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STATE OF CALIFORNIA
State Energy Resources
Conservation And Development Commission

In the Matter of: APPLICATION FOR CERTIFICATION FOR THE EASTSHORE ENERGY CENTER	Docket No. 06-AFC-6 CITY OF HAYWARD PREHEARING BRIEF REGARDING LEGAL STANDARDS UNDER PUBLIC RESOURCES CODE §25525

Intervener City of Hayward ("City") submits this brief at the request of the California Energy Commission ("CEC") Committee ("Committee") overseeing the Application for Certification for the Eastshore Energy Center ("EEC" or "Project"). According to the Final Staff Assessment ("FSA") for the EEC and testimony submitted by

the City and others, the Project does not comply with all applicable laws, ordinances, regulations and standards ("LORS"). The Committee has indicated to the parties that it nonetheless may consider certifying the Project pursuant to its authority under Public Resources Code § 25525 (i.e., an override). As requested by the Committee, the City submits this brief to identify and describe the legal standards that would apply to an override decision.[1]

I. Public Resources Code § 25525 Sets a High Bar for an Override Decision

In order to expedite siting power plants in California, the Legislature granted the CEC the exclusive power to approve new power plants – including requiring conditions and mitigation where appropriate – and to decline to certify power plants that cannot be conditioned to comply with LORS and environmental requirements.

The Warren-Alquist Act requires CEC Staff ("Staff"), the applicant, and responsible agencies to work together to ensure that a project is compliant with LORS and to mitigate all environmental impacts of a project. *See* Pub. Res. Code § 25519. However, in some instances, a plant does not and cannot comply with LORS, nor can all environmental impacts be mitigated. In such circumstances, the CEC has the discretion to approve a power plant, but only if the CEC can make conclude that (1) the facility is required for public convenience and necessity and (2) all other alternatives are infeasible. In forming this conclusion, the Committee must make findings that the benefits of the project outweigh both unavoidable environmental impacts and noncompliance with LORS.

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[1] As instructed by the Committee, this brief is limited to the discussion of the applicable legal standards and does not argue the merits of whether the evidence in this case would support an override by the Committee. The City reserves the right to present such arguments, if necessary, at the appropriate time.

A. The Warren-Alquist Act creates a presumption that the Committee should not approve a noncompliant facility.

Public Resources Code § 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. We believe the Committee must approach its override analysis with a presumption that it should not certify the EEC because it does not comply with LORS. It is then the applicant's burden – not Staff's, the interveners', or the Committee's – to submit additional evidence to overcome this presumption and meet the standards of § 25525.[2]

In previous override decisions, the Committee 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, pp. 367-368. 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, 517, fn. 16 (holding, in a case decided under the California Environmental Quality Act ("CEQA"), that a mere recitation of statutory language alone does not provide the necessary factual basis to approve a

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[2] The regulations are clear that the burden to provide sufficient evidence to support findings rests on the applicant. *See* Title 20 Cal. Code Regs. § 1748(d).

facility). In *Los Esteros*, the CEC supported its decision, in part, with evidence that the City of San Jose consumed much more electricity than was being generated locally. *See Los Esteros*, p. 368. That is the type of evidence that the EEC must provide to establish that the Project is "required for public convenience and necessity."

B. The CEC should apply a strict test to determine public convenience and necessity.

In recent override decisions, to apply the "public convenience and necessity" standard in § 25525, the Commission has relied on cases interpreting that phrase in Public Utilities Code § 1001 ("Section 1001"). *See Commission Decision, Los Esteros Critical Energy Facility II, Phase II,* 03-AFC-2, Oct. 2006, p. 367; *Commission Decision, El Segundo Power Redevelopment Project,* 00-AFC-14, Feb. 2005, p.296; *3rd Revised Presiding Member's Proposed Decision, Morro Bay Power Plant Project*, 00-AFC-12, June 2004, p.593; *Commission Decision, Metcalf Energy Center,* 99-AFC-3, Sept. 2001, p.464.

Section 1001 applies to the power of the Public Utilities Commission ("PUC") to certify public utilities to operate in California. Pursuant to Section 1001, the PUC will grant a telephone company, natural gas provider, or railroad a certificate to construct and operate facilities in the public rights of way, and "give consideration to" "(1) Community values; (2) Recreational and park areas; (3) Historical and aesthetic values; (4) Influence on environment . . . ." Unlike the CEC, the PUC is not required to thoroughly examine whether the proposed facility complies with LORS or will have unavoidable environmental impacts, because the PUC process does not wholly override local processes. *See, e.g.,* Pub Util. Code § 2902. Once a company obtains a certificate of public convenience and necessity from the PUC, it may still need to undergo local permitting or, in the case of a power plant, permitting before the CEC. Therefore, the standards for establishing "public convenience and necessity" in Section 1001, from a land use perspective, are quite low and are balanced in only a general way against the factors listed above. As such, the standard applied by the PUC should not be directly applicable to the CEC process. Because the

evaluation of whether a facility is required for public convenience and necessity is not part of a normal CEC approval process as it is for the PUC, but rather, a decision to override noncompliance, the EEC should have a higher burden of proving public convenience and necessity.

II. The CEC Regulations Set a High Bar for an Override Decision

The CEC regulations also contain a presumption against certifying a facility with unavoidable environmental impacts and noncompliance with LORS. *See* Title 20 Cal. Code Regs. §§ 1001-1003, 1101-1237, 1701-2031, 2301, 2305, 2306, 2308, 2501-2557.[3] In addition to the standard set forth in § 25525, the regulations add additional detail regarding the findings that the Committee must make to support an override. *See* §§ 1741, 1752, 1755.

A. The applicable regulations establish a presumption that the Committee should not approve a noncompliant facility.

Section 1755 details the requirements for the Commission's final written decision and implies that an override decision is not to be entered into lightly. The purpose of the final written decision is to memorialize the Committee's objective factual findings. Those factual findings must support and logically lead to the final decision.

Section 1755 provides, in relevant part: "(b) The [written] decision ***shall not certify*** any facility considered in the proceeding unless the commission's findings pursuant to subsections (e), (f), and (k) of Section 1752[4] are all in the affirmative." (*Emphasis added*). Thus, § 1755 begins with the general requirement that the Committee must make certain

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[3] Unless otherwise stated, all citations to regulations refer to Title 20 Cal. Code Regs.

[4] Section 1752 describes in detail the findings the Commission must make in order to certify a facility. Subsections (e) and (f) are not relevant here in that they apply to natural resource protection. Section 1752(k), consistent with Section 25525, restates that the CEC shall not approve the facility unless it makes findings that "the facility is required for public convenience and necessity and there are no more prudent and feasible means of achieving such public convenience and necessity."

findings or else reject a project. The standards contained in § 1752(k) track the standards in Public Resource Code § 25525.

In addition, for CEQA compliance purposes, § 1755 further limits the Commission from approving a noncompliant facility:

> "(c) The commission ***shall not certify*** any site and related facilities for which one or more significant adverse environmental effects have been identified ***unless the commission makes both of the following findings***:
>
> (1) With respect to matters within the authority of the commission, that changes or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant environmental effects identified in the proceeding.
>
> (2) With respect to matters not within the commission's authority but within the authority of another agency, that changes or alterations required to mitigate such effects have been adopted by such other agency, or can and should be adopted by such other agency.

If the Committee is unable to make either of the findings listed above, then it does not have discretion to issue an override decision. We do not believe that the CEC will be able to make such findings for the EEC.

Lastly, after exploring all other options for compliance, the Committee may make the override decision, if it can support such decision "specifically" with the following findings:

> "(1) That ***specific economic, social, or other considerations make infeasible*** the ***mitigation measures or project alternatives*** identified in the application proceeding; and
>
> (2) That the ***benefits of the project outweigh the unavoidable significant adverse environmental effects*** that may be caused by the construction and operation of the facility.

Put simply, in order to make a decision to override LORS or unavoidable environmental impacts, the Committee must be able to make findings that (1) all other mitigation is infeasible; (2) all other alternatives are infeasible; and, (3) Project benefits

outweigh the harms caused by noncompliance with LORS and the unavoidable environmental impacts.

To support the necessary findings for override, the EEC must present specific evidence that economic, social and other factors make the alternatives proposed by Staff not just inconvenient, but "infeasible." Finally, the EEC must demonstrate that it is vital to site the Project at the particular proposed location and any unavoidable adverse effect, e.g., current and future safety risks to the Hayward Municipal Airport, are inconsequential in comparison.

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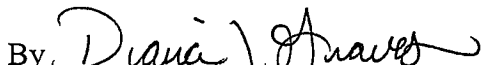
By 
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