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4

Attorneys for Group Petitioners California  
5 Pilots Association, Citizens for Alternative Transportation  
Systems, San Lorenzo Homeowners Association,  
6 Skywest Townhouse Homeowners Association,  
Hayward Democratic Club and Hayward Area Planning  
7 Association

8  
9 STATE OF CALIFORNIA  
STATE ENERGY RESOURCES

10 Conservation and Development Commission  
11

12 In the Matter of:

13 Initially noticed as “Petition to Amend the  
Commission Decision Approving the Application  
14 for Certification for the Russell City Energy  
Center”;

15  
16 Later Noticed as “Modification of the Application  
for Certification for the Russell City Energy  
17 Center”

Docket No.: 01-AFC-7C

GROUP PETITIONERS’ PETITION TO  
INTERVENE AS A GROUP TO REOPEN  
THE ADMINISTRATIVE PROCEEDINGS,  
REOPEN THE EVIDENTIARY RECORD  
AND FOR RECONSIDERATION; and

PETITION RE FINANCIAL HARDSHIP

Date: TBD  
Location.: TBD  
Time: TBD

Accompanying documents: Supporting  
declarations of Jay White, Tom Kerston,  
Sherman Lewis , Gary Cathey, Michael Toth,  
Andrew Wilson III, and Jewell Hargleroad

1           1. Petitioner is a group collectively referred to as “Group Petitioners” consisting of the  
2 following non-profit corporations based in California:

- 3           a. California Pilots Association (“Calpilots”)
- 4           b. Citizens for Alternative Transportation Systems (“CATs”)
- 5           c. San Lorenzo Homeowners Association
- 6           d. Skywest Townhouse Homeowners Association
- e. Hayward Democratic Club (“Demos”)
- f. Hayward Area Planning Association (“Hapa”)

7 The purpose of this petition to intervene is to urge the California Energy Commission to  
8 reconsider its Final Decision concerning the Russell City Energy Center Project docketed on  
9 October 2, 2007 entitled “Amendment No. 1 (01-AFC-7C) Alameda County.” Group Petitioners  
10 seek to become a party to submit evidence in support of their positions to support and enable the  
11 Commission to make a determination in favor of Group Petitioners supported by the evidentiary  
12 record.

13           2. Group petitioners will be represented by attorney Jewell J. Hargleroad whose address is  
14 1090 B Street, No. 104, Hayward, California 94541, and certifies that she will act as spokesperson  
15 in these proceedings for members of the group. Counsel reserves the right and entitlement,  
16 however, of designating any person or entity to assist counsel in these proceedings. Group  
17 Petitioners further agree to notify the Applicant and Commission of additions or deletions to the  
18 Group list within ten days of when such changes occur. Counsel certifies that she has served the  
19 applicant’s attorney of record in this proceeding with this petition.  
20

21           3. Group Petitioners represent the concerns of aviators and community organizations who  
22 use the Hayward Airport and are concerned about the recent trend of attempting to locate large  
23 thermal power plants near community local airports, such as was established near the Blythe  
24 Airport in Blythe, California. Calpilots and the community organizations share a common interest  
25 in assuring that aviators may safely and fully utilize the Hayward Airport without facing  
26 hazardous conditions posed by “thermal plumes” reaching one thousand feet or one hundred  
27

1 stories high resulting in the restriction of airspace and thereby forcing aviators to invade airspace  
2 otherwise restricted by noise regulations rendering this Russell City Energy Center inconsistent  
3 with the community's land use designations, ordinances and regulations.

4         4. Group Petitioners share the interest in assuring that school children and college students  
5 are provided education in a healthy and safe environment. This project is located within a few  
6 miles of several public and private elementary and high schools located in the San Lorenzo and  
7 Hayward School Districts and the Chabot Junior College, a campus of the Chabot-Las Positas  
8 Community College District. Based on Group Petitioners information and belief, the student  
9 population of Chabot College alone exceeds 15,000 students, the population of San Lorenzo  
10 School District has grown over the past five years and the Hayward School District maintains and  
11 operates several elementary, middle and high schools, not including the student population of  
12 several local parochial and private elementary and high schools. Based on Group Petitioners  
13 information and belief, the population surrounding this project has substantially increased if not  
14 doubled since 2001 based on the information provided in the Hayward Area Recreational  
15 District's 2006 Master Plan.

16  
17         5. CATs is a community organization organized to promote alternative transportation  
18 systems and has an interest in this project's detrimental impact on Interstates 888 and Highways  
19 92, highways that are known to operate at level "F." CATs shares the opinions with the other  
20 members that The Final Decision's Transportation Section is inadequate, fails to seek and  
21 incorporate meaningful input from the County and the Alameda Congestion Transportation  
22 Agency, that this project is not mitigated and that the impact of accidental hazardous materials will  
23 have a substantial detrimental impact on traffic circulation that is not addressed by the Final  
24 Decision docketed on October 3, 2007.

25  
26         6. The San Lorenzo Homeowners Association is a homeowners association of over 5,600  
27 residences established in 1945 in unincorporated County of Alameda, located in the  
28

1 unincorporated the San Lorenzo District, adjacent to the City of San Leandro and the  
2 unincorporated communities of the County of Alameda known as Cherryland and Ashland.  
3 Adjacent or near to San Lorenzo’s southern border is the Russell City Energy Proposal, which at  
4 the time of this application for an “amendment” in November 2006 fell within the jurisdiction of  
5 unincorporated Mount Eden. San Lorenzo residents and members of the Association share an  
6 interest in the San Francisco Bay shoreline, the preservation of the Hayward San Lorenzo Bay  
7 Trail and its viewshed and air quality, and assuring that the air quality and health and safety of its  
8 residents and neighbors are fully protected. San Lorenzo further shares an interest in assuring that  
9 aviators of the Hayward Airport are not presented hazardous conditions or that airspace which  
10 presently is not subject to noise ordinances is protected to enable aviators to avoid airspace  
11 protected by noise ordinances and regulations which San Lorenzo residents have an interest in  
12 protecting.  
13

14         7. The Skywest Townhouse Homeowners Association is a homeowners association  
15 consisting of 140 residences located near the Hayward Airport and the shoreline, located in the  
16 City of Hayward. Like other members of the group, Skywest Homeowners have an interest in  
17 protecting their properties, residents’ health and safety, the San Francisco Bay shoreline, the  
18 preservation of the Hayward San Lorenzo Bay Trail, and assuring that the air quality and health  
19 and safety of its residents and neighbors are fully protected, including assuring that aviators of the  
20 Hayward Airport are not presented hazardous conditions or that airspace which presently is  
21 subject to noise ordinances is protected to enable aviators to avoid airspace protected by noise  
22 ordinances and regulation.  
23

24         8. The Hayward Democratic Club (“Demos”) was formed in 1967 by citizens from  
25 Hayward, San Leandro, San Lorenzo and Castro Valley to influence local government and politics  
26 with almost 200 active members and is a member of the California Democratic Council. The  
27 Demos is a local grassroots volunteer organization that has an interest in assuring there are  
28

1 progressive solutions to today's problems and works to support those progressive ideas. These  
2 include sustainability of energy resources, prevention of global warming and emissions of  
3 pollutants damaging communities' health and safety. The Demos have an interest in assuring that  
4 the community's opinions and concerns over the environment and residents' health and safety is  
5 fully legislatively considered and provided sufficient weight to support an affirmative finding in  
6 their favor by the CEC. The Demos interest is to assure that the legislators of the local  
7 jurisdictions review the merits of this project with the public and direct that staff, which is suppose  
8 to be working for the public interest, to address issues raised by the public and fully analyze the  
9 impacts of this project to provide adequate and meaningful analysis to the CEC and its staff as  
10 well as other applicable agencies, such as Bay Area Air Quality Management Agency.

12 9. The Hayward Area Planning Association (HAPA) was formed in 1978 by citizens from  
13 in the Hayward area (in addition to residents in the City of Hayward, adjacent unincorporated  
14 Alameda County districts, such as Fairview and Castro Valley) to research, educate, and promote  
15 better planning for open space, transit, smart growth, and sustainability. HAPA has about fifty-  
16 five members, mostly local residents of the City of Hayward and unincorporated County. HAPA's  
17 interests include advocating and promoting reduced greenhouse gases, sustainable energy resources,  
18 and less pollution. HAPA has participated in local civic education, media relations, advocacy to  
19 the Hayward City Council and other agencies, including litigation involving the California  
20 Environmental Quality Act.

23 10. All members of the group share an interest in having their views and members' views,  
24 opinions and positions fully considered and weighed by the California Energy Commission.  
25 Group Petitioners and members relied on the representations of the public notices that these  
26 proceedings are the same or consistent with the provisions of the California Environmental  
27 Quality Act ("CEQA"). However, CEQA does not require petitions to "intervene" to offer

1 evidentiary support which also requires that offer of proof be made by a “party.” Nor do CEQA  
2 proceedings adopt the Rules of Evidence and limit the applicable reviewing authority, here the  
3 CEC, to an “evidentiary record” governed by the Rules of Evidence to support affirmative  
4 determinations in the Group Petitioners’ favor. So that Group Petitioners, their members and the  
5 communities’ opinions, views, arguments and offers of proof may be admitted as evidence and  
6 properly weighed by the CEC, Group Petitioners seek leave to intervene to become a party to  
7 make their offers of proof and to pose their exceptions to these present “amendment” or  
8 “modification” proceedings.  
9

10 11. Group Petitioners have an interest in assuring that this project’s application is properly  
11 processed consistent with procedural due process. Based on Group Petitioners information and  
12 belief, changed circumstances require that this application be processed as a new project, not an  
13 “amendment” or “modification” of an approved project. Likewise, Group Petitioners traditionally  
14 have relied on the staff and experts of their local jurisdictions to investigate and analyze impacts  
15 of proposals, but assert that, to date, these proceedings have deprived them of those fundamental  
16 privileges and entitlements.  
17

18 12. Group Petitioners further petition to be excused from filing twelve copies with the  
19 Commission Docket Unit of all filings and serving papers on all other parties of record. The basis  
20 for this request is that compliance with such requirements creates an undue financial hardship and  
21 burden. Group Petitioners are non-profit organizations that traditionally do not have to retain  
22 counsel to have their opinions accepted and weighed. Group petitioners did not retain counsel  
23 until after September 26, 2007. These evidentiary proceedings in themselves, even granting this  
24 hardship petition, constitute a hardship. Further, counsel who represents Group Petitioners  
25  
26  
27  
28

1 is a sole practitioner, and such administrative burdens would unduly detrimentally impact  
2 counsel's ability to address the important and substantial legal issues presented by these  
3 proceedings.

4 Dated: October 25, 2007

Respectfully Submitted,

5  
6  
7 S/ original

Jewell J. Hargleroad, Attorney for  
Group Petitioners California Pilots Association,  
Citizens for Alternative Transportation Systems,  
San Lorenzo Homeowners Association,  
Skywest Townhouse Homeowners Association,  
Hayward Democratic Club and Hayward Area  
Planning Association

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Transportation Solutions, San Lorenzo Homeowners Association,  
6 Skywest Townhouse Homeowners Association, Hayward  
Democratic Club, Hayward Area Planning Association  
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Docket No.: 01-AFC-7C

GROUP PETITIONERS’ OBJECTIONS TO  
FINAL DECISION EFFECTIVE  
SEPTEMBER 26, 2007

Date: TBD  
Location: TBD  
Time: TBD

18  
19 Based on the short amount of time Group petitioners have had to briefly review the Final  
20 Decision docketed on October 3, 2007 but made effective on September 26, 2007, Group  
21 petitioners except or object to the following, reserving their right and entitlement to supplement  
22 these objections:

23 1. Any reliance on the alleged “full support” of the City of Hayward is suspect and the  
24 contracts and resolutions upon which the City are relying should first be referred to the Attorney  
25 General’s office for an opinion as to what weight, if any, should be provided to the City’s “full  
26 support.”  
27

28 Group petitioners Objections CEC 01-AFC-7C



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Docket No.: 01-AFC-7C

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF GROUP  
PETITIONERS’ PETITION TO  
INTERVENE, REOPEN THE  
ADMINISTRATIVE PROCEEDINGS,  
REOPEN THE EVIDENTIARY RECORD  
AND FOR RECONSIDERATION; And  
REQUEST FOR STAY OF COMPLAINEE  
PROCEEDINGS**

Date: TBD  
Location: TBD  
Time: TBD

## INTRODUCTION

As Commissioner Geeseman recently stated during an interview with the California Report aired by NPR/KQED on October 19, 2007, after this Commission's approval on September 26, 2007 of the 600-megawatt gas turbine thermal power plant known as the Russell City Energy Center ("Russell"), California has overly relied on natural gas plants. Also the day after the Commission's effective approval and the hearing on September 26, 2007, Calpine, a majority owner of Russell (or "applicant") filed its fourth amended disclosure with the New York Federal Bankruptcy Court revealing that the same engines which the applicant states will be used for Russell and could not be replaced with superior technology as urged by the CEC's staff, may have been sold; and that in the West the supply of power has increased during this decade while the demand has decreased. *In re Calpine Corporation, et al.*, United States Bankruptcy Court, Southern District of New York, No. 05-60200 (BRL).<sup>1</sup>

Additional new information which has developed since the Commission's September 26, 2007 hearing which was not available until after the hearing is that the Alameda County Land Use Airport Commission found that posting "notices to airmen" or "NOTAMs" did not constitute a mitigation for the loss of or restriction of airspace. These are simply warnings, not mitigations. Group petitioners, which include the statewide organization California Pilots Association, agree. Also, contrary to Calpine's representations to the Alameda County Land Use Airport Commission, the power plant over which Caltrans Aeronautics Pilot Gary Gatheys flew in Yolo County known as Sutter, was *smaller* in size, *not* the same size as represented by the applicant's representative present at that hearing. As a result, Group Petitioners' present evidence that the severe turbulence experienced by the Caltrans Aeronautics Pilot Gary Gatheys, who investigated flying over thermal

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<sup>1</sup> See Exhibit 7 to accompanying declaration of Jewell J. Hargleroad attaching portions of Calpine's bankruptcy filing filed the day after the CEC hearing.

1 plumes for the CEC due to the complaints received from pilots utilizing the Blythe Airport, was  
2 turbulence over a smaller power plant and at a higher elevation, 1,000 feet, not 800 feet.

3 Likewise, as revealed by the supporting declarations offered by Group Petitioners, there is  
4 substantial evidence that this project will have a significant effect on the environment and public  
5 health and that the almost 1.3 million pounds of pollutants and toxins are not mitigated as the  
6 CEC's staff also has admitted. Further, the evidence unambiguously establishes that this project  
7 was not properly processed and the public was not adequately or meaningfully informed or  
8 provided the opportunity to participate through their elected representatives. In fact, critical  
9 information submitted by the public, such as that offered by Michael Toth raising serious  
10 challenges to the methodology and analysis applied in evaluating the Russell project, was  
11 excluded from these proceedings.  
12

13 Nor, for that matter, does the CEC have the consent or appropriate input from the local  
14 jurisdictions, the City of Hayward and the County of Alameda ("County") or any of affected  
15 unincorporated districts whose residents like those in the City will be adversely impacted. As  
16 established by the public record, the public in both the City of Hayward ("City") and the County  
17 to date have been deprived of reviewing this project with their elected officials who have the best  
18 resources available to direct their staff to investigate and analyze the significant public health and  
19 environmental risks. The importance of that fundamental exercise protected by the state and  
20 federal Constitutions is starkly established by a comparison between the City's response to the  
21 Eastshore proposal, which specific project was reviewed by the public before the Hayward City  
22 Council this year, and the Russell proposal, which was not.  
23

24 As to the City's "contractual agreements" with the various owners and applicants for  
25 Russell, Group Petitioners contend that these and the alleged "full support" of City staff are  
26 entitled to *no* weight as a matter of law. Based on the evidence before the CEC, this question and  
27 the City contracts entered into with the various owners of this project should be referred to the  
28

1 California State Attorney General’s Office for its opinion to the CEC as to what weight, if any,  
2 should be given to the City’s position in this proceeding.

3 This Final Decision also must be reconsidered as a matter of law on the ground that this  
4 project “does not conform with [the] applicable state, local or regional standards, ordinances, or  
5 laws.” (Pub. Resource Code, Sec. 25525.) The Hayward General Plan was amended in 2002 and  
6 as the CEC staff have observed, the Russell project is inconsistent with the Plan as amended since  
7 the 2002 amended Plan changes “industrial” to a “knowledge based” use, a use inconsistent with  
8 “heavy industrial.”<sup>2</sup> As to conformance with County ordinances standards and laws, no one ever  
9 asked.<sup>3</sup>

10  
11 Likewise, since 2002, California’s Senator Diane Feinstein successfully negotiated  
12 acquiring property next door (or very nearby) to Russell, which is one of the largest restoration  
13 wetland projects in the West. As for “necessity” required to be found to overcome this  
14 nonconformance as set forth under section 25525, based on Calpine’s own affirmative  
15 representations to the New York federal court the day after this hearing, power supplies have  
16 grown, while demand in the West has decreased. According to the CEC’s own webpage public  
17 records, there are approximately twenty power plants certified which have yet to be built.

18  
19 Group petitioners submit that as a matter of law, this certification issued on September 26,  
20 2007 must be revoked under section 25534 of the Public Resource Code<sup>4</sup> and if the applicant

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21 <sup>2</sup> Based on counsels and Group petitioners’ short opportunity to review this 250 page Final  
22 Decision, counsel and Group petitioners disagree that the “only real” disagreement between CEC  
23 staff and the Commission has to do with aviation.

24 <sup>3</sup> Group petitioners agree that notice to such County agencies such as mosquito abatement are  
25 appreciated, but that agency is not responsible for analyzing conformance with local land use laws.  
26 Group petitioners agree that the Board of Supervisors who are the public’s elected decision makers  
27 and accountable to the public were due proper and adequate notice and a meaningful opportunity  
28 to review and analyze this proposal with the appropriate agencies and counsel. The failure of that  
notice in itself mandates reconsideration.

<sup>4</sup> All references to sections are to the Public Resource Code unless otherwise specified.

1 wishes to pursue certification, that the application be properly submitted as a new application  
2 following the procedural rules required as a matter of law.

3  
4 **DEMAND FOR STAY OF COMPLAINE PROCEEDINGS**

5 Group petitioners demand that given the County of Alameda’s filings and Group  
6 petitioners’ petition, any compliance proceedings for processing this new certification must be  
7 immediately stayed. Based on the evidence presented by Group Petitioners and the County,  
8 grounds exist to not only reconsider this certification, but to revoke any certification under 25534.

9 Additionally, this so called “Amendment” is improper and the applicant retains no vested  
10 rights whatsoever in the certification obtained in 2002. In fact, as the Commission’s docket  
11 establishes, posted on June 14, 2007, just months prior to the five year expiration of this 2002  
12 certification for the power plant known as “Russell,” was a petition for ownership change  
13 acknowledging that the originally certified project “is not yet under construction or in operation.”  
14 In fact, according to the applicant, it cannot build at this 2002 location.

15  
16 One month later, on July 25, 2007, the new owner applied to “extend the deadline for  
17 commencement of construction” from September 10, 2007 to September 10, 2008. But, as  
18 admitted by the applicant, the new owner, it cannot build at this 2002 location. Group petitioners  
19 contend that as a matter of law this new applicant was not entitled to an extension to build  
20 something it had earlier acknowledged it could not build in the former owner’s “amendment”  
21 application in November 2006. Therefore, based on the applicant’s own admission, this 2002  
22 certification was unusable and any such request for extension should have been denied. Based on  
23 the record, the applicant has no vested interest and any compliance proceedings must be  
24 immediately stayed to enable the CEC to review the County and Group petitioners’ petitions.  
25  
26  
27

1 **BACKGROUND**

2 **A. The 2001 Rolling Blackouts And One Of The Largest Shifts In Wealth Out Of California**

3 As this Commission’s own public web page admits, during 2001, California was  
4 experiencing severe rolling blackouts resulting in power outages for hospitals and nursing home.  
5 In the midst of this crisis, the joint venture Calpine and Bechtel applied for certification to  
6 construct this 600-megawatt power plant in the City of Hayward, located virtually on the  
7 wetlands, under proceedings for a six-month expedited siting process. (See generally, docket for  
8 01-AFC-7 entitled “original proceedings.”) Certification for this site by this owner was issued on  
9 September 11, 2002.  
10

11 Later on, California sought recovery of billions of dollars which the California Attorney  
12 General contended was wrongfully transferred out of California based on a scheme of closing on-  
13 line power plants for maintenance and selling power generated in California out of the state to be  
14 resold to the state at a higher price. In 2005, Calpine petitioned for protection of the bankruptcy  
15 courts. Construction of the Russell City Energy Center never commenced, while the population of  
16 the City and surrounding unincorporated areas doubled, making it the third to fourth most densely  
17 populated urban areas in the San Francisco Bay Area. In 2002, the City changed its land use  
18 designation from heavy industrial to knowledge based research and development.  
19

20 **B. The City Of Hayward’s 2001 And 2005/2006 Contracts With The Former Owner**  
21 **Calpine And The Decision To Locate A Power Plant Falling Within Alameda**  
22 **County’s Jurisdiction Without Seeking Its Land Use Review Or Approval.**

23 On February 6, 2001, noticed to be heard before the City Council was the following:  
24 “Direction to Staff Regarding Preparation of Agreement Between City of Hayward and  
25 Calpine/Bechtel for Proposed Russell City Energy Center.” (Exhibit 1 to accompanying  
26 declaration of Jewell J. Hargleroad (“Hargleroad.”) The recommendation was to provide  
27 direction on the preparation of a contract with Calpine/Bechtel “setting forth mutual obligations

1 and commitments in connection with the proposed Russell City Energy Center.” (Exhibit 1, p. 1.)  
2 Although the introduction refers to “interest in locating a 600 megawatt energy facility” in  
3 Hayward, the staff report represents that the Council

4 . . . ***is not being asked to determine if the proposed***  
5 **use is appropriate for the referenced location.** Rather,  
6 such a determination will be processed in the normal  
7 fashion, **meaning that following a staff evaluation a**  
8 **recommendation will be submitted to both the Planning**  
9 **Commission and City Council.** In keeping with normal  
10 practice, public hearings will be scheduled to provide the  
11 community an opportunity to comment. Only following  
12 the public hearings, will the Commission and Council  
13 be asked to render their decision.

14 (Exhibit 1, pp. 2-3, emphasis and italics added.) Numerous promises were made, including “the  
15 equivalent of wholesale power at a discounted rate to the City,” a total of \$500,000 to the  
16 Hayward Education Foundation, and \$100,000 for youth programs for five years.

17 Five months later, on July 10, 2001, presented to the City Council was the following:

18 “Determination that the Proposed Power Plant (Russell . . .) at 3636 Enterprise Avenue is  
19 consistent with the General Plan and the Industrial Zoning District Designation.” (Exhibit 2, p. 1  
20 to Hargleroad.) The staff report states the following:

21 At this point in the review process, the City is being asked to  
22 review and discuss whether the RCEC [Russell] power plant use is  
23 consistent with the Industrial District of the Zoning Ordinance and the  
24 General Plan. ***This report is not meant to review the merits***  
25 ***of the project, nor any of its potential environmental impacts.***  
26 There is a separate, distinct, and elaborate review process, with  
27 ample opportunity for public input under the auspices of the  
28 California Energy Commission.

(Exhibit 2, p. 2, emphasis and italics added.)

Four years later, on October 11, 2005, the City Manager presented for consideration

“Cooperation and Option Agreement Regarding Russell . . .” The recommendation was for the  
City Council to authorize the City Manager to execute a cooperation and option agreement with

1 “RCEC-LLC in connection with the Russell City Energy Center.” (Exhibit 3, p. 1 to Hargleroad.)  
2 Noted in the staff report was that “Much has changed since 2002,” and that “the property on which  
3 Calpine planned to construct the RCEC is no longer available.” (Exhibit 3, p. 1.) Further, “[d]ue  
4 to changed economic conditions and a more competitive pricing environment, Calpine reports it  
5 can no longer provide the same level of support and still compete.” (Exhibit 3, p. 2.) All promises  
6 for contributions were withdrawn with the exception of a contribution of \$10 million to “support”  
7 the library. (Exhibit 3, p. 2.) .) Whether that contribution was or has been approved by the  
8 Bankruptcy Court was not disclosed. Under the 2005 resolution, the City makes the following  
9 findings:  
10

11 WHEREAS, the City Council has previously found  
12 that the development of a modern, clean source of reliable  
13 energy is a benefit to the public health, safety and welfare; and

13 WHEREAS, changing circumstances have necessitated  
14 consideration alternative sites for the location of the energy  
15 center; and

14 . . . .[P] [P] [P] [P] [P] [P]

15 BE IT FURTHER resolved that the *City Manager is*  
16 *hereby authorized and directed to execute the attached Agreement,*  
17 *And negotiate and execute any and all related agreements and*  
*Documents necessary to carry out the purpose and intent of such*  
*Agreement* in forms approved by the City Attorney.

18 (Exhibit 3, attached resolution, emphasis and italics added.)

19 On December 20, 2005, Calpine together with others petitioned for relief under chapter 11  
20 of the Bankruptcy Code.

21 On May 23, 2006, next presented to the City Council was to “adopt the attached resolution  
22 authorizing the City Manager to execute the First Amendment to the referenced Agreement with  
23 Russell City Energy Center-LLC.” (Exhibit 4, p. 5.) Described was a new and different “property  
24 swap.” Noted, however, was that “[t]he new layout of the RCEC will result in a portion of the  
25 energy center **being constructed on land currently within the jurisdiction of Alameda County,**  
26

1 although intended to be annexed into Hayward in the near future.” (Exhibit 4, p. 2 to Hargleroad,  
2 emphasis added.) Under the attached resolution, the City makes the following findings:

3  
4 WHEREAS, subsequent changes to the construction  
5 configuration require substantive changes and revisions to the  
6 Agreement with RCEC. NOW, THEREFORE, BE IT RESOLVED  
7 that the City Council . . . hereby authorizes the City Manager  
8 to negotiate and execute the First Amendment to the Cooperation  
9 and Option Agreement with Russell City Energy Center-LLC  
10 on file in the Office of the City Clerk, in a form approved by  
11 the City Attorney.

12 (Exhibit 4, attached resolution.)

13 During the review period before the CEC of this November 2006 “amendment,” no where  
14 does the City staff provide any analysis or criticism of mitigations, environmental or health  
15 hazards, or anything other than “full support.” In response to CEC’s staff’s March 16, 2007  
16 inquiry to the City staff concerning its inconsistency of “fully supporting” a 600 megawatt  
17 fourteen story high thermal plant with a thermal plume of minimally 1,000 feet, but opposing a  
18 seven story 115 megawatt plant, the City staff acknowledged the following:

19 **The Hayward General Plan [as amended in 2002] contains**  
20 **discussion and policies that encourage the *transformation***  
21 ***of the Industrial Corridor from a manufacturing* and distribution**  
22 **emphasis *to more research and development oriented businesses.***

23 (April 19, 2007 letter from David Rizk, Planning Manager to CEC Environmental Office Manager  
24 Paul Richins: Exhibit 6 to Hargleroad.)

25 The only explanation for the City Council’s authorization to the City Manager to swap  
26 land and enter into agreements was that by authorizing the land swap and execution of contracts  
27 the Council must have “determine[d] that the new location was consistent with local land use  
28 regulations.” (Exhibit 6, p. 5.) However, as to the second power plant proposed and presently  
under CEC review called Eastshore, on March 13, 2007 the Council “adopted Resolution #07-028,  
which declared the siting of the Eastshore project “to be inconsistent with the Hayward 2002

1 General Plan policies” and that the Eastshore plant was “inconsistent with the Hayward Industrial  
2 Zoning District provisions (HMC S10-1.16000.)” (Paul C. Richins March 16, 2007 letter to David  
3 Rizk, p. 2: Exhibit 5 to Hargleroad.) As CEC staff properly recognized,

4 **The original Russell City project site was not**  
5 **evaluated under these provisions, but the new**  
6 **site is subject to the requirements of the revised**  
7 **document. *The Council did not address consistency***  
8 ***of the new site with the 2002 General Plan or current***  
9 ***Municipal Code as part of the 2005 resolution and***  
10 ***did not amend the original site-specific #01-104***  
11 ***resolution.***

12 (Exhibit 5, p. 2, emphasis and italics added.) Group petitioners agree.

13 Group petitioners submit that these exhibits establish that the City Council improperly  
14 contracted away its legislative authority and that these “agreements” with the former applicant and  
15 various Russell owners, and that the alleged “full support” by the City Council as to Russell, as a  
16 matter of law are entitled to no weight whatsoever. Additionally, Group Petitioners agree that  
17 Alameda County was never meaningfully solicited for its input nor was the public of either or both  
18 jurisdictions provided an opportunity for meaningful public review by its numerous affected  
19 communities with their respective elected representatives and staff.

20 **C. The Aviation Hazards Raised Over Blythe, The CEC’s Staff Investigation And The**  
21 **New Information From The County Airport Commission Determining That A**  
22 **“NOTAM” Is Not A Mitigation.**

23 Although this is information which the CEC is aware of, despite CEC staff’s opposition to  
24 this project at least in part based on its aviation hazards, the CEC nevertheless determined that  
25 “the RCEC will not be a hazard to aircraft, *even less so with the additional protective measure of a*  
26 *notice to pilots to avoid overflight of its thermal plumes.* It will also comply with all LORS, . . . “  
27 (Decision, p. 168.)

28 After the Decision, however, on October 17, 2007, the Alameda County Land Use Airport  
Commission met and heard the application for a recommendation of the Eastshore Plant proposed

1 by the applicant Tierra. In recommending disapproval as to that location, a mere 1,000 feet from  
2 Russell, the Commission struck the suggested “proposed mitigations of posting a notice to  
3 airmen,” which were adopted for Russell. The basis of the decision was that a “notice to airmen”  
4 did not constitute mitigation for loss of airspace or utility to the Hayward Airport. (Declarations  
5 of White and Cathey.)

6 Also not in the evidentiary record is the offered testimony of Gary Cathey, who appeared  
7 before the Commission on September 26, 2007, but no party offered his opinion as testimony.  
8 Group petitioners do so now as well as Jay White, counsel for California Pilots Association. As  
9 their accompanying declarations reflect, they too agree with the Alameda Airport Commission’s  
10 opinion that a “notice to airmen” is not mitigation.  
11

12 Additionally, in preparing for this declaration, Mr. Cathey discovered his December 18,  
13 2003 field notes for his flyover of the Sutter Plant in Yuba County accompanied by CEC staff  
14 member Eileen Allen. At the time of his appearance before the Alameda Airport Commission and  
15 the CEC, Mr. Cathey did not have his field notes. They reflect that Mr. Cathey and Ms. Allen  
16 with the CEC experienced extreme turbulence at 1,000 feet and that he had concluded that he  
17 could descend no lower without experiencing loss of control and maneuverability. Contrary to the  
18 representations made by the representatives of Russell before the Alameda Airport Commission,  
19 the Sutter plant is not “the same” size, but smaller, 540 megawatts.  
20

21 **D. The Doubling Of The Surrounding Population And Change In Land Use**  
22 **Designations Rendering The Project Contrary And Inconsistent With The Local,**  
23 **Ordinances, And Regulations As Well As Section 25528.**

24 According to the Hayward Area Recreational Park District’s 2006 Master Plan, adopted in  
25 June 2006, page 3:

26 . . . the **City of Hayward’s population**, which represents the  
27 majority of the District, **has grown by 25 percent in the last ten**  
28 **years, at almost double the rate of both Alameda County and**  
**the Bay Area. This density is also represented in the unincorporated**  
**areas of the District with Cherryland (11,859/persons per square**

1 **mile) and Ashland (11,284 /persons per square mile) ranking**  
2 **respectively as the third and sixth most densely populated**  
3 **areas of the Bay area.**

4 (Emphasis added.)

5 Also, as discussed by the letters exchanged between the City Planning Manager and CEC  
6 staff, Exhibits 5 and 6, the City zoning changed in 2002 and there exists no determination by  
7 either the City or County concerning whether the Russell site is consistent with the local  
8 ordinances or regulations. Based on the alleged “mitigation” adopted of posting a NOTAM for  
9 the one thousand plus high thermal plume, the noise abatement ordinances to prohibit aircraft over  
10 residential neighborhoods will likely be violated in order to obey the NOTAM.

11 Moreover, although the cities of Berkeley and Piedmont may enjoy the benefits of the  
12 partial subsidy for the highly questionable fire retrofit program, the unincorporated districts of  
13 Cherryland and Ashland, virtually next door and densely populated, are completely omitted. (See  
14 accompanying declaration of Michael Toth.) Nor is there any discussion concerning the  
15 applicability of section 25528, which requires that the “applicant acquire, by grant or contract, the  
16 right to prohibit development of privately owned lands in the area of the proposed site which will  
17 result in population densities in excess of the maximum population densities which the  
18 commission determines . . . are necessary to protect public health and safety.” In this regard, also  
19 ignored is the impact on the close by regional Bay shorelands, Bay Trail, and the Cargill wetlands  
20 restoration program.

21  
22 **E. The September 27, 2007 Bankruptcy Filing By Calpine In New York After This**  
23 **Decision Disclosing There Is No Need For This Project And That The Equipment**  
24 **Allegedly Held For This Project As Represented To CEC Staff Is Sold.**

25 Nowhere does the alleged “amendment” address whether this project is needed, as required  
26 when there is nonconformance with the local ordinances and regulations. (Pub. Resource Code,  
27 Sec. 25525.) However, the day after the effective day of this Decision, September 27, 2007,  
28 Calpine, a majority owner of this project, together with the other debtors, filed with the U.S.

1 Bankruptcy Court a fourth amended disclosure statement. (Exhibit 7 to Hargleroad.) The  
2 disclosure made after this Commission’s Decision, reflects substantial changed circumstances:

3  
4 By 2001, Calpine had developed or acquired a portfolio  
5 of nearly 10,000 MW of clean and reliable power plants  
6 in North America and was undergoing further expansion  
7 through both construction and acquisitions. **Between 2001  
and 2004, this expansion effort led Calpine to more than  
double its *installed* power generation capacity. By December  
2006, Calpine owned 24,839 MW of *operating* generation capacity . . .**

8 (Disclosure, p. 57, Exhibit 7 emphasis and italics added.)

9 Additionally, Calpine represents to the federal court in New York, concerning the West:

10 . . . **Between 2000 and 2003, more than 175,000 MW of  
11 new generating capacity came “on line” in the United States.  
12 *In most regions, these new capacity additions far outpaced  
the growth of demand, resulting in “overbuild” markets, i.e.,  
13 markets with excess capacity. In the West, for example,  
approximately 24,000 MW of new generation capacity was  
14 added between 2000 and 2003, while demand only increased  
by approximately 8,000 MW.***

15 . . . . .  
16 This surge of generation investment has subsided since 2003.  
17 During 2005, for example, only 17,000 MW of new supply was  
18 added nationwide. . . . **Currently, supply exceeds demand in most  
regional markets.**

19 (Disclosure, p. 21, Exhibit 7, emphasis and italics added.) According to the CEC’s on records  
20 provided on line, there are some twenty plants already approved which have not been built and  
21 continue pending.

22 Additionally, this project does not use the best available technology as observed by the  
23 CEC staff who have suggested, **“Staff notes that the El Segundo Power Redevelopment  
24 Project (00-AFC-14), in order to meet changing electricity market demands, just filed a  
25 major amendment (June 15, 2007) redesigning their project from a “traditional” combined cycle  
26 to a Rapid Response Combined Cycle that will use Siemens combustion turbines (replacing the  
27 previously approved GE CTGs) and Benson once-through boilers.”** Additionally, “The project  
28 previously approved by the CEC (AFC-05) . . . . .”

1 owner claims that redesign of the project with Fast-Start technology would **involve significant**  
2 **costs as they have purchased some equipment** and designed the project and systems. These cost  
3 increases and redesign may require extensive renegotiations with their financing entities.”<sup>5</sup>

4 Group petitioners bring to the CEC’s attention the following information disclosed the day  
5 after the September 26, 2007 hearing:

6 c. Turbine and Industrial Equipment Sales

7 (i) *GE Model PG7241 FA 60 Hz Turbine*. The Debtors  
8 sold this single surplus turbine, along with certain related equipment, to  
9 Invenergy Thermal LLC, the stalking horse bidder, for approximately  
10 \$16 million on October 17, 2006 after no other bidders were qualified  
to participate in a Bankruptcy Court-approved auction.

11 (ii) **SPG 501F Turbines. The Debtors sold four surplus**  
12 **Siemens Power Generation Model 501FD2** Econopac combustion  
13 turbines, along with certain intellectual property rights, equipment  
and materials related thereto, to Consorcio Pacific Rim Energy

14 <sup>5</sup> The basis for this recommendation was the following:

15 Staff believes that the Siemens-Westinghouse Fast-Start  
16 technology is an alternative technology that would mitigate  
17 the project impacts to the environment; Staff therefore  
18 recommends that, unless the project owner accepts conditions  
19 that restrict the start-up duration and emissions, the RCEC  
should be built employing the Fast-Start technology or its  
equivalent to reduce the start-up and shutdown event emissions.  
Staff’s recommendation is incorporated into Condition of  
Certification **AQ-SC7** through **-SC10**.

20 Alternatively, the 600 MW combined cycle Palomar Project  
21 in Escondido has installed a proprietary control system, OpFlex from  
22 General Electric, which allows ammonia to be injected at the  
23 earliest time to shorten start-up times and reduce start-up emissions  
at the facility. Preliminary, non-optimized results from their March 7, 2007,  
24 Petition for Variance 4703 Extension indicated that they have  
25 reduced NOx emissions from 120 lbs to 28 lbs for hot or warm  
26 start-up events. Staff provided a comment on May 29, 2007, to  
the District on the PDOC for RCEC that the District consider  
hardware and software modifications to the project to shorten  
startup times and significantly reduce start-up emission as BACT.

27 (Staff Report \_\_\_\_.)

28 Memo of points and augh CEC 01-AFC-7C

Cec petition p & as.doc

1 Yucal Placer HTE (“Pacific Rim”). After marketing the turbines,  
2 the Debtors executed an asset purchase agreement with Pacific Rim  
3 on October 13, 2006 to sell the turbines for approximately **\$48 million**.  
4 After no higher or better offers for the turbines were received  
5 in a Bankruptcy Court- approved auction, the sale to Pacific  
6 Rim was approved by the Bankruptcy Court, and subsequently  
7 consummated, on November 15, 2006.

8 (Exhibit 7, emphasis and italics added.) Group petitioners note that this “amendment” petition  
9 was filed just a few weeks later with the CEC in November 2006. Whether this is the “same”  
10 equipment, at this point Group petitioners do not have sufficient information, but raise this issue  
11 as new information requiring reconsideration and an investigation as to whether certification should  
12 be revoked.

## 13 ARGUMENT

### 14 **A. Entitlement To Intervene For The Purpose Of Reopening The Administrative And 15 Evidentiary Records And For Reconsideration Of Material Omissions In The Final 16 Decision And To Consider New Evidence.**

17 Group petitioners submit their petition to intervene to become a party to achieve standing  
18 to petition for reconsideration. Group petitioners offer the declarations of Michael Toth, Jay  
19 White, Gary Cathey, Tom Kerston, Sherman Lewis, Andrew Wilson III and Jewell Hargleroad in  
20 support of their offer of proof. In submitting this, Group petitioners reserve the right to  
21 supplement any offer of proof.

22 Further, Group petitioners request that the administrative and evidentiary records be  
23 reopened to accept their proffered evidence and any and all other evidence that was presented to  
24 the CEC but excluded because it was not offered subject to the Rules of Evidence and offered by a  
25 party.

1 **B. The CEC’s Representation That CEQA Proceedings Are Followed When They Are**  
2 **Not And Representations That Russell Was “Approved” And Nothing Could Be**  
3 **Done.**

4 Unlike the first public notice posted on the docket for the 2001/2002 proceedings, the  
5 “Notice of Public Informational Hearing And Site Visit” dated November 29, 2006, affirmatively  
6 represented the following:<sup>6</sup>

7 **The power plant licensing process, which incorporates**  
8 **requirements equivalent to the California Environmental**  
9 **Quality Act** considers all relevant engineering and environmental  
10 aspects of the proposed project. The amendment process  
11 provides a public forum allowing the Applicant, Commission staff,  
governmental agencies, adjacent landowners, and members of  
the general public to consider the advantages or disadvantage *of the*  
*modifications, . . .*

12 (Page 2 under “Purpose of the Informational Hearing.”) The first sentence of this notice provides:  
13 “ On November 17, 2006, Russell City Energy Company, LLC (“Applicant”), filed a petition to  
14 *modify the California Energy Commission’s decision approving the Russell City Energy Center*  
15 *Project.*” (Page 1, italics added.) Under Background, the notice provides “On November 17,  
16 2006, the Energy Commission began its *review of the proposed modifications to the Russell City*  
17 *Energy Center which was originally approved on September 11, 2002.*”

18  
19 By failing to properly process this application as an application for a new project, the  
20 public was misled into believing “there is nothing that can be done.” (*See* declaration of Michael  
21 Toth.) That was fundamentally incorrect. Likewise, these proceedings are far from CEQA. This  
22 representation caused Group petitioners delay in obtaining counsel since under CEQA they do not  
23 have to satisfy the hearsay provisions of the Evidence Code and evidence offered is not limited to  
24 only that offered by officially recognized “parties.”

25 \_\_\_\_\_  
26 <sup>6</sup> To date CEC staff has failed to identify where these notices were published despite several  
27 public requests.

1 **C. As A Matter Of Law, The Amendment Proceedings Must Be Set Aside To Treat This**  
2 **Application As A New Project, The Public Health And Environmental Hazards**  
3 **Reviewed With The Local Jurisdictions To Be Assured They Are Mitigated, And**  
4 **“Need” Must Be Examined, Including In Light Of AB 32.**

5 As a matter of law, the Commission must reconsider this “amendment” to this  
6 certification. The record unambiguously establishes that:

- 7 1. The Project has not been reviewed or approved by the local jurisdictions and is not in  
8 conformance with the local or regional laws, standards, or ordinances.
- 9 2. The County was not notified of any intent to build a 600-megawatt thermal power plant  
10 with a 1000-foot high thermal plume in its Mount Eden unincorporated or redevelopment  
11 jurisdiction.
- 12 3. The Project is not mitigated.
- 13 4. New information has been revealed that restriction of airspace is not a mitigation and there  
14 are material misassumptions concerning a pilot’s ability to safely land, among the other  
15 information presented.
- 16 5. The methodology in calculating air emissions and mitigations is fatally flawed and as a  
17 matter of law must be reconsidered to apply the proper and current known methodology.
- 18 6. The Project will clearly have a significant detrimental effect on the environment **and the**  
19 **“No Build Finding” is unsupported by any evidence.**

20 Additionally, any attempt to overcome this non-conformance must still satisfy section  
21 25523. Also, in light of the passage last year of AB 32, section 25500.5 becomes particularly  
22 relevant. This requires the Commission to certify sites “which are required to provide a supply of  
23 electric power sufficient to accommodate the demand projected in the most recent forecast of  
24 statewide and service area electric power demands adopted pursuant to subdivision (b) of Section  
25 25309.” As admitted by Calpine’s filing the day after this Commission’s hearing, there already  
26 exists more supply than demand.

27 Since 2001, in addition to AB 32, substantial changes in the law also have been enacted  
28 which should equally apply. As Calpine’s bankruptcy filing acknowledges:

Carbon (greenhouse gas) regulations. Carbon regulations  
are still pending in the United States and may come into  
effect in the Northeast in 2009 and California in 2012. The  
United States Supreme Court recently issued a decision

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holding that the Federal Clear Air Act of 1970 requires the Environmental Protection Agency to regulate greenhouse gases from new motor vehicle once it concludes that such emissions contribute to climate change. **Calpine believes the Supreme Court's ruling could effectively determine the Environmental Protection Agency's authority to regulate air pollution associated with climate change from all sources, including power plants.**

Under these circumstances based on the record before this Commission, as a matter of law, Group petitioners and the County are entitled to reconsideration, or alternatively, certification must be revoked.

**CONCLUSION**

Group petitioners urge the Commission to grant their petition to intervene, reopen the administrative and evidentiary records, to either reconsider or revoke this improper September 26, 2007 certification of this new project.

Dated: October 25, 2007

Respectfully Submitted,

\_\_\_\_\_  
Jewell J. Hargleroad, Attorney for Group  
Petitioners California Pilots Association,  
Citizens for Alternative Transportation  
Systems, San Lorenzo Homeowners  
Association, Hayward Democratic Club,  
Skywest Townhouse Homeowners and  
Hayward Area Planning Association

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7 Attorney for Group Petitioners California  
8 Pilots Association, Citizens for Alternative  
9 Transportation Systems, San Lorenzo Homeowners  
10 Association, Skywest Townhouse Homeowners Association,  
11 Hayward Democratic Club and Hayward Area Planning  
12 Association

13 STATE OF CALIFORNIA  
14 STATE ENERGY RESOURCES  
15 Conservation and Development Commission

16 In the Matter of:

Docket No.: 01-AFC-7C

17 Initially noticed as “Petition to Amend the  
18 Commission Decision Approving the Application  
19 for Certification for the Russell City Energy  
20 Center”;

DECLARATION OF TOM KERSTON IN  
SUPPORT OF GROUP PETITIONERS’  
PETITION TO INTERVENE, REOPEN THE  
ADMINISTRATIVE PROCEEDINGS,  
REOPEN THE EVIDENTIARY RECORD  
AND FOR RECONSIDERATION

21 Later Noticed as “Modification of the Application  
22 for Certification for the Russell City Energy  
23 Center”

Date: TBD  
Location.: TBD  
Time: TBD

24 I, Tom Kersten, hereby declare:

25 1. I am a resident of the City of Hayward, and President of the Hayward Democratic Club.

26 I have personal knowledge of the facts set forth below and if called as a witness in this matter,  
27 would and could testify competently to the following.

28 2. Earlier this year the Hayward Demos’ Executive Board met and reviewed the proposal of  
the Russell City Energy Center, a 600-megawatt thermal power plant.

Decl. of Kerston CEC 01-AFC-7C

1           3. Although I live only a few miles of the proposed site and have been President of the  
2 Demos since 1/7/07, I never received any notification from either the City of Hayward, County of  
3 Alameda or from the CEC relating to any power plant despite the Demos long record of activity in  
4 Hayward. Based on our information and belief and as discussed in our September 6, 2007 letter,  
5 the CEC has not received adequate input or meaningful approval from the local jurisdictions.

6           5. After our review of the staff documents, I sent a letter for the Demos setting forth our  
7 resolutions, in good faith and on time, to the CEC. Attached is a true and correct copy of my  
8 letter dated September 6, 2007 that I directed to the Commission members and CEC hearing  
9 officer Paul Kramer. I believed the letter constituted valid testimony on the Russell City proposal.  
10 I was never informed before or after by the CEC that my letter did not constitute admissible  
11 evidence upon which the CEC could rely to support a denial of the project. Based on the Demos  
12 experience reviewing proposals involving CEQA proceedings, I was surprised to find out that the  
13 Demos comments are not entitled to any weight unless offered “by a party” and offered under  
14 penalty of perjury consistent with the hearsay rules admitted into the evidentiary record.

15           6. In petitioning to intervene, reopen the administrative and evidentiary records and for  
16 reconsideration, the Demos offer as testimony the opinions and observations stated in our  
17 September 6, 2007 letter together with the accompanying declarations of this Group Petition. As  
18 our letter states, we disagree that this project “will not have a significant effect on the  
19 environment,” and we assert that this project is not mitigated, particularly the health hazards  
20 presented by the almost 1.3 million pounds of emissions, including 86.4 tons of particulate matter,  
21 as discussed in our attached letter.

22           I declare under penalty of perjury under the laws of the State of California that the foregoing  
23 is true and correct. Executed this 24 day of October 2007, in Hayward, California.

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Attorney for Group Petitioners California  
5 Pilots Association, Citizens for Alternative  
Transportation Systems, San Lorenzo Homeowners  
6 Association, Skywest Townhouse Homeowners Association,  
Hayward Democratic Club and Hayward Area Planning  
7 Association

8  
9 STATE OF CALIFORNIA  
STATE ENERGY RESOURCES

10 Conservation and Development Commission  
11

12 In the Matter of:

Docket No.: 01-AFC-7C

13 Initially noticed as “Petition to Amend the  
Commission Decision Approving the Application  
14 for Certification for the Russell City Energy  
Center”;

DECLARATION OF SHERMAN LEWIS IN  
SUPPORT OF GROUP PETITIONERS’  
PETITION TO INTERVENE, REOPEN THE  
ADMINISTRATIVE PROCEEDINGS,  
REOPEN THE EVIDENTIARY RECORD  
AND FOR RECONSIDERATION

15  
16 Later Noticed as “Modification of the Application  
for Certification for the Russell City Energy  
17 Center”

Date: TBD  
Location.: TBD  
Time: TBD

18  
19  
20  
21 I, Sherman Lewis, hereby declare:

22 1. I am a resident of the City of Hayward, Professor Emeritus in Political Science from  
23 California State University East Bay Hayward, and President of the Hayward Area Planning  
24 Association (HAPA), founded and led by me since 1978. I am knowledgeable about the issues  
25 discussed below from teaching Public Policy and the Environment, reading articles and reports,  
26 and participating in regional planning activities. I have personal knowledge of the facts set forth  
27  
28

1 below and if called as a witness in this matter, would and could testify competently to the  
2 following.

3         2. I have received several emails with substantive information about the two proposed power  
4 plants in Hayward, one known as the Russell City Energy Center, a 600-megawatt thermal power  
5 plant, and a second known as Eastshore, a 115 megawatt thermal power plant located  
6 approximately 1,000 feet away.

7  
8         3. I have reviewed the relevant parts of the California Energy Commission's Final Decision  
9 concerning the Russell City Energy Center Project docketed on October 2, 2007 entitled  
10 "Amendment No. 1 (01-AFC-7C) Alameda County."

11         4. I did not receive notice from the City of Hayward, Alameda County, or the CEC about  
12 any issues relating to either power plant despite HAPA's long record of activity in Hayward,  
13 including review of proposals governed by the California Environmental Quality Act and federal  
14 environmental legislation, such as the Endangered Species Act.

15         5. After extensive discussion with the Board of Directors of HAPA, I sent a letter for HAPA  
16 setting forth our resolutions, in good faith and on time, to the CEC. Attached is a true and correct  
17 copy of my letter dated September 25, 2007 faxed to the CEC hearing officer Paul Kramer. I  
18 believed the letter constituted valid testimony on the Russell City proposal. I was never informed  
19 before or after by the CEC that my letter did not constitute admissible evidence upon which the  
20 CEC could rely to support a denial of the project. HAPA has commented in many CEQA  
21 proceedings, and I was surprised to find out that HAPA comments did not count unless offered  
22 "by a party" and offered under penalty of perjury consistent with the hearsay rules.

23  
24         6. HAPA is concerned about aviation, air pollution, aesthetics, fossil fuel dependency,  
25 greenhouse gases, and the high feasibility of alternative means to meet the need, as set forth in our  
26 letter, a true and correct copy of which is attached.



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Pilots Association, Citizens for Alternative  
Transportation Systems, San Lorenzo Homeowners Association,  
Skywest Townhouse Homeowners, Hayward  
Democratic Club, Hayward Area Planning Association

STATE OF CALIFORNIA

STATE ENERGY RESOURCES

Conservation and Development Commission

In the Matter of:

Initially noticed as “Petition to Amend the  
Commission Decision Approving the Application  
for Certification for the Russell City Energy  
Center”;

Later Noticed as “Modification of the Application  
for Certification for the Russell City Energy  
Center”

Docket No.: 01-AFC-7C

DECLARATION OF MICHAEL TOTH IN  
SUPPORT OF GROUP PETITIONERS’  
PETITION TO INTERVENE, REOPEN THE  
ADMINISTRATIVE PROCEEDINGS,  
REOPEN THE EVIDENTIARY RECORD  
AND FOR RECONSIDERATION

Date: TBD  
Location: TBD  
Time: TBD

I, Michael Toth, hereby declare:

1. I am a resident of the City of Hayward and a Software Architect by profession. I attended the joint work sessions conducted by the California Energy Commission during the late spring / early summer 2007 which initially examined the proposed project entitled “Eastshore,” a 115 megawatt thermal power plant, together with the project known as the Russell City Energy Center, a 600 megawatt thermal power plant. I have personal knowledge of the facts set forth

below and if called as a witness in this matter, would and could testify competently to the following.

2. I have reviewed the California Energy Commission's Final Decision concerning the Russell City Energy Center Project docketed on October 2, 2007 entitled "Amendment No. 1 (01-AFC-7C) Alameda County." The Final Decision appears to contain certain information that is not in agreement with publicly available scientific research and information published by other state and government agencies and omits other vital information concerning known health risks, which may have resulted in the failure to properly analyze that information and to apply current known information and may result in a substantial failure to adequately mitigate the hundreds of thousands of pounds of emissions generated by Russell City annually. Within the limited opportunity to review the Final Decision which approaches almost 250 pages, these are just some of the important issues and potential inaccuracies I have initially identified.

3. Contrary to the publicly stated CEC policy to "notify, inform and involve community members" (stated in the CEC Public Advisor's office Environmental Justice FAQ), as a resident within the zone of potentially significant health impact immediately downwind of the plant, I have never received any form of official notification by mail, e-mail, phone, handbill or other prominent public notice regarding my right and opportunity to provide meaningful input into the CEC decision making process with respect to the Russell City Energy Center Amendment.

(a) I first became aware of the Russell City project in February, 2007 when the Hayward Planning Commission, in consideration of the Eastshore project, referenced the Russell City project as having been approved and licensed by the CEC in 2002, and that the Russell City project was supported by the City of Hayward. I was never directly informed by the CEC or any other federal, state, local or county agency of an amendment to the project.

(b) I learned informally of the amendment to relocate the project to the opposite side of the street of the previously permitted location, but was never informed of an opportunity to participate

in the re-evaluation of the public health impact of the project, and was never informed that significant changes were being made to the project which would subject the public health aspect of the project to reconsideration.

(c) Despite my frequent interactions with CEC staff on topics of air quality and public health during CEC workshops pertaining to the Eastshore project, the proximity of both projects to each other and to my residence, direct notifications to me via e-mail from the CEC regarding the Eastshore project, the commonality of staff between the Eastshore and Russell City projects, and my submission of my name, street address and e-mail address to the CEC to receive notifications, the CEC did not avail themselves of these established communication channels to notify me of opportunities to provide input into the public health and air quality portions of the Russell City Amendment project. The CEC staff, at the workshops, was insistent that public comment be restricted to topics that concerned the Eastshore plant. Had I known that my concerns were also relevant to a simultaneously occurring, similarly structured proceedings involving some of the same CEC staff members with respect to the Russell City project, I would have taken the time to bring up these concerns within the context of the Russell City project.

(d) The CEC assessed in some detail cumulative Eastshore and Russell City air quality and public health impacts for consideration in the context of the Eastshore preliminary staff assessment and did not indicate that the Russell City portion of this cumulative assessment was still under review. I would have expected that a cumulative assessment based on data from a process still under review would have indicated such- the fact that it was not reinforced my understanding that the Russell City public health analysis was not under review as a result of the amendment

4. The CEC has failed to publish detailed documentation of its health risk computation. The CEC Final Decision states on page 112 that “The Public Health aspects of the proposed project do not create significant direct or cumulative environmental effects”.

(a) The BAAQMD FDOC, upon which the CEC relies to provide a portion of its public health assessment, does not document the concentrations, applicable RELs, and contribution towards the health risk for individual TACs (toxic air contaminants), and has only provided the summary conclusions of the health risk computation. This failure has denied myself and may have denied others the opportunity to present informed input into the CECs decision. I have issued a public records request with the BAAQMD and am currently awaiting receipt of the relevant documentation.

(b) This omission stands in contrast with the Eastshore Energy Center approval process, where the CEC includes documentation of the health risk screening computation in Appendix B of the BAAQMD Preliminary Determination of Compliance for the Eastshore Energy Center published on April 25, 2007. The information that the CEC has published for Russell City regarding public health risk does not include the equivalent information in either the CEC Staff Assessment or the docketed BAAQMD Final Determination of Compliance dated June 19, 2007. The level of documentation provided to the public seems to parallel the level of involvement of the community and ultimately the opportunity for the CEC to include informed public input into the decision process. The fact that this documentation was published as part of the Eastshore Energy Center process as a routine part of issuing the PDOC should establish that publishing such documentation for public consumption is neither an extraordinary nor an onerous burden.

(c) As a member of the public who had the opportunity to review the Eastshore Project PDOC, I was able to discover and correct errors in the table on page 8 of the PDOC where the chronic trigger levels in the final column were expressed as being slightly above the annual project emissions as opposed to the appropriate numbers stated in CARB regulation 2 rule 5. While no explanation was offered for the error, which may have misled the public into thinking that project emissions were below trigger levels and thus not subject to further analysis, my public input resulted in the BAAQMD correcting and re-issuing their PDOC. This incident, in my opinion,

illustrates the importance of fully documenting and allowing public scrutiny of all the steps taken to analyze public health risk in order to ensure that the analysis is free from errors, omissions, or deviations from accepted practice.

5. The use of mean emission factors from the CATEF database to estimate health risk in the BAAQMD's FDOC, the only documentation contained in the CEC's public record which substantiates the public health risk computation, the use of which is documented on page 44 of appendix A of the FDOC, may underestimate facility emissions. The use of the mean (average) factor for a given TAC to predict emissions from a single facility is contrary to the published guidance issued by the US-EPA and by CARB, and is much less conservative than the use of the maximum factor, also published in the CATEF database alongside the mean, or an upper bound of a low statistical confidence interval calculated using the relative standard deviation percentage, also published in the CATEF database alongside the mean, which would, by definition, account for the statistical variability of the data. The use of the mean value does not account for variability in measurements of a TAC between emissions sources, and thus does not yield a conservative risk estimate.

(a) The use of mean emission factors appears to be contrary to the guidance issued by the US-EPA regarding emissions factors provided by the EPA's AP-42 "WebFire" on-line emission factor retrieval system (<http://cfpub.epa.gov/oarweb/fire/view/Applicability.html>), which states "Emissions factors published in this database and in most other such compilations typically 1) are arithmetic averages of available source test data, 2) are based on limited numbers of emissions tests, 3) represent only a few hours of process operating time per test, 4) represent limited ranges of process operating conditions, and 5) represent a limited sample of operating units within any source category. As a result, site-specific emissions estimates based on emissions factors will include significant data uncertainty. Such uncertainties can easily range over more than one order of magnitude in determining emissions from any one specific facility. Use of emissions factors

should be restricted to broad area-wide and multiple source emissions cataloging applications that will tend to mitigate the uncertainty associated with quantifying site-specific emissions.”

“Because of the uncertainties inherent in the use of average emissions factors for facility-specific emissions determinations, emissions from potentially large numbers of permitted sources are characterized incorrectly in permitting and compliance applications. Further, emissions factors at best are imprecise tools for establishing emissions limits ... or standards ... For these reasons, we recommend against use of source category emissions factors (whether derived from AP-42, FIRE, or elsewhere) for site-specific emissions determinations or regulatory development. We recommend instead the use of alternatives to emissions factors (see below).”

“We recognize that emissions factors are often used in many applications including site-specific applicability determinations, establishing operating permit fees, and establishing applicable emissions limits even though such use is inappropriate. If you must apply emissions factors for site-specific applications, we strongly recommend due consideration of the uncertainty inherent in the data. Applying emissions factors without accounting for uncertainty will result in doubtful applicability determinations, ineffective emissions reductions requirements, and poorly supported compliance determinations or enforcement actions.”

“Approaches to accounting for uncertainty include adjustments based on statistical assessments addressing bias and imprecision for both pollutant emissions control and process operations or activities variability.”

“With this information, we think it prudent to apply standard statistical adjustments in the use of emissions factors consistent with the goals of your specific application (e.g., upper confidence level in determining site-specific thresholds for applicability and fees, lower confidence level in setting emissions limits).”

(Guidance issued by the US-EPA regarding emission factors provided by the EPA's AP-42

“WebFire” on-line emission factor retrieval system)

(b) The use of mean emissions factors appears to be contrary to the Appendix F of AB-2588 document entitled “Criteria For Inputs for Risk Assessment Using Screening Air Dispersion Modeling”, <http://www.arb.ca.gov/ab2588/final/f.pdf>, page F-1, paragraph (A), which states “Emission estimates must be health-protective and approved by the district, and the assessment must take into account both the highest actual emissions and the facility's potential to emit, including use of the highest levels enforceable under the facility's permit(s), if the process(es) are subject to permits.” The application of basic statistics suggests the conclusion that an untested facility, by definition of the term “mean”, has a 50% chance of exceeding a mean emission factor, and an untested facility's potential to emit is more conservatively characterized using the maximum emission factor, or an emission factor that that can be statistically characterized as sufficiently high that the facility is not likely to exceed it.

6. There is reason to suspect that the health risk analysis performed by the BAAQMD and partially documented in its Russell City FDOC and apparently relied upon by the CEC to assess the public health risk of the plant does not include the compound acrolein. Even though the BAAQMD has published the base acrolein emissions factor in their FDOC, the exclusion of acrolein in the actual health risk calculation for other projects regulated by the BAAQMD (ie. Eastshore Energy Center), and a guideline issued by the BAAQMD excluding acrolein from the health risk calculation procedure raise legitimate questions about the inclusion of acrolein in the health hazard index that cannot be answered without further information from the CEC and the BAAQMD, given that the BAAQMD and the CEC have excluded the details of the HRSA computation for Russell City from their published documents.

The guideline from the BAAQMD was published in their HRSA (Health Risk Screening Analysis) guidelines adopted in June 2005, on page 4, section 3 ([http://www.baaqmd.gov/pmt/air\\_toxics/risk\\_procedures\\_policies/hrsa\\_guidelines.pdf](http://www.baaqmd.gov/pmt/air_toxics/risk_procedures_policies/hrsa_guidelines.pdf)), and consists of the following statement: “Assessment of Acrolein Emissions: Currently, CARB does

not have certified emission factors or an analytical test method for acrolein. Therefore, since the appropriate tools needed to implement and enforce acrolein emission limits are not available, the District will not conduct a HRSA for emissions of acrolein. In addition, due to the significant uncertainty in the derivation, OEHHA is currently re-evaluating the acute REL for acrolein. When the necessary tools are developed, the District will re-evaluate this specific evaluation procedure and the HRSA guidelines will be revised.” This guideline is functionally equivalent to treating the risk from acrolein as non-existent, when in fact the risk may be subject to some uncertainty.

A large amount of publicly available information appears to be inconsistent with the justification of the BAAQMD for excluding acrolein from the HRSA computation.

(a) The US-EPA AP-42 Emissions Factors database references emissions factors and source test methods for acrolein using the FTIR (Fourier Transform Infrared) measurement process via EPA method 320.

(b) GE Energy advertises a mobile unit ([http://www.gepower.com/prod\\_serv/serv/env\\_serv/en/downloads/gea14569\\_ftir\\_techoverview.pdf](http://www.gepower.com/prod_serv/serv/env_serv/en/downloads/gea14569_ftir_techoverview.pdf)) that implements the FTIR method to conduct stack testing for acrolein, along with many other TACs, with the claim: “Real-Time, On-Site Data. FTIR simultaneously measures multiple analytes in a complex gas matrix, detecting virtually all gas-phase species, including multiple Clean Air Act Hazardous Air Pollutants (HAPs), criteria pollutants, diluents, and Volatile Organic Compounds (VOCs). Measurements are made on a continuous basis and reported in real time. The most important advantage of real-time FTIR data is that it demonstrates whether or not a facility is meeting emissions requirements while the test is being conducted.”

(c) A study funded by Cal-State Long Beach (reference: IN-SITU ENGINE EMISSIONS TESTING AND COMPARISON FOR A HIGH SPEED FERRY AND COMPETING LAND TRANSIT VEHICLE, PHASE I: TASK 7.0: Final Report FY 2001, PROGRAM ELEMENT 1.16 SUBCONTRACT NO. DTMA91-97-H00007 -

<http://www.ccdott.org/Deliverables/2001/task1.16/task%201.16.pdf>), states on page v, in the Executive Summary section: “This report concludes that well-established large-bore stationary diesel engine test methods are best suited for this analysis. This will be accomplished using extractive Fourier Transform Infrared Spectroscopy (FTIR) for testing of all targeted pollutants. The following pollutant species will be measured: acetaldehyde, *acrolein*, carbon 4+ straightchain hydrocarbons, carbon dioxide, carbon monoxide, ethane, ethylene, formaldehyde and adelhyde compounds, methane, oxides of nitrogen (NO<sub>x</sub>), oxygen, particulate matter, sulfur dioxide, water vapor and any other FTIR-detected species. [Emphasis and italics added.] With FTIR, a single instrument will directly measure all targeted compounds and yield the highest quality data achievable utilizing any known test method. The FTIR analyzer will measure all targeted emissions simultaneously, in real-time, also enabling excellent measurement of engine transients.”

(d) A Canadian company named Avensys, Inc (Suite 301, 1493 Johnston Road, White Rock, British Columbia V4B 3Z4) advertises the “Gasmeter In Situ Continuous Gas Monitoring analyzer”

([http://www.avensysolutions.com/AvensysSolutions/Applications.php?locale=en&Application\\_no=&sub\\_category\\_id=181](http://www.avensysolutions.com/AvensysSolutions/Applications.php?locale=en&Application_no=&sub_category_id=181)) that is designed to be permanently installed in a stack and purports to measure acrolein using the FTIR method, along with many other emissions.

(e) According to the Eastshore project documentation, which, unlike the Russell City documentation, published the calculations underlying the health risk analysis in the BAAQMD PDOC Appendix B – Tables, pages 2 and 3, the health risk index computed for the residential receptor when acrolein was included was higher by approximately a factor of 10 than the health risk index computed without including acrolein. This suggests that acrolein could be a major component of the health risk for the Russell City project, underscoring the importance of

performing a more detailed analysis in the face of uncertainty rather than simply ignoring the risk. Since the health risk computation was not documented, neither the CEC or the public had an opportunity to consider these issues with respect to the Russell City project, and thus there was no evidence for the CEC to consider and mitigate the project with respect to acrolein emissions and their public health impact in their Final Decision.

7. Recent, publicly available scientific research implicates acrolein as a cancer agent. The following scientific study published in 2006 in the journal “Proceedings of the National Academy of Sciences”, appears from its abstract to identify acrolein as a lung cancer risk: “Acrolein is a major cigarette-related lung cancer agent: Preferential binding at p53 mutational hotspots and inhibition of DNA repair” Zhaohui Feng , Wenwei Hu , Yu Hu, and Moon-shong Tang; Departments of Environmental Medicine, Pathology, and Medicine, New York University School of Medicine, Tuxedo, NY 10987; Communicated by Richard B. Setlow, Brookhaven National Laboratory, Upton, NY, August 14, 2006 (received for review June 22, 2006) (PNAS, October 17, 2006, vol. 103, no. 42, 15404-15409). It does not appear that California regulatory agencies governing the computation of health risk have incorporated this new information into their regulatory framework, and thus it appears that the CEC has not considered this information in their determination that the health impacts of the project are mitigated.

8. Recent, publicly available scientific research has quantified the correlation between generic fine particulate matter (PM<sub>2.5</sub>) and increased cancer risk. According to their abstracts, at least 2 reputable studies have associated ambient PM<sub>2.5</sub> concentrations with an increase in cancer risk:

(a) “Lung cancer, cardiopulmonary mortality, and long-term exposure to fine particulate air pollution.” Pope, et al., JAMA. 2002 Mar 6;287(9):1132-41

(b) “Reduction in fine particulate air pollution and mortality: Extended follow-up of the Harvard Six Cities study.” Laden F, et al., Am J Respir Crit Care Med. 2006 Mar 15;173(6):667-

The OEHHA, discussing PM2.5 specific to diesel engine emissions in its published guidelines for Health Risk Assessment ([http://www.oehha.ca.gov/air/hot\\_spots/pdf/HRAguidefinal.pdf](http://www.oehha.ca.gov/air/hot_spots/pdf/HRAguidefinal.pdf), appendix D, page D-2, says “potential cancer risk from inhalation exposure to whole diesel exhaust will outweigh the multipathway cancer risk from the speciated components.”

In response to my public comment to this effect at the joint Eastshore-Russell City CEC workshop in June 2007, Dr. Alvin Greenberg suggested that, unlike diesel PM, the cancer risk of non-diesel PM2.5 was fully accounted for by the cancer risk of its speciated components that were already included in the health risk assessment for the Eastshore Project. No scientific evidence for this conclusion was referenced in the publicly available documents, therefore, at least within the written public record before the CEC in the context of the Russell City decision, there is little basis to conclude that whole non-diesel PM2.5 does not also exhibit a higher inhalation cancer risk than that contributed by its speciated components.

Given the results of the above studies and the OEHHA's position on diesel PM2.5, it would appear to be more health protective to conduct a parallel cancer risk assessment using risk factors indicated by the studies based on the amount of generic PM2.5 emitted by the project, to compensate for the possibility of an erroneous assumption by CEC staff.

9. The fireplace retrofit program does not appear to be mitigative. The BAAQMD has elected to allow the project applicant to bank ERCs (emission reduction credits) from a future fireplace retrofit program, the precise structure and details of which were deferred until after the CEC's Final Decision, in lieu of securing ERCs from the marketplace, where they have been subject to a verification process before being banked by other facilities (see CEC Russell City Final Decision, condition AQ-SC12, AQ-SC13). The CEC has allowed the BAAQMD and the applicant to defer resolution of the details of this program until after the CEC has issued its

decision, requiring a condition of certification that requires the applicant to obtain other ERCs from the marketplace if the retrofit program does not yield a sufficient amount of ERCs.

The failure to require the applicant to demonstrate that they have obtained valid ERCs before approving the project may represent a failure to mitigate, since the emission reductions gained from a fireplace retrofit program are difficult to verify and easily inflated, fireplace retrofit programs are prone to failure (as in the Los Esteros project, ) and the ERC marketplace, being highly competitive, may not yield sufficient ERCs. In the Lost Esteros Project (see Los Esteros Critical Energy Facility II, Phase 1, Presiding Members Proposed Decision, page 102), CEC staff stated that “The applicant provided funding for specific PM10 abatement programs administered by the air district, consistent with the strictures of the Final Decision. Staff asserts that the funded programs failed to sufficiently mitigate the contribution of the project. In summary, the evidence indicates that the woodstove/fireplace retrofit program resulted in approximately 5.7 tons per year (tpy) of PM10 reductions. Purchase of three new school buses resulted in a further 88 pounds per year of PM10 reductions. In Staff’s view, that we adopt, this mitigation falls far short of offsetting the project’s 21.9 tpy of fall/winter quarter PM10 emissions”

Without documentation of actual wood combustion in the target fireplaces as a means to distinguish between fireplaces used for heating and fireplaces used for ornamental or entertainment purposes, the applicant may seek credit for the reduction of the burning of many hundreds of pounds of wood per-fireplace, per-year, when in actuality, a significant portion of these fireplaces may only burn a small amount of wood per year, if any, especially given that the area under consideration is urban and consists predominantly of structures with gas heating installed as part of the original construction. The BAAQMD states, in its “Model Wood Smoke Ordinance”, [http://www.baaqmd.gov/pio/wood\\_burning/ordinance\\_background.htm](http://www.baaqmd.gov/pio/wood_burning/ordinance_background.htm), that the average residence burns .28 cords of wood per winter season, and that 38 percent of homeowners burn wood during the winter season. Depending on the type of wood, a cord weighs around 1 to 3

tons, so .28 cords is equivalent to about 560 to 1680 pounds.

While the CEC has stated (in its Final Decision on page 7 and 8) that residents with low-use fireplaces would not likely pay the non-rebated portion of the cost of a retrofit, and that requiring the applicant to pay the entire cost would be unwise as it would encourage the inclusion of low-use fireplaces, the CEC saw fit to permit the project applicant to control the rebate amount. If marketplace ERCs are scarce and expensive, it appears that the applicant would have a tremendous incentive when faced with the prospect of non-operation to pay a greater proportion of the retrofit cost in order to include lesser-used fireplaces, overstating actual emission reductions, thus gaining emissions credits without proportionately reducing emissions.

It appears reasonable that the applicant should only be permitted to use ERCs which can be reasonably verified. In order for the fireplace retrofit program to meet this condition of verifiability and establish whether the program is likely to achieve the desired mitigation, in my opinion, the CEC should commission an independent, comprehensive survey to reflect fireplace usage by zip-code, specifically to determine the frequency and purpose of fireplace use on a per-household basis, to determine a reasonable set of retrofit targets and reduction levels. Any emission reduction credits generated for retrofit of wood-burning systems should, in my opinion, be contingent on purchase receipts or sworn affidavits provided by the owner of such systems which document the amounts, sources and purchase dates for wood purchased for consumption for the unit being retrofitted. The credit amount should be proportionate to the amount of wood that will no longer be burned in that unit, such that the ERCs yielded by such a program would verifiably offset a proportionate amount of actual wood combustion.

It appears that a fireplace retrofit scheme that does not have a reasonable amount of verification would not be enforceable and may thus become a loophole for polluters to bypass air quality regulations, and should not be considered by permitting agencies as mitigation.

10. It does not appear that the CEC has included a neighborhood level toxics inventory in its

public health analysis to determine whether the Russell City project, when combined with all current and planned emission sources, would result in levels or add to levels of toxic air contaminants that exceed applicable impact thresholds in the neighborhoods downwind of the plant.

The local air quality in the area being considered is currently impacted by the emissions from existing industrial sources, heavy local truck traffic, an interchange of two highly congested major highways (routes 880 and 92), the Hayward Executive Airport, and the Oakland International approach flight path, and would likely be impacted by future projects such as the planned Eastshore Energy Center and local transportation related construction projects.

Because the process that the CEC has followed may have only considered the impact of the project's contribution absent the existing and planned toxics inventory, the logical outcome if this process if repeated is an accumulation of sources which would each individually fall under the threshold of a significant health impact, but may collectively exceed these thresholds and possibly endanger the public health.

Since the actual selection of sites for projects appears to be an unregulated confidential function of private industry based on solely economic considerations, it appears that the industry driven selection process results in the selection of inexpensive land that is close to infrastructure, in communities that lack the socio-economic resources to mount significant challenges to the process which may lack the necessary critical examination to protect health and safety.

By not challenging the siting of power plants by project applicants on the basis of existing and planned local toxics inventory, it appears that the CEC has failed to uphold the rights of residents of these communities to equal protection from air toxics presenting health hazards.

A 2003 study commissioned by the CEC on measurement methods (“A survey of monitoring instruments for measurement of airborne pollutants- [http://www.energy.ca.gov/reports/2003-07-31\\_500-03-053F.PDF](http://www.energy.ca.gov/reports/2003-07-31_500-03-053F.PDF), authored by Philip Hopke, Ph.D., Clarkson University and Dina

Markowitz, Ph.D., University of Rochester) states on page 1 of the Executive Summary: “Currently, power plant siting determinations are based on existing ambient air monitors and meteorological sites that may be located miles from the site of the proposed project. These monitoring and meteorological data are used to estimate ambient air quality in the siting location and surrounding area, as well as to evaluate the potential impact of the proposed power plant on the site and surrounding area. This approach can be problematic, because ambient air quality levels have tremendous spatial and temporal variation and are difficult to interpret. Moreover, routine air quality measurement devices are expensive and require trained technicians to operate. These limitations hinder our ability to identify areas disproportionately affected by air pollution (i.e., environmental justice (EJ) communities) and to determine the air quality impacts of new sources (e.g. power plants)--particularly for DG technologies.”

It appears that the availability and cost of air quality monitoring and toxics detection devices have recently improved, and thus it appears that it is within the means of the CEC to conduct ambient air monitoring studies both before and during facility operation to determine the local air toxics inventory and impose conditions on the applicant which mitigate any contributions to local concentrations of air toxics that result in exceedance of applicable significance thresholds, and to prevent projects from being constructed where such contributions cannot be mitigated, as a means of upholding the rights of impacted communities to equal protection under the power plant siting process.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this \_\_\_\_ day of October, 2007, in Hayward, California.

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Michael Toth

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6 Homeowners Association, Hayward Democratic Club and Hayward  
Area Planning Association  
7

8 STATE OF CALIFORNIA

9 STATE ENERGY RESOURCES

10 Conservation and Development Commission

11 In the Matter of:

Docket No.: 01-AFC-7C

12 Initially noticed as “Petition to Amend the  
13 Commission Decision Approving the Application  
for Certification for the Russell City Energy  
14 Center”;

DECLARATION OF JAY WHITE IN  
SUPPORT OF GROUP PETITIONERS’  
PETITION TO INTERVENE, REOPEN THE  
ADMINISTRATIVE PROCEEDINGS,  
REOPEN THE EVIDENTIARY RECORD  
AND FOR RECONSIDERATION

15 Later Noticed as “Modification of the Application  
16 for Certification for the Russell City Energy  
Center”  
17

Date: TBD  
Location: TBD  
Time: TBD

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21 I, Jay White, hereby declare:

22 1. I am an attorney admitted to practice law before the state of California and am the  
23 General Counsel for the California Pilots Association (“Calpilots”), a California non-profit, public  
24 benefit corporation. It is an association of pilots and other airport supporters throughout California  
25 that was formed in 1949. The mission of Calpilots is to promote and preserve California’s public  
26 airports, of which the Hayward Executive Airport is one. I am also a pilot of over fifty years. I  
27

28 Decl. of White CEC 01-AFC-7C

Cec peti Dec White.doc

1 learned to fly at the Hayward Airport. I have flown more than 25,000 hours as an airline pilot for a  
2 major national airline and more than 2,000 hours as a general aviation pilot. I am very familiar  
3 with the Hayward Airport and its surroundings, having landed there many times in both Visual  
4 Flight Rules (VFR) conditions and Instrument Flight Rules (IFR) conditions.

5       2. I have reviewed the California Energy Commission's FINAL COMMISSION DECISION  
6 concerning the Russell City Energy Center Project docketed on October 2, 2007 entitled  
7 "Amendment No. 1 (01-AFC-7C) Alameda County." The Final Decision contains certain  
8 incorrect information and omits other vital safety information concerning the Hayward Airport.  
9 Within the limited opportunity to review the Final Decision which approaches almost 250 pages,  
10 these are just some of the important issues and inaccuracies I have initially identified.

12       2. Omission of Instrument Flight Rules (or "IFR") flight operations: The most glaring  
13 omission is failure to consider flight in IFR conditions when pilots utilize the published  
14 Federal Aviation Administration ("FAA") approach procedures for Hayward Airport.  
15 References in the Final Decision impliedly assume that *all* flights will be conducted under  
16 conditions consistent with Visual Flight Rules when the cloud ceiling is at least 1,000 feet  
17 above the ground and visibility is at least three miles.

19       3. The Final Decision fails to recognize that when cloud conditions are lower than 1,000  
20 feet, or the visibility less than one 3 miles, aircraft must operated in accordance with IFR  
21 standards and procedures as adopted and published by the FAA for the Hayward Airport.  
22 Attached as Exhibit A is a true and correct copy of the current IFR approach plate for the  
23 Hayward Airport. This procedure was adopted through the FAA's official rule making  
24 procedure and can be changed only by FAA.

25       5. The IFR approach plate, Exhibit A, includes standards for a circling approach for flights  
26 that cannot land straight in. A minimum cloud ceiling of 493 feet above ground and a minimum  
27 visibility of one mile are required for a circling approach. A pilot must keep the runway in sight at  
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1 all times during a circling approach.

2 6. FAA publication entitled “DESCENT TO THE MDA OR DH AND BEYOND” shows  
3 the turning radii of aircraft of different speeds. Attached as Exhibit B is a true and correct copy of  
4 an excerpt from this FAA publication. Applying the FAA guidelines as set forth in Exhibit B for  
5 aircraft landing at Hayward Airport, assuming the usual general aviation mix of varying aircraft  
6 size and airspeed, a number of flights would pass over the RUSSELL CITY ENERGY CENTER  
7 at altitudes lower than 500 feet when executing a circling approach for Runway 28L, one of the  
8 two primary runways utilized by aircraft for the Hayward Airport.

9  
10 7. “Notice To Airmen” or “NOTAM”: At pages 182 and 190, the Final Decision states that  
11 by posting or publishing a NOTAM announcing the position and nature of the Russell City Energy  
12 Center, this is an adequate safety measure which also operates as a mitigation for the dangers  
13 presented to aircraft by the thermal plume which will extend to a height of approximately 1000  
14 feet. **A NOTAM, however, by its nature is not a mitigation measure.** It provides information  
15 only. It does nothing to restore the safety present absent the thermal plume nor does it enhance  
16 safety or restore the airspace otherwise lost. Instead, **a NOTAM merely announces that a**  
17 **specific safety hazard exists.**

18  
19 8. This observation was also affirmed unanimously by the Alameda County Airport Land  
20 Use Commission, which met on October 15, 2007 at which I attended and offered  
21 testimony, to review the second power plant proposed nearby and even closer to the  
22 Hayward Airport, called “Eastshore.” Based on that conclusion, the Commission struck  
23 the proposal that they adopt the same or similar mitigations at issue for Russell City  
24 plant and adopted by the Final Decision on the ground that a NOTAM did not constitute  
25 a mitigation.

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9. The Final Commission Decision at page 179 states “The amended RCEC project is located approximately 1.5 miles to the southwest of the Hayward Executive Airport. It lies off the side of the airport’s two parallel runways.” That is a correct statement. .
10. The Final Commission Decision refers to “the airport’s defined traffic pattern”, Page 186; the “prescribed traffic pattern” Page 180; “...relevant zones are the Traffic Pattern Zone....”; “...outside the Traffic Pattern Zone.” Page 183. These references are to the flight path for aircraft operating in Visual Flight Rules conditions. That is not the flight path pattern for aircraft executing a circling approach under Instrument Flight Rules as contemplated by the FAA’s official approach plate.
11. At Page 184 of the Final Commission Decision it is stated “Applicant’s witness Mr. Graves testified that he reviewed the published approach paths for the Hayward and Oakland airports and found no flight paths that would be affected by restricting the airspace above the RCEC.” This statement does not address the flight path for a circling approach to the Hayward Airport.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 24th day of October, 2007, in San Carlos, California.

---

Jay White

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10 Skywest Homeowners Association, Hayward  
11 Democratic Club and Hayward Area Planning Association

12 STATE OF CALIFORNIA

13 STATE ENERGY RESOURCES

14 Conservation and Development Commission

15 In the Matter of:

16 Initially noticed as “Petition to Amend the  
17 Commission Decision Approving the Application  
18 for Certification for the Russell City Energy  
19 Center”;

20 Later Noticed as “Modification of the Application  
21 for Certification for the Russell City Energy  
22 Center”

Docket No.: 01-AFC-7C

DECLARATION OF ANDREW WILSON III  
IN SUPPORT OF GROUP PETITIONERS’  
PETITION TO INTERVENE, REOPEN THE  
ADMINISTRATIVE PROCEEDINGS,  
REOPEN THE EVIDENTIARY RECORD  
AND FOR RECONSIDERATION

Date: TBD  
Location: TBD  
Time: TBD

23 I, Andrew Wilson III, hereby declare:

24 1. I am a resident of the City of Hayward and a Project Software Developer by profession. I  
25 am also a pilot of 28 years and instrument rated to fly a Cessna P210N. Since February 15,  
26 2007 I have been following the proceedings of the California Energy Commission during the  
27 late spring / early summer 2007 which initially examined the proposed project entitled  
28 “Eastshore,” a 115 megawatt thermal power plant, together with the project known as the  
Russell City Energy Center, a 600 megawatt thermal power plant. Later on, the proceedings

Decl. of Williams CEC 01-AFC-7C

1 for Eastshore plant was separated from the Russell proceedings and I have continued to  
2 follow the proceedings for both plants. I have personal knowledge of the facts set forth  
3 below and if called as a witness in this matter, would and could testify competently to the  
4 following.

5 2. Attached as Exhibit A is a true and correct copy of California Energy Commission's  
6 published fact sheet on the Sutter Power Plant.

7  
8 3. I attended the Alameda County Airport Land Use Commission meeting August of 2007  
9 where Gary Cathey of California Transportation Aviation described his experience over-  
10 flying a power plant named Sutter Power Plant in Yuba County. Mr. Cathey said he flew  
11 through the plume at 800 to 1,000 feet, classified the turbulence caused as severe, and one of  
12 his wings tilted up and that he would not fly through the plume any lower because of the  
13 severe turbulence and risk. He said he had the highest ratings possible from the FAA. A  
14 conversation by the Commission members pursued with Mr. Mike Argentine of Calpine,  
15 who stated told the Commission that the Sutter Power Plant was a Calpine Power Plant and  
16 stated that the Sutter Power Plant was the same size as the Calpine Russell Energy Center  
17 Power Plant (RCEC).

18  
19 4. In fact, however, as reflected in Exhibit A the size of Calpine's Sutter Plant is 540 MW,  
20 not 600 MW. At the hearing at which Mr. Cathey attended for Russell and Mr.  
21 Argentine, the Alameda Airport Land Use Commissioners voted to require that RCEC  
22 include a Notice To Airmen (NOTAM) be posted on aviation charts warning pilots not to  
23 fly below 1,000 feet above the RCEC power plant. The horizontal distance required by  
24 the NOTAM will encroach upon the Airport Buffer Zone and Airport Influence Area.

1 5. I attended the Alameda County Airport Land Use Commission meeting on October 17,  
2 2007 for the Tierra Energy Eastshore Energy Center. The Commissioners voted as stated  
3 in their Resolution 02-2007 – At Meeting Held October 17, 2007 to strike the proposed  
4 NOTAM, but only require Tierra Energy Eastshore Energy Center to select an alternate  
5 site for the proposed project outside of the Airport Influence Area for the Hayward  
6 Executive Airport. The proposed mitigation for Tierra was modeled after the RCEC  
7 mitigations but the Commissioners agreed that a “NOTAM” was not a mitigation. The  
8 RCEC site needs to be relocated as well because the NOTAM is not a substitute of  
9 restricted buffer or airspace.  
10

11 6. I have reviewed the letter dated September 25, 2007 from Federal Aviation  
12 Administration to California Energy Commission posted on the Russell amendment web  
13 page at 5 p.m. on September 25, before the hearing set for September 26, 2007 on Russell  
14 before the CEC. It alleges that “The proposed RCEC is located 1.56 miles southwest of  
15 the Hayward Executive Airport”. This is the first time over the past seven months that the  
16 Russell plant has been stated as that being located 1.56 miles and not 1.5 miles from the  
17 Hayward Executive Airport. The horizontal distance now required to remain a safe  
18 horizontal distance from the plume as required by the NOTAM in Trans-10 now  
19 encroaches into the Buffer zone or Airport Influence Area.  
20

21 7. Attached Exhibits B are true and correct copies of information I gathered related to  
22 Hazardous Material releases:

23 a. County of Riverside –Health Services Agency Department of Environmental Health  
24 Hazardous Materials Management Division Emergency Response, Complaint,  
25 Investigation Report. This shows that after the Hazardous Materials release at the Blythe I  
26 Power Plant the decision was made to close the freeway but no attempt was made to  
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either measure the air above the power plant, to close the Blythe I power plant or to warn pilots. This power plant is the same technology as Russell City Energy Center.

b. Los Medanos Energy Center Bulk Chemical Offload incident Root Cause Analysis.

Pittsburg, CA. Air analysis was made at ground level but no attempt was made to conduct measurements above the power plant or to warn pilots in the area. The power plant uses the same technology as the Russell City Energy Center.

8. The Hayward Executive Airport operations have grown over the past two years. In addition more hanger space has been constructed. Bud Fields has proposed construction of additional hanger space and a new fuel island. Closing or restricting air space in or around the Hayward Executive Airport by the use of NOTAMS does not ensure a safe airport environment, nor is it a mitigation for loss of the utility of the airport, but may push pilots over neighborhoods in avoiding the Russell thermal plume.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this \_\_\_\_ day of October, 2007, in Hayward, California.

\_\_\_\_\_  
Andrew Wilson III

1 Jewell J. Hargleroad (SBN 130285)  
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5 (510) 331- 2975  
6 jewellhargleroad@mac.com

7 Attorney for Group Petitioners California  
8 Pilots Association, Citizens for Alternative  
9 Transportation Systems, San Lorenzo Homeowners Association,  
10 Skywest Townhouse Homeowners Association and Hayward  
11 Democratic Club, and Hayward Area Planning Association

12 STATE OF CALIFORNIA

13 STATE ENERGY RESOURCES

14 Conservation and Development Commission

15 In the Matter of:

16 Initially noticed as “Petition to Amend the  
17 Commission Decision Approving the Application  
18 for Certification for the Russell City Energy  
19 Center”;

20 Later Noticed as “Modification of the Application  
21 for Certification for the Russell City Energy  
22 Center”

Docket No.: 01-AFC-7C

DECLARATION OF JEWELL J.  
HARGLEROAD IN SUPPORT OF GROUP  
PETITIONERS’ PETITION TO INTERVENE,  
REOPEN THE ADMINISTRATIVE  
PROCEEDINGS, REOPEN THE  
EVIDENTIARY RECORD AND FOR  
RECONSIDERATION

Date: TBD  
Location: TBD  
Time: TBD

23 I, Jewell J. Hargleroad, hereby declare:

24 1. I am an attorney admitted to practice before all courts of the State of California and  
25 principal of the Law Office of Jewell J. Hargleroad. counsel for group petitioners California Pilots  
26 Association, Citizens for Alternative Transportation Systems, San Lorenzo Homeowners  
27 Association, Skywest Townhouse Homeowners Association, Hayward Democratic Club, and  
28 Hayward Area Planning Association (“Group Petioners”). I was not retained by Group Petioners

Decl. of Hargleroad in support of Group petitioners CEC 01-AFC-7C

1 until after this Commission’s hearing and Final Decision effective September 26, 2007. I have  
2 personal knowledge of the facts set forth below and would and could testify competently to the  
3 following if called as a witness in this matter.

4 2. Attached as Exhibit 1 is a true and correct copy of the City of Hayward’s February 5,  
5 2001 Agenda Report for “Direction to Staff Regarding Preparation Of Agreement Between City of  
6 Hayward and Calpine/Bechtel for Proposed Russell City Energy Center.”

7  
8 3. Attached as Exhibit 2 is a true and correct copy of the City of Hayward’s July 10, 2001  
9 Agenda Report for “Determination that the Proposed Power Plant (Russell City Energy Center) at  
10 3636 Enterprise Avenue is consistent with the General Plan and the Industrial Zoning District  
11 Designation.

12 4. Attached as Exhibit 3 is a true and correct copy of the City of Hayward’s October 11,  
13 2005 Agenda Report for “Cooperation and Option Agreement Regarding Russell City Energy  
14 Center.”

15 5. Attached as Exhibit 4 is a true and correct copy of the City of Hayward’s May 23, 2006  
16 Agenda Report for “First Amendment to Cooperation and Option Agreement with Russell City  
17 Energy Center-LLC.”

18 6. Attached as Exhibit 5 is a true and correct copy of Paul C. Richins, CEC Manager of  
19 Environmental Office March 16, 2007 letter to City of Hayward’s Planning Manager David Rizk.

20 7. Attached as Exhibit 6 is a true and correct copy of City of Hayward’s Planning  
21 Manager David Rizk’s letter dated April 19, 2007, responding to Mr. Richins March 16, 2007  
22 correspondence.

23 8. Attached as Exhibit 7 is a true and correct copy of portions of the Calpine Corporation’s  
24 Fourth Amended disclosure Statement for Debtors’ Fourth Amended Joint Plan of Reorganization  
25 pursuant to Chapter 11 of the United States Bankruptcy Code filed in In re Calpine Corporation, et  
26 al., United States Bankruptcy Court Southern District of New York, No. 05-60200 (BRL).  
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this \_\_\_\_ day of October, 2007, in Hayward, California.

\_\_\_\_\_  
Jewell J. Hargleroad

1 Jewell J. Hargleroad (SBN 130285)  
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5 Attorney for Group Petitioners California  
Pilots Association, Citizens for Alternative  
Transportation Systems, San Lorenzo Heritage  
6 Association, San Lorenzo Homeowners Association,  
Skywest Townhouse Homeowners Association and Hayward  
7 Democratic Club

8  
9 STATE OF CALIFORNIA

10 STATE ENERGY RESOURCES

11 Conservation and Development Commission

12 In the Matter of:

Docket No.: 01-AFC-7C

13 Initially noticed as “Petition to Amend the  
Commission Decision Approving the Application  
14 for Certification for the Russell City Energy  
Center”;

ATTORNEY PROOF OF SERVICE OF  
PETITIONS TO INTERVENE, REOPEN THE  
ADMINISTRATIVE PROCEEDINGS,  
15 REOPEN THE EVIDENTIARY RECORD  
AND FOR RECONSIDERATION;

16 Later Noticed as “Modification of the Application  
for Certification for the Russell City Energy  
17 Center”

PETITION RE FINANCIAL HARDSHIP  
18 REQUEST FOR STAY OF COMPLAINE  
PROCEEDINGS

19 AND SUPPORTING DECLARATIONS OF  
WHITE, CATHEY, TOTH, LEWIS AND  
20 KERSTON, WILLIAMS AND  
HARGLEROAD

21  
22 Date: TBD  
Location: TBD  
23 Time: TBD  
24  
25

1 I, Jewell J. Hargleroad, certify:

2 I am, and at all times mentioned here, an active member of the State Bar of California and  
3 not a party to the above action. My business address is 1090 B Street, No. 104, Hayward,  
4 California 94541. Today on October 18, 2007 I served the following documents by electronically  
5 depositing copies (without exhibits [originals for filing signed w/ exhibits]) addressed to the  
6 persons on the attached proof of service list.

7  
8 PETITIONERS' PETITION TO INTERVENE, REOPEN THE ADMINISTRATIVE  
9 PROCEEDINGS, REOPEN THE EVIDENTIARY RECORD AND FOR RECONSIDERATION;  
10 and PETITION FOR FINANCIAL HARDSHIP; AND REQUEST FOR STAY OF  
COMPLIANCE

11 MEMORANDUM OF POINTS AND AUTHROITIES IN SUPPORT OF GROUP  
12 PETITIONERS' PETITION TO INTERVENE, REOPEN THE ADMINISTRATIVE  
PROCEEDINGS, REOPEN THE EVIDENTIARY RECORD AND FOR RECONSIDERATION;  
And REQUEST FOR STAY OF COMPLAINCE PROCEEDINGS

13 DECLARATION OF TOM KERSTON IN SUPPORT OF GROUP PETITIONERS' PETITION  
14 TO INTERVENE, REOPEN THE ADMINISTRATIVE PROCEEDINGS, REOPEN THE  
EVIDENTIARY RECORD AND FOR RECONSIDERATION

15 DECLARATION OF GARY CATHEY IN SUPPORT OF GROUP PETITIONERS' PETITION  
16 TO INTERVENE, REOPEN THE ADMINISTRATIVE PROCEEDINGS, REOPEN THE  
EVIDENTIARY RECORD AND FOR RECONSIDERATION

17 DECLARATION OF SHERMAN LEWIS IN SUPPORT OF GROUP PETITIONERS'  
18 PETITION TO INTERVENE, REOPEN THE ADMINISTRATIVE PROCEEDINGS, REOPEN  
THE EVIDENTIARY RECORD AND FOR RECONSIDERATION

19 DECLARATION OF MIKE TOTH IN SUPPORT OF GROUP PETITIONERS' PETITION TO  
20 INTERVENE, REOPEN THE ADMINISTRATIVE PROCEEDINGS, REOPEN THE  
EVIDENTIARY RECORD AND FOR RECONSIDERATION

21 DECLARATION OF JAY WHITE IN SUPPORT OF GROUP PETITIONERS' PETITION TO  
22 INTERVENE, REOPEN THE ADMINISTRATIVE PROCEEDINGS, REOPEN THE  
EVIDENTIARY RECORD AND FOR RECONSIDERATION

23 DECLARATION OF ANDREW WILLIAMS III IN SUPPORT OF GROUP PETITIONERS'  
24 PETITION TO INTERVENE, REOPEN THE ADMINISTRATIVE PROCEEDINGS, REOPEN  
THE EVIDENTIARY RECORD AND FOR RECONSIDERATION

25 DECLARATION OF JEWELL J. HARGLEROAD IN SUPPORT OF GROUP PETITIONERS'  
26 PETITION TO INTERVENE, REOPEN THE ADMINISTRATIVE PROCEEDINGS, REOPEN  
THE EVIDENTIARY RECORD AND FOR RECONSIDERATION

27 Group petitioners Objections CEC 01-AFC-7C

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this  
18th day of October 2007 in Hayward, California.

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Jewell J. Hargleroad

1 ATTACHMENT TO GROUP PETITIONER'S PROOF OF SERVICE

2 CALIFORNIA ENERGY COMMISSION

3 Attn: Docket No. 01-AFC-7C  
4 1516 Ninth Street, MS-4  
5 Sacramento, CA 95814-5512  
6 docket@energy.state.ca.us

7 APPLICANT

8 Michael A. Argentine, PE  
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10 Calpine Corporation  
11 104 Woodmere Road  
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14 Marianna Isaacs,  
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32 INTERESTED AGENCIES

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34 East Bay Regional Park District  
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2  
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8 Revised 7/6/07 \* Indicates change 2  
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#### INTERESTED PARTICIPANTS

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28 Group petitioners Objections CEC 01-AFC-7C

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