumes. Moreover, the Applicant's overflight test also demonstrates that the Applicant does not even understand the real risks involved.

For all these reasons, Mr. Butterfield explained that the FAA could not accept the results of the Applicant's overflight testing to buttress the lack of in-flight testing in the FAA Safety Analysis. (RT 12/18/07 254:13-255:5.) If the Applicant's in-flight testing does not satisfy the federal regulator of aviation safety, it should not satisfy the Committee either. The Committee would not accept such minimal testing in any other topic area of the Eastshore AFC, and should not do so here.

iii. Eastshore's Significant Adverse Impact to Aviation Safety Cannot Be Mitigated

The Applicant's opening evidentiary brief all but concedes the conclusion reached by the FAA, Caltrans, Port of Oakland, City of Hayward and ALUC that the risk from thermal plumes cannot be mitigated. (See Applicant's Opening Evidentiary Brief, at 22-23.) Instead, the Applicant argues that Eastshore's thermal plumes are perfectly safe, so no mitigation is necessary. (Id.) To the extent the Committee does not agree, the Applicant argues that planes will not fly low enough to encounter the plume. (Id., at 23.)

To support this contention, the Applicant points to flight track data from the Staff and City of Hayward indicating that planes flew as low as 300 feet over the Eastshore site, and argues that only planes operating as low as 250 feet would risk encountering the plume.[2] The Applicant's argument misreads the import of the data. The flight track data shows the lowest recorded

[2] The County's opening brief quoted Staff testimony indicating that flight track data did not include planes operating at less than 500 feet. Of course, the City of Hayward presented evidence that planes traverse the Eastshore site as low as 300 feet. (See Ex. 417.)

overflight of the Eastshore site during the course of only a few months. It does not, however, in any way support Applicant's contention that planes *cannot* or *do not* fly over the Eastshore site at altitudes lower than 300 feet, only that planes happened not to do so during those few months. In addition, the County's witness Larry Berlin provided uncontested testimony that under certain conditions planes could fly over the Eastshore site at altitudes less than 250 feet. (RT 12/18/07 155:24-156:25.)

Thus in its review the Committee must assume planes will encounter the plume at low altitudes as they pass over Eastshore. The data does not support the Applicant's contention that planes cannot or do not do so. Moreover, the record clearly demonstrates, and the Applicant has largely conceded, that whatever the merits of the mitigation used for the Russell City Energy Center, such mitigation measures would be infeasible and impractical for Eastshore. (See Exs. 206, 416.) Therefore, to the extent the Committee judges Eastshore's thermal plumes any level of threat to aviation safety, it must deny the Eastshore AFC.

iv. The Committee Should Defer to the Unanimous Judgment of Federal, State and Local Aviation Regulatory Agencies

The Committee's denial of the Eastshore AFC based on aviation safety concerns would come with the unanimous agreement of every federal, state and local aviation safety agency that has considered the proposed facility. (See Exs. 203 (Caltrans), 204 (FAA), 205 (Port of Oakland), 206 (FAA), 416 (FAA), 513 (ALUC).) The Committee should disregard the Applicant's attempt to denigrate these agencies' decades of expertise when its own paid consultants do not seem to understand the threat thermal plumes pose to aviation and public safety. The weight of the evidence provided by these agencies, coupled with the deference their years of experience demands, requires the Committee to deny the Eastshore AFC.

b. Land Use

Most of the Land Use issues in the Eastshore AFC overlap with Traffic & Transportation, and to the extent they do not overlap they mostly concern the City of Hayward's general plan and zoning ordinance. For that reason, the County joined in the City of Hayward's opening evidentiary brief in this regard.

In the areas of the ALUC airport plans and the County's Redevelopment Agency, however, the County provided expert witnesses at the evidentiary hearing. The Applicant has argued that neither the ALUC's airport plans nor the County's redevelopment plans have any application. These arguments are based on misreading of the evidence and have no merit.

i. The Applicant Failed to Present Any Evidence to Rebut the ALUC's Resolution

The County has conceded that the language of the 1986 Airport Plan (Ex. 535) does not require a formal land use consistency determination because the Eastshore site falls slightly outside the nearest safety zone, and the 1986 Airport Plan does not contain any language specifically restricting power plants or facilities that emit thermal plumes. That said, the ALUC did review the Eastshore AFC, and consistent with the ALUC's obligation under state law to ensure public and pilot safety, and to coordinate the safe and orderly expansion of airports, determined that Eastshore would pose a threat to pilots, the Hayward Executive Airport and the public. (See Ex. 513.) On the basis of that conclusion, the ALUC recommended the Energy Commission locate Eastshore at a site outside of its jurisdiction, the Airport Influence Area. (Id.)

The Applicant's opening evidentiary brief does not discuss the ALUC's resolution or present any evidence to contradict its conclusion. Instead, the Applicant argues that Staff inappropriately concluded Eastshore would not comply with the 1986 Airport Plan based on its misreading of the FAA Safety Analysis. Although the Staff and ALUC reached very similar conclusions about Eastshore, the Committee is obligated to show local jurisdictions great deference in the interpretation of their own LORS. (See 20 C.C.R. § 1714.5.) As the Applicant has not offered any argument or evidence to refute the ALUC's resolution, the Committee must afford it the maximum weight and conclude, as the ALUC has, that Eastshore should not be built within the Airport Influence Area.

ii. The Applicant Misreads the December Draft Airport Compatible Land Use Plan

For the past several years the ALUC has been involved in the process of updating its over twenty year-old Airport Plan. The effort has resulted, to date, in a draft plan that includes,

among other things, new restrictions on the siting of power plants and facilities that emit thermal plumes, added in response to the ALUC's earlier investigation of the proposed Russell City Energy Center. (See Ex. 534.) Although much ink has been spilt debating whether the ALUC's new restrictions amount to a conspiracy against Eastshore, it is undisputed that should the ALUC adopt the draft version of the plan to replace the existing 1986 Airport Plan, the Committee would have to consider the draft plan's language.

The Applicant misreads the draft plan to not restrict the Committee from approving Eastshore. The Applicant's argument is based on its selective reading of the new restriction on thermal plumes. In section 3.3.3.5, the draft plan prohibits the construction of facilities that cause hazards, including "thermal plumes that may impair pilot vision or create turbulence within the flight path . . .." The Applicant contends that Eastshore emits invisible plumes that do not impair pilot vision or create turbulence, and thus does not create a hazard. The Applicant's own overflight testing revealed, however, that Eastshore's plumes do create some amount of turbulence. (See Ex. 20.)

Moreover, the language of the draft plan prohibits facilities that *may* create turbulence, not those that absolutely create turbulence. ALUC Commissioner Dave Needle provided the rationale for this language, explaining that even small disturbances can cause a ripple effect through the traffic pattern because when one plane "wiggles in the sky and another pilot sees that, that continues down the chain." (RT 12/18/07 150:4-6.) In this context, Eastshore would violate section 3.3.3.5. Furthermore, that violation would in turn make it unlikely the ALUC would find Eastshore a conditional use. (See, Ex. 434, Table 3-2.) Therefore, should the ALUC adopt the draft airport plan to replace the current 1986 Airport Plan, the Committee must find that Eastshore would be incompatible and deny the Eastshore AFC.

iii. Eastshore's Burden on Redevelopment Is Relevant as the County Will Retain Jurisdiction Even After "Islands" Annexed to the City of Hayward

In its opening evidentiary brief, the Applicant persists in its effort to convince the Committee that it should ignore the County's nearby redevelopment efforts based on its false claim that the County lacks redevelopment authority. (See Applicant's Opening Evidentiary Brief, at 30.) The

County's Redevelopment Agency Director Eileen Dalton clearly explained that under a unique provision of an annexation agreement between the City of Hayward and the County, the County will retain redevelopment authority over a series of unincorporated "islands" near the Eastshore site, even after the land becomes part of the city. (RT 1/14/08 167:15-168:18.) Applicant's misunderstanding is hardly surprising, because its paid consultant did not discuss any of the County's redevelopment plans in her testimony[3]. (See Ex. 17, RT 1/14/08 193:22-194:3.)

The Applicant also urges the Committee to ignore Eastshore's potentially detrimental impact to redevelopment efforts because the County did not conduct a study.[4] Ms. Dalton's opinion was based upon her 19 years of experience in planning and redevelopment, which has culminated in her promotion to director of the County's redevelopment agency. (Ex. 505.) At no point did the Applicant question Ms. Dalton's credentials or professional judgment. Instead, the Applicant presented the opinion of its paid consultant, Jennifer Scholl, who revealed during cross-examination that she did not understand the scope of the County's redevelopment efforts in this area. (RT 1/14/08 193:22-194:16.) The Committee should defer to Ms. Dalton's professional judgment and find that Eastshore will impose a significant adverse burden on redevelopment efforts to remove blight and build affordable housing.

c. Air Quality

The County has argued in the alternative that the Committee should find Eastshore would cause a significant adverse effect with respect to air quality should the Committee not agree with the Staff's recommendation in the FSA with respect to Land Use and Traffic & Transportation that the Eastshore AFC be denied. The Applicant's air quality evidence does not

---

[3] During cross-examination, Applicant's land use witness, Jennifer Scholl, attempted to explain this omission by claiming she had reviewed the documents, but inexplicably had not discussed them, perhaps because they were interrelated to other County planning documents. (RT 1/14/08 193:22-194:16.) Ms. Scholl's misunderstanding as to the County's continued redevelopment authority after annexation clearly indicates that if she read the plans, she did not understand their import.

[4] The Applicant also claims the undersigned told the Committee it may ignore the County's redevelopment efforts. The transcript clearly reveals, however, that the undersigned conceded that the County's redevelopment plan was not one of the local LORS subject to the Energy Commission's override authority, but was nevertheless an impact that the Committee should consider. The Committee should disregard the Applicant's attempt to distort the record.

satisfy its burden of proof. Although the Applicant complains about various aspects of the interveners' witnesses' testimony, none of the interveners bear the burden of proof, and do not have to conclusively *disprove* the Applicant's case. Instead, the Committee should review the interveners' concerns and determine whether in light of those concerns the Applicant nevertheless meets its burden of proof.

i. The Applicant Has Failed to Demonstrate that Regional Emissions Reductions Credits Using Interpollutant Trading Will Not Exacerbate Existing PM Nonattainment in Hayward

The Applicant and Staff acknowledge that Eastshore's potential emissions rise to a level of significance if left unmitigated, and that the East Bay is out of attainment for particulate matter ("PM"). (See Ex. 200, at 4.1-23.) The Bay Area Air Quality Management District ("BAAQMD") has acknowledged that Eastshore will emit "higher than typical power plant emissions." (RT 12/17/07 101:3-6.) Nevertheless, the Applicant and Staff propose to mitigate on a regional basis what will become a local air quality problem for the people of Hayward and surrounding communities. The evidence does not support this contention.

For example, the Applicant contends that "[d]ue to the varied wind conditions in the Bay Area and the regional nature of particulate matter transport, ERCs [Emissions Reduction Credits] from any location in the Bay Area would contribute to particulate matter benefits in the Hayward area." (Applicant's Opening Evidentiary Brief, at 51.) While that statement is undoubtedly true, the Applicant fails to address the disproportionate impact local sources of PM – i.e. Eastshore – will have on the local population. (RT 12/17/07 145:11-16, 145:21-146:10.) By mitigating on a regional basis what will become a local problem, the Applicant's construction of Eastshore will increase the actual PM impact on the local population at a time when the local area already exceeds attainment levels for PM. (Id.) This is because, as Dr. Zannetti[5]

[5] The Applicant's Opening Evidentiary Brief questions Dr. Zannetti's "credibility and relevance." (pg. 62.) The County has already acknowledged that Dr. Zannetti is not a regulatory specialist, he is an expert in air pollution science and modeling. His testimony calls into question some of the assumptions and decisions made by the Applicant, the Staff and the BAAQMD. As the County does not bear the burden of

explained, "[b]y the time the plume reach[es] Hayward it is going to be absolutely negligible in comparison with the local emissions." (Id.)

The Applicant's proposal to resort to interpollutant mitigation of PM with SO_2 ERCs will only exacerbate this problem. Reducing SO_2 emissions will eventually reduce the regional PM impact as SO_2 converts to sulfates – a form of PM – over time, but even if all the SO_2 ERCs came from Hayward, those reductions will be felt downwind, rather than in Hayward, as the conversion process can take days. (RT 146:17-147:1.) As a result, the Applicant's proposal to use interpollutant ERCs will increase the actual PM impact to the local population. The Applicant's opening evidentiary brief does not respond to this concern.

Although BAAQMD's regulatory program regulates PM on a regional basis, the Energy Commission's obligation under CEQA to avoid significant adverse environmental effects requires more stringent protections for the local population. The Staff did not even model the PM impact to Hayward when the ERCs are applied because the Applicant has not identified which ERCs it intends to use, claiming it is "impossible to predict which ERCs will become available." (RT 12/17/07 33:20-22; Applicant's Opening Evidentiary Brief, at 51.) Somehow the proponents of the nearby Russell City Energy Center overcame this purported impossibility and identified the ERCs they intended to use. (RT 12/17/07 33:20-22.) The Committee should not let the Applicant hide behind a false claim of impossibility to avoid learning the real PM impact to the local population. Nor should the Committee allow the local population to absorb the deleterious significant effects of PM to satisfy the BAAQMD's regional regulatory goals. The people in these communities deserve better.

ii. The Applicant Has Failed to Provide Any Evidence to Support the Use of Fireplace Retrofitting as a Form of Power Plant PM Emissions Mitigation

The Applicant continues to attempt to confuse the Committee into believing the parties' general agreement that reducing PM from wood burning fireplaces and stoves benefits the region necessarily means that a fireplace and wood stove retrofit program will be an appropriate

---

proof, his comments are highly relevant. Moreover, the Applicant provides no rationale for its baseless

and effective form of mitigation for Eastshore's PM emissions. The evidence does not support this contention.

The Applicant provides copious amounts of information demonstrating that burning wood produces PM and that BAAQMD has vigorously pursued reductions in wood burning through fireplace retrofitting programs, "Spare the Air" nights, and through proposed regulatory limitations. (See Ex. 55.) This evidence does not demonstrate that these programs will effectively mitigate the actual PM impacts from Eastshore.

The only relevant evidence the Applicant has identified is a single slide entitled "Mitigation Calculations" related to an attempt to use a fireplace retrofit program to mitigate PM_{10} emissions from the Pico Power Plant. (Applicant's Opening Evidentiary Brief, at 58 (citing Ex. 55).) The Applicant touts that the slide indicates that the program eliminated 12,003 pounds per year of PM_{10}. (Id.) The Applicant does not mention that the slide appears to indicate that the program only achieved one-third the required PM reductions. (See Ex. 55.) Thus the slide only reinforces the Staff's conclusion that "[w]ood stove and fireplace replacement programs in the Bay Area have produced highly localized and uneven results." (Ex. 200, at 4.1-26.)

The Committee should not allow the Applicant to use an unproven and unreliable fireplace retrofit program to mitigate Eastshore's admitted significant PM emissions levels. Instead, it should demand a serious study of the effectiveness of fireplace retrofitting as a form of power plant PM emissions mitigation, or simply deny the Eastshore AFC.

iii. The Applicant's Proposed Modifications to AQ-SC6 and AQ-SC6 Are Based on Phony Claims of "Good Science."

Given the concerns raised by the County and its fellow interveners with Eastshore's air pollution impact, the Committee should dismiss out of hand the Applicant's proposal to water down the Staff's conditions of certification AQ-SC6 and AQ-SC8. The Applicant's proposal has nothing to do with a need for flexibility or good science. The Applicant simply wants to pay less for privilege to pollute.

---

challenge to Dr. Zannetti's "credibility."

The Applicant claims it needs greater "flexibility" to find ERCs based on its contention that it is "impossible" to locate the specific ERCs it will use. (Applicant's Opening Evidentiary Brief, at 51.) As the County has already demonstrated, however, this claim of impossibility is highly suspect as the Russell City Energy Center proponent identified the ERCs it intended to use during its AFC proceedings. (RT 12/17/07 33:20-22.) Furthermore, the Applicant's proposal to use "best efforts" to identify local ERCs is completely unenforceable as written, and will necessarily lead to the use of geographically distant ERCs to the detriment of the local population. When asked about the enforceability of the "best efforts" proposal, the Applicant's paid consultant, Mr. Westbrook, was evasive and did not answer the question. (RT 12/17/07 90:1-20.) The Applicant cannot meet its burden of proof without answering questions.

Similarly, the Applicant's proposal to reduce the interpollutant trading ratio from 5.3:1 to 3:1 has nothing to do with "good science." It simply allows the Applicant to provide less interpollutant SO_2 ERCs for every unit of PM Eastshore emits. Purchasing fewer SO_2 credits costs the Applicant less, but it also protects local residents less as well. The County already demonstrated in its opening evidentiary brief that the Applicant's claim that it does not understand how the Staff calculated its ratio and that its work was "peer reviewed" are disingenuous. (See 25-26.) Moreover, the County has also demonstrated that interpollutant trading itself is less protective of the local population than direct PM mitigation. "Good science" demands the Applicant's proposed modifications be denied.

iv. The County Has Made a Reasonable Showing That Its Proposed Modifications to AQ-SC6 and AQ-SC8 Will Better Protect Human Health and the Environment

In acknowledgement that the Committee may not agree with the County and approve the Eastshore AFC, the County has offered for the Committee's consideration proposed modifications to AQ-SC6 and AQ-SC8 to better mitigate its concerns with Eastshore's air pollution impacts. (See County's Opening Evidentiary Brief, Attachment 1.) This proposal meets the "reasonable showing" requirement under Title 20, C.C.R. section 1748(d) based upon the testimony of Dr. Zannetti and the County's concerns with the Staff's mitigation proposals.

The proposed modification will ensure local ERCs are used first, eliminate less protective interpollutant ERCs, and prohibit the use of untested and unproven fireplace mitigation. Should the Committee adopt the Eastshore AFC, the County respectfully requests the Committee adopt the County's proposed modifications to AQ-SC6 and AQ-SC8.

d. Environmental Justice

The Applicant and Staff have not performed the environmental justice analysis under the methodology adopted by the Staff in the form of "Final Guidance for Incorporating Environmental Justice Concerns in USEAP's National Environmental Policy Act Compliance Analysis (April, 1998)" ("1998 EPA Guidelines"). (Ex. 200, at 2-4.) Instead, the Staff and Applicant argue that the Dr. Greenberg's health risk analysis under the "ARB/OEHHA Hotspots Analysis and Reporting Program" ("HARP") can double as the required environmental justice analysis. There is no support for this contention, and while HARP analysis may be appropriate for public health risk assessment, it is no substitute for required environmental justice review.

i. Applicant Inappropriately Relies on Public Health Risk Analysis as Substitute for Environmental Justice Analysis Under 1998 EPA Guidelines

As the County discussed at length in its opening brief, the record clearly reflects that the Staff imported the results of the health risk analysis into its environmental justice screening. (Ex. 200, at 7-2.) HARP and the 1998 EPA Guidelines, however, have different requirements. HARP risk assessment uses generic categories of "sensitive receptors" that do not conform to actual unique circumstances of the affected population. (Id., at 4.7-6.) By contrast, the 1998 EPA Guidelines requires identification of the affected population in terms of the *actual* unique circumstances of the affected population, such as the existing burden of disease. (See 1998 EPA Guidelines, at 2.1.1.)

Similarly, HARP risk assessment uses static geographic boundaries for the population based on a one mile radius and the point of maximum impact that do not necessarily correspond to the actual contours of the geographic distribution of the population. (See Ex. 200, at 4.7-2; 208:12-22.) By contrast, one of the major steps involved in analysis under the 1998

EPA Guidelines is the process of defining the "appropriate unit of geographic analysis." (See, sec. 2.1.1.) Dr. Witt demonstrated the importance of properly performing this step when she used a three mile radius that revealed a high poverty, high minority, low life expectancy population. (See Ex. 532, at 2-3; RT 12/17/07 381:5-382:10.)

Beyond defining the appropriate population, the HARP and 1998 EPA Guidelines differ in the manner of analysis. The 1998 EPA Guidelines requires consideration of the potential for otherwise insignificant effects to impact the affected population disproportionately such that they rise to a level of significance. (See sec. 3.2.2.) By contrast, HARP imposes impacts to the population at large as a threshold limitation on finding significant impacts to the affected population. (Ex. 200, at 7-2.) In addition, the Staff's HARP analysis did not contemplate the 1998 EPA Guidelines' required discussion of the potential uneven distribution of exposure to various sources of toxicity in the local population, such as the potential for multiple and varied air pollutants to act synergistically, rather than additively. (See Ex. 200, at 4.7-6; 1998 EPA Guidelines, at 2.2.2, 3.2 Ex. 3; Ex. 532, 4-5.)

ii. Applicant's and Staff's Attempts to Discredit Dr. Witt's Testimony Are Based on Their Misunderstanding of What Constitutes Environmental Justice Analysis

The Staff and Applicant's attempts to diminish the testimony of Dr. Witt simply reflect their misunderstanding of what environmental justice analysis requires. The Staff attempts to discredit Dr. Witt by claiming that she did not offer persuasive evidence that the Staff public health analysis was wrong[6]. (See Staff's Opening Evidentiary Brief, at 8-9.) That argument is a red herring. Dr. Witt was not offered as a public health expert witness, but instead as an environmental justice expert witness. Her testimony was a critique of the Staff's environmental justice analysis, not the public health analysis. Unfortunately her testimony had only the public

[6] The Applicant's brief refers to Dr. Witt as a "purported expert," but offers no argument in support of its contention. (Applicant's Opening Evidentiary Brief, at 47.) The Applicant never challenged Dr. Witt's credentials during the evidentiary hearing, even though it had ample opportunity to do so. If the Applicant wants to attempt to diminish witnesses' testimony by way of pejorative adjectives, it should back those

health testimony to review because the Staff's public health and environmental justice analyses were – inappropriately – one in the same. Dr. Witt reviewed the public health testimony of Dr. Greenberg in terms of its environmental justice analysis and found it lacking.

The Committee should make the same finding and conclude that the Applicant has not met its burden to demonstrate that Eastshore will not cause a significant adverse impact. Failing to do so would simply perpetuate the shameful legacy of environmental injustice that has disproportionately burdened minority and low-income communities in the local area with avoidable disease and lowered life expectancy. (Ex. 532, at 5.)

III. THE COMMISSION SHOULD NOT OVERRIDE STATE AND LOCAL LORS THAT PROTECT PILOTS AND THE PUBLIC FROM AVIATION HAZARDS

Under Public Resources Code section 25525, the Energy 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.

(Public Resources Code § 25525 (hereinafter "the override authority").) The Applicant has requested in the alternative that should the Committee find Eastshore would not conform with applicable state and local LORS related to aviation safety and compatible land use, the Committee find the LORS in question merit use of the override authority. (See Applicant's Opening Brief Concerning Override of LORS Noncompliance ("Applicant's Override Brief," "Override Brief"), at 1.)

The Energy Commission has rarely employed its override authority, and for good reason. When the State Legislature passed in the Warren-Alquist Act in the 1970s, it stripped local

---

claims up with argument and evidence. In the absence of such, they are simply *ad hominem* attacks

governments' land use authority over thermal power plants. (Public Resources Code § 25500.) In doing so, however, the Legislature protected local governments and communities from potential abuse by requiring the Energy Commission to make findings that the proposed thermal power plant would comply with all applicable state and local LORS. (Public Resources Code §§ 25523, 25525.) The Energy Commission's override authority upsets that delicate balance and raises the potential for the construction of a facility that will severely burden local communities. The Energy Commission must – as it has done in the past – exercise sound judgment in the use of the override authority, and only resort to its employ when all other attempts at compliance with state and local LORS have failed, and noncompliance will not burden local communities or endanger public health, welfare or the environment.

Under the circumstances present in the Eastshore AFC, the Applicant's request for an override of aviation safety-related land use LORS does not merit use of the Energy Commission's override authority. An override is not warranted when the LORS in question protect public safety, and noncompliance poses serious risks for pilots, the Hayward Executive Airport, and the local population. Furthermore, the demand for Eastshore's additional electricity generation has been tempered by the equally important need to curb the State's greenhouse gas emissions. Under these circumstances, the Committee must find that Eastshore does not warrant an override at the expense of public and pilot safety.

a. The Applicant's Proposed Standard of Review Ignores the Impact of AB 32

The Energy Commission has consistently articulated the standard of review for making findings under its override authority in terms of the two prongs articulated in the statute: (1) public convenience and necessity, and (2) prudent and feasible means. (See e.g. In re: The Metcalf Energy Center, 99-AFC-3, Commission Decision, P900-01-023 (September, 2001) ("The Metcalf Decision"), at 461.) Put another way, "[i]n essence, the lack of conformity of a project with LORS is to be balanced against its benefits." (Id.)

---

unnecessary to the proceedings.

i. The Commission's Determination of Public Convenience and Necessity Must Take Into Account the Requirements of AB 32

Under the first prong, the Energy Commission determines the necessity of the electricity the proposed thermal power plant will generate. Citing San Diego & Coronado Ferry Co. v. Railroad Commission, (1930) 210 Cal. 504, 643, the Energy Commission has concluded that "necessity" is a relative, rather than absolute term, whose meaning must be relative to the purposes of the statute in which it is found. (The Metcalf Decision, at 464.) The Commission has noted in past decisions that the enabling legislation, the Warren-Alquist Act, included legislative findings that electricity is essential to the health, safety and welfare of the people of California, and to the state's economy, and that it was the state government's responsibility to ensure an adequate and reliable supply of electrical energy. (Id.)

In past AFC proceedings involving override considerations, the Energy Commission has never had to consider the impact of legislation with potentially competing legislative findings to those found in the Warren-Alquist Act. In 2006, however, the Legislature passed and the Governor signed into law AB 32, The Global Warming Solutions Act (Health and Safety Code § 38500 *et seq.*), that imposes a cap on greenhouse gas emissions in an effort to stave off the potentially catastrophic effects of global warming on the state and its people. The legislative findings supporting the Global Warming Solutions Act offer a competing set of policy priorities that offer significant qualification to the previously straightforward determination of power plant "necessity and public convenience."

The findings supporting the Global Warming Solutions Act are written in grand, sweeping terms, evidencing the Legislature's desire for, as it puts it, "far-reaching effects," including the transformation of the state's economy and infrastructure, as well as that of the other states, the federal government and foreign countries. (Health and Safety Code § 38501(d).) Within the confines of the present discussion, however, the Global Warming Solutions Act's findings also explicitly target the legislation's transformative goals at the energy and electric utility industry. (Id., at § 38501(c), (g), (h).) Indeed, subpart (h) implicitly calls attention to the need to balance the goals of the Warren-Alquist Act with those of the Global Warming Solutions Act in its

command that the State Air Resources Board implement the cap on greenhouse gas emissions in a manner that "improves and modernizes California's energy infrastructure and maintains electric system reliability, maximizes additional environmental and economic co-benefits for California, and complements the state's efforts to improve air quality." (Id.)

Furthermore, the Energy Commission has already broadly endorsed the goals of the Global Warming Solutions Act and affirmed its central role in reducing California's greenhouse gas emissions. In its Integrated Energy Policy Report, the Energy Commission explains that the state's energy policy has been significantly altered with the passage of AB 32. (See Integrated Energy Policy Report, California Energy Commission, CEC-100-2007-008-CTF, November, 2007, at 1.) The Integrated Energy Policy Report goes on to explain that "[w]ith AB 32, California's progressive energy policies must now also include reducing the state's greenhouse gas footprint and stepping up the intensity of existing programs, standards and regulations is mandatory to achieve aggressive carbon dioxide (CO_2) reduction." (Id., at 1-2) (emphasis removed).

The inclusion of this language within an integrated energy policy report is significant where, as here, these annual reports have served as the foundation of the Energy Commission's findings with respect to the public convenience and necessity prong of the override. (See e.g. The Metcalf Decision, at 464.) Therefore, to the extent the Global Warming Solutions Act offers competing policy goals to those found in the Warren-Alquist Act, the Energy Commission has already publicly endorsed those competing goals as its own.

In this context, the Energy Commission can no longer define "necessity and public convenience" exclusively by the narrow terms of its own enabling legislation without effectively defying the will of the Legislature. The Global Warming Solutions Act has essentially redefined the terms "necessity and public convenience" and given them a new dimension. Within this new paradigm, the degree of need for electricity must be balanced against its impact on global warming. Thus the need for power facilities producing little-to-no greenhouse gases, such as renewables, greatly outweighs the need for power plants employing older technologies that emit high levels of greenhouse gases. In addition, the Global Warming Solutions Act's findings

include explicit reference to needed improvements in efficiency and conservation that in turn become additional factors in this new definition of "necessity and public convenience." (Id., at 38501(c).)

As a practical matter, passage of the Global Warming Solutions Act has unfortunately made past Energy Commission override decisions less relevant sources of precedent for use in analyzing current and future requests for an override of state and local LORS. Therefore, with the present Eastshore AFC, the Energy Commission will need to establish a new standard of review that reflects the significant change in state law to focus statewide efforts on reducing greenhouse gases. As the Applicant's Override Brief does not at all reflect the need for a new standard of review in light of the passage of the Global Warming Solutions Act – indeed it asks the Committee to explicitly follow existing precedent – the request for an override of local aviation safety-related land use LORS must be denied.

The County anticipates that in its forthcoming rebuttal brief the Applicant may argue the Energy Commission should not wade into the precise meaning of the terms of the Global Warming Solutions Act at this time because the State Air Resources Board has yet to promulgate the regulations to implement its mandate. The recent proceedings before the Public Utilities Commission ("PUC") should thoroughly disabuse the Energy Commission of this notion.

In its Opinion Adopting Pacific Gas and Electric Company's, Southern California Edison Company's, and San Diego Gas & Electric Company's Long-Term Procurement Plans ("LTPP Decision"), Decision 07-12-052 (Issued December 21, 2007), the PUC rejected the notion that electric utilities and energy providers should wait to implement the Global Warming Solutions Act mandate until all the regulations have been put into place. The PUC explained that "while utilities were mandated to plan for uncertainties associated with the implementation of AB 32, Commission policy also mandates that the IOUs [Investor-Owned Utilities[7]] submit LTPPs that

---

[7] The Applicant may also argue that this PUC decision does not apply to Eastshore because the Applicant is not an IOU. Eastshore is, however, the kind of "resource" the PUC discusses in its LTPP decision. Therefore, the same concerns apply to the Eastshore AFC.

are on course for reducing GHG [greenhouse gas] emissions." (Id., at 244.) The PUC went on to say that

> [r]egardless of the ultimate specifics of the GHG cap, it is apparent that to help the State reach 1990 GHG emission levels, the IOUs will need to "raise the bar" on their loading order procurement when filling net short positions. Procurement of zero- or low-GHG resources should be given preference over other resources since these are the types of resources that AB 32 regulations will favor.

(Id.) The message of the PUC's LTPP Decision could not be clearer: the past will not be precedent, and the electricity industry cannot wait to implement the goals of the Global Warming Solutions Act.

The Global Warming Solutions Act has set ambitious goals for the State: the reduction of greenhouse gas emissions to 1990 levels by 2020. (See Health and Safety Code §§ 38550-51.) Reaching those goals will require significant and immediate changes in procedure, lest the goals of the Global Warming Solutions Act become mere words on paper. Indeed, as Governor Schwarzenegger noted at a signing ceremony for the Global Warming Solution Act, "We simply must do everything in our power to slow down global warming before it's too late." (Press Release, *Gov. Schwarzenegger Signs Landmark Legislation to Reduce Greenhouse Gas Emissions*, September 27, 2006 (GAAS:684:06).) The Energy Commission has it within its power the ability to alter the standard of review for override determinations, thus helping to ensure California leads the nation and the planet away from a global catastrophe. Applying a new standard of review to the Eastshore AFC furthers California's need for immediate action, rather than words, to reduce greenhouse gas emissions before it is too late.

ii. The Commission Cannot Evaluate Whether Prudent and Feasible Alternatives Exist Without Considering Other Points of Interconnection

During the Eastshore AFC proceedings, the Committee has repeatedly asked the parties whether in making findings in support of the second prong of section 25525, the Energy Commission would need to consider the cost of interconnection at other substations. (See e.g.

Transcript of Joint Committee Status Conference, June 6, 2007, at 82:21-83:8.) During the Joint Committee Status Conference, the Staff explained that its present analysis does not include cost studies at other substations because such studies are typically funded by applicants. (Id., at 83:12-84:8.)

At the time, the Applicant raised an objection to conducting further interconnection studies, which it has renewed in its Override Brief. (Id., at 85:9-86:5; Applicant's Override Brief, at 31.) The Applicant argued that interconnection studies for other substations were unnecessary to the proceedings because connection at a different substation from that proposed in the Eastshore AFC would require the filing of another application, and thus the so-called "no project alternative." (Transcript of Joint Committee Status Conference, June 6, 2007, at 85:9-86:5.) The Staff opined that this level of analysis went beyond the Energy Commission's required level of analysis under CEQA. (Id., 86:18-87:6.)

The Staff did acknowledge, however, that "from staff's perspective, there may be difference in the level of information that's needed for a CEQA alternatives analysis, and for information that's required for an override." (Id.) Although at the time the Staff did not contemplate the need for an interconnection study, the evidence adduced at the evidentiary hearings points up the need for interconnection studies at nearby substations, at a minimum those substations considered during the Staff's analysis of alternative sites that were rejected by and large because they did not connect to the Eastshore substation. (Id., at 87:7-10.) Absent such a study, the Committee may not make the required "prudent and feasible means" finding in support of an override.

Section 25525 requires the Committee to determine whether there exist "more prudent and feasible means" of meeting public convenience and necessity. In past override cases, the Energy Commission has relied on the Staff's review of alternatives, finding that the Staff "essentially performed an analogous exercise." (The Metcalf Decision, at 466.) Unlike past cases, however, the Staff's alternatives analysis is not directly analogous, and thus requires inclusion of cost studies of interconnection at other substations.

For example, in Los Esteros Critical Energy Facility II, Phase 2 ("Los Esteros") (03-AFC-2), the applicant proposed to increase the generation capacity of a facility already in operation. (Los Esteros Final Commission Decision, CEC-800-2005-004-CMF, October, 2006 ("The Los Esteros Decision"), at 365.) Therefore, interconnection to other substations in that proceeding was a less relevant factor. (Id., at 370.) Similarly, in The Metcalf Decision, the Energy Commission supported its override with a finding that the Metcalf plant necessarily had to be connected to a particular substation because the City of San Jose required a local source electricity to insure against potentially catastrophic blackouts. (The Metcalf Decision, at 467.) Thus interconnection at other substations played no role in the Metcalf override analysis because the Metcalf facility had to be connected to a particular substation to ensure the project goal of providing a local source of electricity.

By contrast, the present Applicant's arguments against the requirement of further interconnection studies rests not on substantive need to be connected to the Eastshore substation, but instead on rhetoric. During the evidentiary hearings, the Staff witness, Dr. Phinney, acknowledged that some alternative sites were rejected, despite that they would not pose a threat to aviation safety, simply because they did not meet the Applicant's project objective of connection to the Eastshore substation. (RT 1/14/08, 73:17-74:18.) Although the Applicant and Staff have identified various benefits of connection to the Eastshore substation, neither has identified a particular *requirement* that Eastshore connect to the Eastshore substation, as the Energy Commission did with Metcalf and Los Esteros, other than the Applicant's rhetorical inclusion of this requirement as a project objective. (See generally Staff FSA, at sec. 6.)

At a broad level, the Energy Commission's override analysis involves an exercise in judgment whether the effects of a facility's LORS noncompliance outweighs the benefit of the electricity it will provide. (See The Metcalf Decision, at 461.) The exercise of this judgment must be based upon evidence in the record from which the Energy Commission may make findings. In the absence of interconnection studies at other facilities, the Energy Commission lacks the necessary factual basis upon which to exercise its judgment as it cannot determine

whether more prudent and feasible means of producing electricity required for public convenience and necessity exist because it cannot evaluate the merits of other locations without the most crucial factor to both IOUs and independent generators: cost.

Making override findings without considering the value of interconnection at other substations reduces the second prong of the section 25525 analysis to a tautology. So long as project proponents include connection at a particular substation within the project's listed objectives, the Energy Commission cannot consider constructing power plants at another site that may offer environmental benefits, LORS compliance, and lower cost. The present myopic arrangement undoubtedly benefits proponents of a single facility, but it does not serve the public need of having the Energy Commission consider override requests with a view to statewide energy needs and to minimizing LORS noncompliance. Under the Applicant's proposed standard of review, the second prong of the section 25525 analysis becomes a mere formality, setting a dangerous precedent that risks to burden other communities in the future. Absent interconnection studies at other facilities, the Committee must find it cannot make findings with respect to the second prong of section 25525, as it lacks sufficient evidence upon which to make a reasoned analysis.

iii. The Commission Must Consult and Meet With Concerned Local Agencies

In addition to the standard of review under section 25525, the Energy Commission must make findings that it has met its obligation under section 25523(d)(1) that it has met and consulted with the state, local or regional governmental agency concerned to attempt to correct or eliminate LORS noncompliance, and if unable to correct the noncompliance, to inform the affected state, local or regional governmental agency of the same. (Public Resources Code § 25523(d)(1).) Although this procedural requirement has not yet been triggered, the County simply wishes to bring it to the Committee's attention. As the Applicant has requested an override of the LORS of the ALUC and City of Hayward, the Energy Commission would need, at a minimum, to meet with those agencies prior to any final decision on the Applicant's request for an override.

b. The Applicant Has Not Demonstrated That Eastshore Is Required for Public Convenience and Necessity

Applying the Applicant's standard of review, or the modified standard of review proposed by the County, the Applicant has not demonstrated that Eastshore is required for public convenience and necessity. Electricity and peak electricity demand in the Staff-defined San Francisco Bay Region has been relatively low, calling into question the Applicant's claim that Hayward desperately needs Eastshore's additional electricity. In addition, Eastshore's natural gas-burning engines will not further the goals of the Global Warming Solutions Act.

i. Electricity and Peak Electricity Demand in the San Francisco Bay Region Is Relatively Lower Than Demand in Surrounding Areas

Throughout these proceedings, the Applicant has told the Committee that Hayward and its surrounding communities desperately need the Eastshore facility due to high demand and the need to avoid catastrophic blackouts. (See e.g. Applicant's Override Brief, at section VI.) The Energy Commission Staff's "California Energy Demand 2008-2018 Staff Revised Forecast," ("Staff Forecast") however, tells a different story. (Staff Forecast, CEC-200-2007-015-SF2, November 2007.) This document evidences that within the San Francisco Bay Region,[8] actual annual consumption growth rates for electricity *fell* between 2005 and 2008 for both electricity and peak electricity. (Id., at 56.) This decline contrasts dramatically with the 8.13% growth in peak demand in the neighboring East Bay Region, and moderate peak growth in the other three nearby planning areas served by PG&E. (Id.)

Although the Staff Forecast predicts some modest growth in peak demand for the San Francisco Bay Region between 2008 and 2016, that growth is only slightly more than half the forecasted annual growth of the East Bay, Valley, and North Cost and Mountain regions. (Id.) Furthermore, the San Francisco Bay Region forecast is only slightly more than a quarter of the significant predicted growth for the Sacramento Region. (Id.) This forecast broadly

[8] This document somewhat confusingly – at least for Bay Area natives – places Hayward and neighboring communities within the "San Francisco Bay Region," rather than the "East Bay Region."

corresponds to the San Francisco Bay Region's historical trend of essentially flat peak energy demand growth over the past 20 years. (See Id., at 57, Figure 18.)

These figures call into question the Applicant's claim that Eastshore is necessary to support a high level of peak demand for electricity. The San Francisco Bay Region uses relatively much less peak electricity than the nearby East Bay Region and Valley Region, a difference of thousands of megawatts. (Id., at 56-57.) The San Francisco Bay Region is also forecasted to use much less electricity overall. (Id.) Moreover, the Hayward area will soon be home to the Russell City Energy Center which will meet some of that growth.

Under these circumstances, the Committee should ignore the Applicant's rhetoric and focus on its own Staff's forecast of demand in the San Francisco Region. Although the Staff Forecast does predict some increase in peak demand, it is hardly dramatic and relatively less than surrounding regions. This evidence does not support a finding of public convenience and necessity.

ii. Eastshore's Natural Gas-Burning Engines Do Not Meet the Goals of the Global Warming Solutions Act

In addition, Eastshore's chosen method of providing electricity does not broadly comport with the goals of the Global Warming Solutions Act. As the Applicant readily acknowledges, the burning of natural gas produces greenhouse gases. (See generally Applicant's Override Brief, at 23-25.) The Applicant argues, however, that natural gas-fired peaker plants are necessary to support renewable sources of electricity that may provide for less stable sources of electricity. (See Id.)

While peaking facilities may provide support to somewhat less consistent sources of renewable electricity, such an argument in favor of the Eastshore AFC must be predicated on a separate finding that there exist a significant quantity of renewable sources requiring such support, or that construction of a quantity of renewable sources is in the planning stages. In the absence of such a finding, approving an override for the Eastshore AFC would simply perpetuate the historical practice of licensing facilities that cause global warming instead of renewable resources that do not emit greenhouse gases, and will not help the state meet its

goals under the Global Warming Solutions Act. Put another way, the Energy Commission should not make a finding of public convenience and necessity based on the rhetorical claim that Eastshore will provide support to renewable sources, unless there exists substantial evidence that those renewable resources exist or will soon come online.

c. Eastshore's Significant Burdens Outweigh its Scant Benefits

The Applicant spends much of its brief contending that the risk of an aviation hazard associated with LORS noncompliance is either remote or nonexistent. (See e.g. Applicant's Override Brief, at 2-3.) As the County has already demonstrated, and its fellow interveners and the Staff concur, Eastshore will pose a real and significant threat to aviation safety, and thus in turn the Hayward Executive Airport and the public at large. Moreover, the County has also demonstrated that Eastshore will cause environmental degradation, perpetuate environmental injustice, and burden land use planning designed to eliminate blight and provide needed affordable housing.

Lost perhaps in the discussion of the science of thermal plumes and the technicalities of LORS noncompliance is the real-world nature of Eastshore's threat. While the Applicant goes to great lengths to downplay the likelihood of incident, it largely ignores the consequences. Should an aircraft encounter Eastshore's thermal plume, lose control and crash, the consequences could be catastrophic. Indeed, should an aircraft lose control and crash into the nearby Russell City Energy Center, the loss of life and harm to the environment would be coupled with potentially massive blackouts.

When balancing the lack of conformity of a project with LORS and its benefits, the Committee must take into account the nature of the LORS in question. Although the Applicant provides a lengthy discussion demonstrating that the Energy Commission has overridden numerically more LORS in a single proceeding than the Applicant herein requests, none of the cases cited by the Applicant involved LORS designed to protect public safety. Most of the other override cases involved land use and related LORS related to visual impacts, managing growth, and economic development. (See e.g. "Combined Summary of Applicable Laws, Ordinances, Regulations and Standards (LORS) for Metcalf Center Which Are Recommended for a CEC

Override," The Metcalf Decision, at Appendix E.) While the County does not downplay the importance of the LORS in past override cases to the affected jurisdictions, the potential *consequences* of an override in those cases were of a different nature all together as none involved measures designed to protect public safety.

It is for this reason that the recent Blythe Energy Project (99-AFC-8) and Barrick overflight test (Ex. 20) serve as poor indicators of the potential consequences of LORS noncompliance. Both of those facilities are located in remote, sparsely populated deserts with relatively little air traffic. By contrast, the Applicant has proposed to construct Eastshore in the middle of a dense and heavily populated urban and industrial area that is the site of a series of overlapping and complex airspaces. Thus in its review, the Committee must be mindful of the potential consequences of LORS noncompliance on pilots and the general public, as well as the unprecedented nature of the Applicant's request. Given the risks, the Committee cannot get this question wrong.

IV. THE APPLICANT FAILED TO REQUEST AN OVERRIDE OF EASTSHORE'S SIGNIFICANT ADVERSE AVIATION, AIR QUALITY AND ENVIRONMENTAL JUSTICE EFFECTS, REQUIRING THE COMMISSION TO DENY THE AFC

As the Energy Commission has noted in past override cases, section 25525 does not provide the only source of authority for an override. (The Metcalf Decision, at 461.) To the extent the Energy Commission finds a facility will cause significant adverse environmental effects under CEQA, the Energy Commission may issue a statement of overriding considerations. (14 CCR § 15092(b)(2)(B).) The findings to support a statement of overriding considerations differ somewhat from the section 25525 override authority, requiring the Energy Commission to balance the applicable "economic, legal, social, technological, or other benefits of a proposed project against its unavoidable environmental risks when determining whether to approve the project." (14 CCR § 15093(a).) In addition, the Energy Commission has acknowledged that CEQA provides a higher standard of review for consideration of alternatives than that found under the Warren-Alquist Act. (The Metcalf Decision, at 466, n.160.)

In the present proceedings, the Applicant has not requested the Committee make a finding of overriding considerations on the basis that Eastshore produces no significant adverse environmental effects. It also specifically contends that the aviation safety-related land use LORS noncompliance that is the subject of its override request does not itself create a significant adverse environmental effect.

By contrast, the County has demonstrated *supra* and in its Opening Evidentiary Brief, that Eastshore will cause significant adverse environmental effects with respect to Air Quality, Traffic & Transportation, Land Use, and Environmental Justice. The County will not repeat those arguments here, but instead simply incorporate them by reference. To the extent the Committee agrees with the County that Eastshore will cause significant adverse environmental effects, the Committee must deny the Eastshore AFC as the Applicant has knowingly waived its opportunity to request such an override based upon its demonstrable ability to argue for a section 25525 override in the alternative. (See e.g. Applicant's Override Brief, at 1-3.)

V. THE COMMISSION MUST NOT APPROVE THE EASTSHORE AFC SIMPLY BECAUSE A DENIAL WOULD REQUIRE THE APPLICANT TO FILE A NEW AFC

In the final section of its override brief, the Applicant introduces a new argument in favor of its override request: that an override would avoid the administrative requirement of filing a new AFC. (Applicant's Override Brief, at 30-33.) This argument has no foundation in law, and should not be a factor for the Committee's consideration. The Energy Commission's denial of an AFC will always cause delay and the re-filing of a new AFC. On the other hand, denial of an application can protect the public from a facility that will threaten public safety, pollute the environment, burden land use planning and perpetuate environmental injustice. The Committee should not approve flawed applications because applicants do not want to take the time to file a new application.

VI. Conclusion

Over these many months, the Committee has heard hundreds of hours of expert and public testimony and read thousands of pages of evidence and argument. The great weight of this evidence and argument points to the conclusion that the proposed Eastshore Energy Center will

cause significant adverse environmental effects, and will not comply with local LORS. The Committee acknowledged as much when it told the Applicant to conservatively assume it would make a finding of LORS noncompliance.

Now the Committee is asked to exercise its judgment upon the Applicant's request for an override of local LORS designed to protect aviation safety, and in turn public safety. That same great body of evidence and argument that pointed the Committee so clearly to a finding of LORS noncompliance should as well support a denial of the Applicant's request for an override. Eastshore is a flawed proposal that will burden the people and environment of this area for many years after these proceedings are long forgotten. Whatever its few merits, they are greatly outweighed by the consequences of putting pilots at risk, and failing to advance California's goal of stopping global warming. The County respectfully requests the Applicant's Eastshore AFC be denied, and along with it the Applicant's request for an override.

DATED: March 3, 2008

RICHARD E. WINNIE, County Counsel in and for the County of Alameda, State of California

BRIAN E. WASHINGTON,
Assistant County Counsel

By _____
Andrew Massey
Associate County Counsel

Attorneys for County of Alameda

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:

CALIFORNIA ENERGY COMMISSION
Attn: Docket No. 06-AFC-6
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

APPLICANT

Greg Trewitt, Vice President
Tierra Energy
710 S. Pearl Street, Suite A
Denver, CO 80209
greg.trewitt@tierraenergy.com

APPLICANT'S CONSULTANTS

David A. Stein, PE
Vice President
CH2M HILL
155 Grand Avenue, Suite 1000
Oakland, CA 94612
dstein@ch2m.com

Jennifer Scholl
Senior Program Manager
CH2M HILL
610 Anacapa Street, Suite B5
Santa Barbara, CA 93101
jscholl@ch2m.com

Harry Rubin, Executive Vice President
RAMCO Generating Two
1769 Orvietto Drive
Roseville, CA 95661
hmrenergy@msn.com

COUNSEL FOR APPLICANT

Jane Luckhardt, Esq.
Downey Brand Law Firm
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
jluckhardt@downeybrand.com

INTERESTED AGENCIES

Larry Tobias
CA Independent System Operator
151 Blue Ravine Road
Folsom, CA 95630
ltobias@caiso.com

INTERVENORS

Greg Jones, City Manager
Maureen Conneely, City Attorney
City of Hayward
777 B Street
Hayward, California 94541
greg.jones@hayward-ca.gov
michael.sweeney@hayward-ca.gov
maureen.conneely@hayward-ca.gov
david.rizk@hayward-ca.gov

Pillsbury Winthrop Shaw Pittman LLP.
Att: Diana Graves, Esq
Att: Michael Hindus, Esq
50 Fremont Street
San Francisco, CA 94120
diana.graves@pillsburylaw.com
michael.hindus@pillsburylaw.com
ronald.vanbuskirk@pillsburylaw.com

Paul N. Haavik
25087 Eden Avenue
Hayward, CA 94545
lindampaulh@msn.com

James Sorensen, Director
Alameda County Development Agency
Att: Chris Bazar & Cindy Horvath
224 West Winton Ave., Rm 110
Hayward CA 94544
james.sorensen@acgov.org
chris.bazar@acgov.org
cindy.horvath@acgov.org

Charlotte Lofft & Susan Sperling
Chabot College Faculty Association
25555 Hesperian Way
Hayward, CA 94545
clofft@chabotcollege.edu
ssperling@chabotcollege.edu

Law Office of Jewell J. Hargleroad
Jewell J. Hargleroad, Esq
1090 B Street, No. 104
Hayward, CA 94541
jewellhargleroad@mac.com

Jay White, Nancy Van Huffel,
Wulf Bieschke, & Suzanne Barba
San Lorenzo Village Homes Assn.
377 Paseo Grande
San Lorenzo, CA 94580
jwhite747@comcast.net
slzvha@aol.com
wulf@vs-comm.com
suzbarba@comcast.net

Richard Winnie, Esq.
Alameda County Counsel
Att: Andrew Massey, Esq.
1221 Oak Street, Rm 463
Oakland, CA 94612
richard.winnie@acgov.org
andrew.massey@acgov.org

*** Libert Cassidy Whitmore**
Att: Laura Schulkind, Esq.
Att: Arlin B. Kachalia, Esq.
153 Townsend Street, Suite 520
San Francisco, CA 94107
lschulkind@lcwlegal.com
akachalia@lcwlegal.com

Robert Sarvey
501 W. Grantline Rd
Tracy, CA, 95376
Sarveybob@aol.com

ENERGY COMMISSION

Jeffrey D. Byron, Presiding Member
jbyron@energy.state.ca.us

John L. Geesman, Associate Member
jgeesman@energy.state.ca.us

Susan Gefter, Hearing Officer
sgefter@energy.state.ca.us

Bill Pfanner, Project Manager
bpfanner@energy.state.ca.us

Caryn Holmes, Staff Counsel
cholmes@energy.state.ca.us

Public Adviser
pao@energy.state.ca.us

DECLARATION OF SERVICE

I, Dalia Liang, declare that on March 3, 2008, I deposited copies of the attached Consolidated Reply to Applicant's Opening Evidentiary and Override Briefs in the United States mail at Oakland, CA, 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.

Dalia Liang