DOCKETED

Docket Number:	15-AFC-01
Project Title:	Puente Power Project
TN #:	221350
Document Title:	Combined Reply Brief and Brief on California ISO Study Issues of Intervenor Center for Biological Diversity
Description:	N/A
Filer:	OMONIGHO OIYEMHONLAN
Organization:	Center for Biological Diversity
Submitter Role:	Intervenor
Submission Date:	9/29/2017 4:02:15 PM
Docketed Date:	9/29/2017

STATE OF CALIFORNIA

Energy Resources Conservation and Development Commission

In the Matter of:	DOCKET NO. 15-AFC-01
APPLICATION FOR CERTIFICATION OF THE PUENTE POWER PROJECT	

COMBINED REPLY BRIEF AND BRIEF ON CALIFORNIA ISO STUDY ISSUES OF INTERVENOR CENTER FOR BIOLOGICAL DIVERSITY

September 29, 2017

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I. Introduction

The California Energy Commission ("Commission") should deny the application for certification of the Puente Power Project ("Puente" or "the Project"). If approved, Puente will stand in the way of the transformations necessary for California to meet its renewable energy and grid decarbonization goals—transformations already well underway across the state. Puente's construction would postpone by decades a necessary transition to cleaner, lower-carbon technology in an area already heavily—and disproportionately—burdened by pollution and industrial development. Approval of Puente would be contrary to environmental justice principles, the local community's desires, the City of Oxnard's development goals and standards, and overall state policy. The facility's only possible benefit—reliability—is itself unreliable due to the threat of flooding and sea level rise under reasonably foreseeable future conditions. If built, Puente will stand only as a monument to an obsolete way of doing things.

Fortunately, the record shows another way is not only possible but readily feasible. Preferred resources are increasingly cost-effective and are being deployed quickly. Oxnard and the Moorpark area can have reliability without more pollution. All it will take is a little courage on the part of this Commission to clear the way—because if Puente is approved, the region's transition to cleaner sources of reliable energy may be delayed for decades to come.

The Puente application not only should be denied, but must be denied. As established in the record and the intervenors' opening briefs, Puente will conflict with applicable laws, ordinances, regulations and standards ("LORS"), and will cause significant or potentially significant environmental impacts related to land use, biological resources, air quality, climate change, hazards, and environmental justice that either have not been adequately disclosed and analyzed, have not been adequately mitigated, or both. Moreover, the California Independent System Operator's Moorpark Sub-Area Local Capacity Alternative Study[1] ("CAISO Study")

[1] TN # 220813, Exh. 9000.

further confirms what the record already revealed: preferred resources, including various combinations of storage, demand response, renewable generation, and reactive power, can feasibly address the local capacity need Puente is being built to meet. Accordingly, the Commission cannot make the findings necessary to approve Puente despite its significant impacts and conflicts with LORS, and therefore must deny the application.[2]

II. Puente Will Conflict with LORS and Will Cause Significant Environmental Impacts that Have Not Been Mitigated or Avoided

A. Land Use

As explained in the City of Oxnard's opening brief, the Puente project conflicts with multiple policies and standards in the City's General Plan and Local Coastal Plan. (TN # 221010 [City of Oxnard's Opening Brief ("City Opening Br.")] at 3-16.) As a result, the Project will cause both LORS conflicts and significant environmental impacts. Staff and the Applicant offer their own interpretations of the City's General Plan and Local Coastal Plan, but this Commission must defer to the City. (Cal. Code Regs., tit. 20, § 1714.5(b); see also *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782 [deferring to an agency's factual finding regarding General Plan consistency "unless no reasonable person could have reached the same conclusion on the evidence before it"]; *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717 [to overcome presumption of regularity of city's general plan consistency determination, "an abuse of discretion must be shown"]; *City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1091 [evidence of City's interpretation of its own code is entitled to deference].) Based on the City's interpretation of its own governing standards, the Commission must find that LORS conflicts and significant environmental impacts exist. Accordingly, in order to approve the Project despite these conflicts the Commission must

[2] In accordance with the Committee's rulings at the close of the September 12, 2017 Committee Conference, the Center has elected to combine its reply brief with its brief on issues presented by the CAISO Study. (See TN # 221281 [September 12, 2017 Committee Conference Transcript] at 100:19-20.)

make override findings under both CEQA and the Warren-Alquist Act. For the reasons set forth in Parts III and IV below, the Commission cannot make the required findings on this record.

B. Air Quality

1. The FSA Used an Inadequate Capacity Factor as a "Mitigation Basis" that Resulted in Incomplete Mitigation of Concededly Significant Impacts

As shown in the opening briefs of the Center and other intervenors, the Project will cause significant, unmitigated air quality impacts due to Staff's selection of an improper capacity factor as a CEQA "mitigation basis." (See TN # 221009 [Opening Brief of Intervenor Center for Biological Diversity ("Center Opening Br.")] at 39-43; City Opening Br. at 63-64; TN # 221025 [Opening Brief of Intervenors Sierra Club Los Padres Chapter, Environmental Coalition of Ventura County, and Environmental Defense Center ("Sierra Club Opening Br.")] at 27-28.) The Applicant's attempt to sweep this unmitigated significant impact under the rug fails.

The Applicant claims Project emissions will be "fully offset under CEQA." (TN # 221024 [Applicant's Opening Brief on All Topics Except the CAISO Special Study ("Applicant Opening Br.")] at 15.) This is incorrect. The FSA analyzed emissions occurring at Puente's full permitted capacity factor of roughly 25 percent, and determined that any resulting increases in non-attainment pollutants would be "significant cumulative impacts that *must be mitigated*." (FSA at 4.1-30 [italics added].) Yet the FSA failed to ensure that these emissions would be "fully offset" or otherwise mitigated, because Staff used only an 11 percent capacity factor in calculating Puente's mitigation requirements. (FSA 4.1-49 to 50.) The FSA derived this lower capacity factor from historical operation of Mandalay Generating Station ("MGS") units 1 and 2 (FSA at 4.1-83), but the FSA also acknowledged that Puente could operate far more often than MGS 1 or 2. (See FSA at 4.1-139 [acknowledging that Puente could have higher total emissions than MGS 1 and 2 due to those units' "very low annual capacity factors"].) Accordingly, absent a condition limiting operation to 11 percent, there is no basis for a finding that the Project will not have significant, unmitigated emissions.

The Center's witness, Bill Powers, explained that GHG emissions would be higher overall with Puente by comparing Puente's permitted operation at a 24.5% capacity factor with actual operation of MGS 1 and 2 at a 5% capacity factor. (TN # 215440-1 [Exh. 7000, Opening Testimony of Bill Powers, P.E.] at 9-10; TN # 215535-3 [Exh. 7027, Rebuttal Testimony of Bill Powers, P.E.] at 3.) This is exactly the comparison CEQA requires. (CEQA Guidelines[3] § 15125(a) [the significance of a project's impacts must be measured against existing physical conditions]; *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 320-321 [discussing "long line of cases" holding that CEQA's baseline normally consists of existing physical conditions]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 660, 664 [CEQA requires analysis of project impacts at fully permitted levels].) The Applicant complains that this comparison is somehow misleading, but the Applicant's preferred comparison—between Puente's potential emissions and hypothetical emissions from MGS at fully permitted levels of operation (Applicant Opening Br. at 12-13)—is exactly the type of misleading, uninformative comparison the Supreme Court rejected in *Communities for a Better Environment*. (48 Cal.4th at 321-23 [describing comparison with "hypothetical allowable conditions" as "illusory" and inherently misleading].)

The Applicant also indulges in misdirection by implying that the Ventura County Air Pollution Control District ("VCAPCD") conclusions regarding Puente's impacts are determinative for purposes of CEQA. (Applicant Opening Br. at 14 [claiming VCAPCD "concluded that the Project will not cause any . . . significant impacts with respect to air quality"].) The implication is both legally and factually incorrect. As a matter of law, VCAPCD is not the lead agency for purposes of CEQA; the Commission is. (Pub. Resources Code § 25519(c).)[4] Significance is for the lead agency to determine. (CEQA Guidelines § 15064(a)(1) [requiring EIR if "lead agency" finds substantial evidence of significant impact], (d) [requiring "lead agency" to consider both direct and indirect impacts in determining significance], (f)

[3] References to the "CEQA Guidelines" are to title 14 of the California Code of Regulations.
[4] All further undesignated statutory references are to the Public Resources Code.

[requiring that significance determination be "based on substantial evidence in the record of the lead agency"].) Significance determinations are not made in the first instance by a responsible agency like the VCPACD. Nor are they made by the Project applicant.[5]

As a factual matter, moreover, the record does not reveal any CEQA conclusion on the part of the VCAPCD. As the Applicant's own citations reveal, the VCAPCD merely found that the Project would not cause or contribute significantly to a violation of air quality standards or otherwise violate rules and regulations the VCAPCD itself implements. (Exh. 2015 at 40; Exh. 2008 at 41.) The FSA used a different standard for assessing CEQA significance, under which it deemed *any* Project emissions of nonattainment criteria pollutants cumulatively significant. (FSA at 4.1-30.) As discussed above and in the opening briefs of several intervenors, the majority of those significant emissions remain unmitigated as a result of Staff's unlawful use of an 11 percent capacity factor to determine CEQA mitigation. Accordingly, absent a condition limiting facility operation to an 11 percent capacity factor or some other form of effective mitigation, the Commission cannot find that Puente's air quality impacts have been mitigated to a less-than-significant level.

2. Decades-Old Emissions Reduction Credits Cannot Adequately Mitigate Present Emissions Increases

The Center agrees with the City of Oxnard that pollution reductions associated with emissions reduction credits ("ERCs") issued decades ago are now part of the baseline and cannot be used as CEQA mitigation for Puente's present increases in air pollution. (See City Opening Br. at 64-65.) Nothing in the Applicant's brief demonstrates that using stale ERCs as mitigation satisfies CEQA's requirements.

It is undisputed that the ERCs on which the applicant proposes to rely represent emissions reductions that occurred decades ago. The Applicant's witness, Gary Rubenstein, stated that "certainly more than half" of the ERCs proposed to be retired by the Project were

[5] The opinion of Applicant's expert that the Project will not result in any significant, unmitigated impacts (2/8/17 Tr. at 62) is thus of no legal significance.

"created in the early 1990s." (2/8/17 Tr. at 182:1-9.) In fact, *all* of the ERCs proposed to be retired by the Project are at least 20 years old. (See TN # 214005-7 [Exh. 2013, Final Determination of Compliance Appx. E] [showing initial ERC deposits for all ERCs occurring between 1992 and 1996].) Mr. Rubenstein explained that the ERC program was designed, as a policy matter, to encourage early action to reduce emissions. (See 2/8/17 Tr. at 185:8-25.) But this policy decision has no bearing on whether the emission reductions represent effective CEQA mitigation. CEQA clearly defines "mitigation" as avoiding, minimizing, rectifying, reducing, eliminating, or compensating for an impact. (CEQA Guidelines § 15370.) Reductions accomplished 20 years ago do not avoid, minimize, rectify, reduce, eliminate, or compensate for emissions increases occurring today.

Using 20-plus-year-old ERCs to mitigate present emissions might be defensible only if there were evidence that emissions from the facilities that generated the ERCs would have persisted in the local ambient air for the entire time had the reductions represented by the ERCs not occurred. Yet nothing in Mr. Rubenstein's testimony establishes that ozone precursors or particulate matter remain in the atmosphere for decades. On the contrary, Bill Powers testified that "the City and affected local communities will experience real-time, present-day emissions increases which will increase the exposure of residents to elevated concentrations" of criteria pollutants. (Exh. 7000 at 14.) Mr. Rubenstein's rebuttal testimony did not dispute that "real-time, present-day emissions increases" would occur; rather, he disputed only Mr. Powers' assertion that such increases would jeopardize Ventura County's progress toward attainment of state PM10 standards. (TN # 215553 [Exh. 1121, Applicant's Rebuttal Testimony] Tab 14 at 10, ¶¶22-23.) Undisputed evidence in the record thus shows that emissions reductions occurring more than 20 years ago are not effective CEQA mitigation for emissions increases that will occur today.

Allowing Puente to take credit for reductions that occurred decades ago also would represent an impermissible double-counting of mitigation. The air pollution reductions reflected in the ERCs are already reflected in the ambient background air quality conditions against which

the Project was evaluated. Counting the ERCs again, as reductions of Puente's additional emissions, would effectively require the Commission to count those reductions twice. The ERCs identified by the Applicant as mitigation for the Project's criteria pollutant emissions do not satisfy CEQA's requirements.

C. Greenhouse Gases

The FSA's conclusion that Puente's greenhouse gas ("GHG") emissions and global climate impacts will be less than significant rests entirely on the assumption that Puente will always displace only less-efficient generation, and thereby will reduce GHG emissions from the overall electrical generating "system." As shown in the Center's opening brief, the evidence does not support this conclusion. (See Center Opening Brief at 31-39.)

In addition to the specific evidence discussed in the Center's opening brief, granular hourly data in the CAISO Study about how Puente is expected to operate further confirms that Puente likely will cause overall gas fleet efficiency to decline and will increase, not reduce, GHG and criteria air pollutant emissions. James Caldwell explained in detail how Puente will displace more-efficient resources when running at minimal load, which it must do in order to serve local capacity needs under conditions similar to those addressed in the CAISO Study. (TN # 220974 [Exh. 3090, James H. Caldwell Testimony in Response to CAISO Report] at 5-7.) Specifically, during a five-day, 1-in-10 heat storm, Puente would have to be "committed pre-contingency each and every day" of the event so that it could be available if a transmission outage were to occur. (*Id.* at 5.) "[I]f the transmission system remained intact, Puente would be committed precontingency and sit idling at minimum load with a poor heat rate crowding out more efficient and lower emission resources much of the time." (*Ibid.*) Under the historic load duration curves for the Moorpark sub-area shown in CAISO's 2013-2014 Transmission Plan, "Puente would be committed and on line as reliability must run for roughly 30 days per year at an average of 5 hrs/day." (*Ibid.*) The CAISO's witness, Neil Millar, confirmed that "the higher likelihood of the need for the resource is during the higher load hours." (TN # 221283 [Transcript of 09/14/2017 Evidentiary Hearing (hereafter "9/14/17 Tr.")] at 69.)

Mr. Caldwell's testimony on the CAISO Study also calls into question assertions in the FSA and the Applicant's opening brief that Puente will reduce greenhouse gas emissions by helping to integrate renewable generation. The FSA claimed that Puente would help integrate renewables as California increases its RPS targets above 33 percent, although the FSA provided only conclusory assertions, devoid of analysis or factual support, for the claim. (See, e.g., FSA at 4.1-127 to 4.1-128, 4.1-150.) The Applicant reiterated the FSA's claim in its opening brief. (Applicant Opening Br. at 16.) As Mr. Caldwell's testimony demonstrated, however, there are already numerous natural gas plants—many of which are threatened with early retirement—available for dispatch that are "significantly more efficient than and at least as flexible as Puente." (Exh. 3090 at 6.) Because Puente will receive higher fixed capacity payments than other competing facilities, moreover, construction of Puente "will only lead to higher Resource Adequacy costs, the retirement of some other plant(s) of like capacity . . . , and there will be no net incremental capacity and no incremental flexibility on the CAISO grid after Puente is operational." (*Ibid.*) Mr. Caldwell thus concluded that Puente will have "no net renewable integration value." (*Id.* at 7.) Because Puente will not add any renewable integration capacity that does not already exist, it cannot claim any greenhouse gas reductions associated with renewables integration.

None of the other testimony at the September 14 hearing contradicted Mr. Caldwell's assertions regarding the likelihood that Puente would displace other more efficient resources. Mr. Millar testified that Puente would not be expected to run *only* in the event of a N-1-1, 1-in-10 contingency, but gave very limited examples—maintenance outages and "other combinations of outages or construction outages"—of other situations that might cause CAISO to "call on the local capacity resource." (9/14/17 Tr. at 70:7-15.) The Applicant's witnesses also claimed Puente might run in circumstances other than the contingency addressed in the CAISO Study, but offered scant evidence as to what those circumstances might be or what other generation might be displaced. (See 9/14/17 Tr. at 228:1-4 [Brian Theaker suggesting that Puente might run during the winter while transmission lines and unspecified "generators" are down for maintenance];

337:21-24 [Dawn Gleiter reiterating CAISO testimony that Puente might run during "maintenance outages on other units"].) For its part, Staff admitted in the FSA that nobody knows what generation Puente will displace. (FSA at 4.1-159.) Mr. Caldwell's testimony on the CAISO Study thus confirms that the FSA's assumptions that Puente would only displace less efficient resources are unsupported, as are its conclusions.

The Applicant's attempts to shore up the FSA's deficient analysis fail. For example, the Applicant claims Puente will "reduce emissions compared to the existing environmental baseline," which it describes as operation of "the existing MGS units." (App. Br. at 16.) However, the FSA did not use "the existing MGS units" as the CEQA baseline; rather, to the extent the FSA defined a GHG baseline at all, it identified "the existing Western grid-wide generation system and its operation" as the baseline. (FSA at 4.1-158.) Moreover, as explained in the Center's opening brief, the FSA completely failed to describe this "system" baseline in a manner sufficient to enable meaningful evaluation of Puente's environmental effects. (Center Opening Br. at 26-28.) And even to the extent the FSA could be read as comparing Puente's efficiency to that of MGS 1 and 2, it failed to quantify existing GHG emissions from MGS 1 and 2 (*id.* at 29), and thus once again failed to provide any basis for meaningful analysis of Puente's actual emissions.[6] Put simply, Puente may be more efficient than MGS 1 or 2 on a per-MW basis, but if Puente runs more often, its actual GHG emissions will be higher—as the FSA itself concedes is "likely." (FSA at 4.1-139.) Mass emissions to the atmosphere, not relative efficiency rates, drive climate impacts. If Puente causes mass emissions to increase, it contributes to global climate damage, even if it does so somewhat more efficiently than other units.

The FSA's failure to identify a stable, adequate baseline is fatal. A recent appellate decision confirms that CEQA's normal baseline requirements apply to certified regulatory programs like the Commission's site certification program. (*Pesticide Action Network of North*

[6] The Applicant's witness, Mr. Theaker, undercut the Applicant's assertion that Puente would displace only MGS 1 and 2 by conceding that Puente would displace generation *outside* the Moorpark area merely by being located within such a "locally-constrained" area. (9/14/17 Tr. at 228:15-229:3.)

America v. Cal. Dept. of Pesticide Regulation (September 19, 2017) 2017 Cal.App.LEXIS 803, *34-*35.) Indeed, the decision holds inadequate a baseline strikingly similar to the FSA's "system" baseline. In *Pesticide Action Network*, the Department of Pesticide Regulation argued that its baseline for analysis of the effects of expanding the use of one pesticide consisted of "mountains of data about actual use" of other similar pesticides. (*Id.* at *36.) The court concluded, however, that the Department's "general statement" about existing use "says nothing about the contours of the baseline relied upon by the Department . . . . In the absence of any meaningful discussion of baseline conditions, we cannot conclude that possible significant environmental impacts" from expanding pesticide use "were adequately investigated and discussed." (*Id.* at *36-*37.) Here, the FSA's similarly general statement that the baseline consisted of the entire Western electrical grid and its operation provided no basis for evaluating Puente's greenhouse gas emissions.

Finally, the Applicant argues that because Puente will be subject to California's greenhouse gas cap-and-trade system, it will be required to mitigate its GHG emissions by obtaining allowances or offsets. (Applicant Opening Br. at 17.) Under the cap-and-trade regulation, however, GHG allowances do not represent or achieve actual emission reductions at any specific facility; they are simply permits to emit greenhouse gases. (See Cal. Code Regs., tit. 17, §§ 95820 (c), 95856.) Indeed, a specific facility like Puente could increase its greenhouse gas emissions notwithstanding the cap-and-trade program simply by purchasing additional allowances or offsets on the open market. The cap-and-trade system, in other words, is not designed to offset or reduce emissions from any particular facility, but rather to achieve modest aggregate reductions from broad categories of facilities. (See *id.*, § 95841 [establishing declining "Annual Allowance Budget" for each year through 2020].) In any event, the Applicant is wrong to suggest that the FSA identified cap-and-trade compliance as a means "to mitigate GHG emission" from the Project. (App. Br. at 17.) Rather, because the FSA erroneously concluded that Puente's GHG emissions will be less than significant, it did not propose any mitigation or other conditions of certification to reduce GHG emissions. (See FSA at 4.1-165 to 166.)

For all of the foregoing reasons, and as set forth in the Center's opening brief, the FSA's analysis of Puente's GHG emissions is fatally deficient.

D. Biological Resources

The Commission bears the affirmative burden of complying with CEQA. (See § 25519(c).) To date, however, Staff has failed both to provide adequate identification and analysis of impacts to biological resources, including federal and state listed species and other protected species, and to provide sufficient detailed mitigation measures to fully avoid impacts to these species. (See Center Opening Br. at 44-46.)[7]

The Center replies below to the opening briefs filed by Staff and Applicant concerning biological resources. The Center also joins in the briefing of the City of Oxnard and Sierra Club et al. regarding the proper identification of ESHA and the need for a 100-foot buffer. (See City Opening Br. at 15-16; Sierra Club Opening Br. at 8-25.)

1. Shortcomings in the Baseline Information, including the Biological Surveys Staff Relied on in the FSA, and the Inadequacy of Other Information Regarding Potentially Significant Biological Impacts Undermines Staff's Conclusions

CEQA requires that in order to assess the impacts of a project, an agency must have detailed and specific information regarding existing environmental conditions in the area affected by the project. (See CEQA Guidelines § 15125.) This "baseline" should reflect the project's real-world physical setting—"real conditions on the ground"—rather than "hypothetical situations." (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 121, 125; *see also Woodward Park Homeowners Association v. City of Fresno* (2007) 150 Cal.App.4th 683, 708-09.)

[7] In addition, while Staff has suggested that the Commission can approach the ESHA determination and buffer distance in various ways (Staff Opening Br. at 13-19), the Commission has to date failed to explain what standards or metrics it will use in making an ESHA determination in lieu of the City of Oxnard and/or the Coastal Commission—undermining the parties' ability to fully address these questions in briefing. (See Center Opening Br. at 3 [discussion of in lieu permitting].)

The environmental setting or baseline information that is relied on in the CEQA review must be fair and accurate and cannot understate the value of the environmental resources so as minimize the significance of the impacts of the proposed project. For example, in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 725, the court found that an agency's failure to adequately describe adjacent riparian habitat and potential for wetlands on the project site "understates the significance of" the river adjacent to the site. By avoiding discussion of those resources, the CEQA document unlawfully "precluded serious inquiry into or consideration of wetland areas adjacent to the site or whether the site contained wetland areas." (*Ibid.*) Inadequate investigation is not a valid excuse for a lack of information.

As shown in the testimony of Ileene Anderson, Staff's investigation here was similarly inadequate. Contrary to the statements in the Applicant's opening brief (at 30-31), Ms. Anderson's testimony is amply supported. Ms. Anderson explained the shortcomings in the FSA and the inadequacy and inaccuracy of information regarding potentially significant biological impacts relied on by Staff. Specifically, Ms. Anderson provided expert testimony regarding her concern that Staff mischaracterized likely effects to listed species and did not require protocol level surveys. "In some instances the Final Staff Assessment (FSA) fails to identify the presence of rare species and then identify and evaluate impacts, this is of particular concern where no surveys were undertaken or where focused surveys for species of special concern were not protocol level surveys where such surveys are recommended by the wildlife agencies." (TN # 215431-1 [Exh. 7022, Anderson Opening Testimony] at 1.) Ms. Anderson was particularly concerned that the FSA did not rely on site-specific information or survey data regarding the likely presence and impacts to California least tern, tidewater goby, Ventura marsh milkvetch and other rare plants. (*Id.* at 2-5.)

The Applicant attempts to dismiss Ms. Anderson's testimony with regard to the tidewater goby. However, Ms. Anderson's testimony properly noted that the FSA contained contradictory statements without factual support for its conclusion that the tidewater goby was

> "not expected in the canal due to high salinity levels." FSA part 1 at 4.2-15 (pdf 454). There is no information in the FSA about the salinity level of the Edison Canal. Elsewhere the FSA states "This species [tidewater goby] could occur in Edison Canal." FSA at 4.2-9.

(Exh. 7022 at 2.) Ms. Anderson provided documentation regarding salinity and the tidewater goby's tolerance for salinity that was absent from the FSA or the Applicant's filings, and explained that:

> In fact, the tidewater goby can tolerate a range of salinity levels. The USFWS recovery plan for the tidewater goby states: "Tidewater gobies have been documented in waters with salinity levels from 0 to 42 parts per thousand". [FN 1] Ocean water is generally 32 ppt- 37 ppt with less salinity near mouths creeks and rivers and during high storm event. [FN 2].

(Exh. 7022 at 2, *citing* [FN 1] TN # 215431-2 [Exh. 7023, Tidewater Goby Recovery Plan]; [FN2] TN # 215431-3 [Exh. 7024, Southern California Coastal Ocean Observing System; Salinity information].)

After reviewing the Applicant's opening testimony, Ms. Anderson noted that it did not provide any additional scientific data or information and contradicted earlier statements by the Applicant itself in the Project Enhancement document which stated that tidewater goby *may occur* in the area. (TN # 215535-4 [Exh. 7026, Rebuttal Testimony of Ileene Anderson] at 1-2 ["Given the close proximity of other known tidewater goby populations, without surveys, the only supportable conclusion is that tidewater goby may be present in the Edison Canal. Indeed, the Applicant's Project Enhancement document also concluded that tidewater goby 'may occur in Edison Canal.'"], quoting TN # 213802 [Exh. 1090, Project Enhancement – Outfall Removal and Beach Restoration] at 3-4.)

At the hearing on February 9, 2017, Ms. Anderson properly pointed out that surveys should be undertaken when a proposed project may impact imperiled species, and that simply relying on "professional judgement" is not sufficient. (TN # 216593 [Feb. 9, 2017 Transcript ("2/9/17 Tr.")] at 508-512.) In response to the Applicant's questions regarding this issue, Ms. Anderson stated: "I think as a professional that people should err[] on the side of caution when dealing with making assumptions about whether or not highly-imperiled species like the ones

we're talking about that are federally, state listed, fully protected, I think that to [err on the side] of making sure that the surveys get done[,] so you actually have some data to back up your professional opinion, is prudent." (*Id.* at 516-517.) And when pressed by the Applicant again, she specifically explained that in her opinion this is true even for so-called "disturbed sites" based on her professional experience: "I recognize that the site has been disturbed, but I also know of a number of different instances where people have written off the site because it's been disturbed and rare species have occurred on them." (*Id*. at 517.)

Applicant's expert Ms. Love stated at hearing that she was familiar with the Tidewater Goby Recovery Plan protocols which state that "[t]he size of the discrete water body (lagoon, pond, stream, ditch) under investigation will be used to determine corresponding sampling efforts to be carried out." (2/9/17 Tr. at 431.) Ms. Love also stated, "I agree that Edison Canal could be considered a ditch in regards to a water body in the Recovery Plan for Tidewater Goby." (*Id*.) Ms. Love further agreed that "the potential for presence of the Tidewater Goby is a separate question from whether the Tidewater Goby would thrive and have consistent reproduction in a particular place[.]" (2/9/17 Tr. at 432.) Thus, the Applicant's own witness confirmed that pursuant to the Recovery Plan the Edison Canal is a water body, a ditch, which meets the criteria as a water body that should be investigated, with the size of the area determining the sampling efforts needed.

Further, the Applicant's opening brief overstates what was presented at the hearing by Staff. (Applicant Opening Br. at 30 ["Although Ms. Watson of CEC Staff stated there is a 'slim chance' that the '[g]oby could occur in the Edison Canal,' the [U.S Fish and Wildlife Service ("USFWS")] does not believe that the tidewater goby occurs in the Edison Canal because it is not suitable habitat."].) In fact, USFWS has not submitted any direct testimony or evidence regarding the tidewater goby into the record. Rather, the statement regarding what USFWS "does not believe" was Ms. Watson's recollection of a phone conversation with Chris Derleth of USFWS.

MS. BELENKY [to Ms. Watson]: Thank you.

17 And in your rebuttal at Page 3, you state that the
18 U.S. Fish and Wildlife Service has stated that they have no
19 concerns with the Tidewater Goby occurring in the Edison
20 Canal. And you cite to a personal communication. I
21 just -- I want to ask you a few things about that personal
22 communication. Was it with you directly?
23 MS. WATSON: Yes, it was between myself and Chris
24 Derleth.
25 MS. BELENKY: Thank you.
1 Did Mr. Derleth say that the Tidewater Goby could
2 not occur in the Edison Canal?
3 MS. WATSON: No, he did not.
4 MS. BELENKY: Did he say that if they occurred, the
5 potential impacts were not of concern to him?
6 MS. WATSON: I didn't ask him that question.
7 MS. BELENKY: Well, perhaps you could illuminate us
8 a bit more on what it means in your statement that they
9 stated they have no concern?
10 MS. WATSON: I asked Chris specifically if he
11 thought that Tidewater Goby occurred in the canal.
12 MS. BELENKY: And what was his answer?
13 MS. WATSON: I believe he stated that he did not
14 believe that they occurred in the canal but there was a
15 possibility that they may enter into the canal, but it is not
16 considered suitable habitat.
17 MS. BELENKY: Do you have any documentation of that
18 communication to provide for this record?

19 MS. WATSON: None other than what's given.

(2/9/17 Tr. at 505-506.) Ms. Watson's report of her conversation with USFWS shows that USFWS confirmed that tidewater goby could occur in the Edison Canal, whether the habitat is "suitable" or not, and therefore surveys should have been undertaken.[8] Beliefs and guesswork are not an appropriate substitute for obtaining baseline biological information and data when a project may affect listed species. In *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, the Supreme Court held a state board's CEQA-equivalent process inadequate where the board failed "to collect information regarding the presence of old-growth-dependent species [the red tree vole, the marbled murrelet, the goshawk, and the spotted owl] on the site" of a proposed logging plan. (*Id.* at 1236.) Without that information, "the board could not identify the environmental impacts of the project or carry out its obligation to protect wildlife . . . and to prevent environmental damage by refusing to approve projects if feasible mitigation measures are available which will avoid or substantially lessen significant environmental effects as required by CEQA." (*Ibid.*; see also *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 728 [disapproving EIR which failed to reflect adequate investigation of the presence and extent of wetlands on site].)

And indeed, when some additional surveys were eventually done, although those surveys were flawed in several ways as explained in the Center's Opening Brief (at 44-46), they found peregrine falcon, a fully protected species, on site as an "incidental" observation. This further shows that the initial biological surveys were inadequate and should have been required to be more robust and follow protocols set forth by the state and federal expert wildlife agencies.

The Applicant's repeated attempts to rebut Ms. Anderson's testimony are not only unavailing, but also ignore CEQA's requirements by assuming that it is the Center, rather than the Commission, that bears the burden of identifying and analyzing impacts to biological

[8] Any statements by Mr. Derleth, as relayed by Ms. Watson, are hearsay that would not be admissible in a civil action over objections and cannot support a finding. (Cal. Code Regs., tit. 20, § 1714.5(c).)

resources. Such a rule would be absurd, particularly given that the Applicant controls the site and has denied access to the Center and other intervenors, opposing intervenors' experts even being in attendance on days when other agency staff made site visits. (*See, e.g.*, TN # 217520 [April 28, 2017 Committee Conference Transcript] at 19-25; TN # 217649 [May 19, 2017, Committee Order Partially Granting Intervenors' Joint Motion to Modify] at 4 [denying request for access and noting Applicant's opposition].) As detailed above, the Center's testimony (along with that of other intervenors) shows that more data and information are needed for the biological baseline identification of the presence of listed species and analysis of likely impacts. To date, the Commission has failed to provide that needed information in violation of its CEQA obligations.

2. Staff's Conditions of Certification Unlawfully Attempt to Defer Development and Analysis of Needed Mitigation Measures for Impacts to Biological Resources

Even for the impacts that the Staff did identify, the analysis is lacking and the mitigation measures have not been adequately developed or disclosed. Rather, Staff assumes that general statements in its Conditions of Certification will suffice to address any impacts to biological resources, including special status and listed species. Staff is incorrect.

Mitigation measures are to be developed at the beginning of the environmental review process. "Formulation of mitigation measures should not be deferred until some future time." (CEQA Guidelines § 15126.4(a).) CEQA review cannot leave the public "in the dark about what land management steps will be taken, or what specific criteria or performance standard will be met." (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670.) The reason for this prohibition is self-evident:

> A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of *post hoc* rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA.

(*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.) Early formulation of mitigation measures is also necessary in order to comply with CEQA's requirement that the impacts of the mitigation measures themselves be evaluated. (CEQA Guidelines §

15126.4(a)(1)(D) ["If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measures *shall* be discussed . . ."] [emphasis added]; *Save Our Peninsula Comm. v. Monterey Board of Supervisors* (2001) 87 Cal.App.4th 99, 130 ["An EIR is required to discuss the impacts of mitigation measures."].)

In certain narrow circumstances, an agency may defer selection of mitigation measures from among several different identified mitigation options, but it cannot delay the formulation of those mitigation options to some future, post-CEQA process. (CEQA Guidelines § 15126.4(a)(1)(B) [explaining that the formulation of mitigation may not be deferred, but that "measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way"].) In other words, an agency may defer specific detailed formulation of mitigation measures *only* where the agency "(1) undertook a complete analysis of the significance of the environmental impact, (2) proposed potential mitigation measures early in the planning process, and (3) articulated specific performance criteria that would ensure that adequate mitigation measures were eventually implemented." (*POET, LLC v. State Air Resources Bd*. (2013) 218 Cal. App. 4th 681, 737-40 [holding that Air Resources Board improperly deferred formulation of mitigation measures] [internal quotations omitted]; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 95 [invalidating mitigation measure where agency "offered no assurance that the [mitigation] plan . . . was both feasible and efficacious, and created no objective criteria for measuring success"].)

As detailed below, none of the three criteria articulated by the courts has been met here for biological resources. In particular, analysis of significant impacts is incomplete, mitigation measures for some potentially significant impacts have not been formulated or proposed, and the Staff's conditions fail to articulate specific performance criteria to ensure adequate mitigation measures eventually will be implemented. As a result, the Commission has failed to comply with CEQA. For example, instead of obtaining the needed information regarding the presence and

location of western snowy plover and California least tern that may be affected by construction and demolition of the outfall on the beach, the Staff assumes that it can rely on generalized conditions of certification requiring post-approval, pre-construction surveys and mitigation actions to "avoid" all impacts to these protected species. However, these measures include "relocation," which may "avoid" some impacts, but also may cause other impacts that must be addressed under CEQA. Moreover, the Staff's conditions allow so-called "avoidance" plans to be submitted to the Commission for approval long after a decision is made and do not require that they then be subject to CEQA's normal public notice and comment procedures. As Staff's Opening Brief describes:

> Staff's proposed conditions of certification for biological resources *assume presence of special-status species, and include sufficient mitigation to reduce impacts to species to below the level of significance on the site at the ocean outfalls and in the surrounding project area*. (7/27/17 RT pg. 97.) Condition of Certification BIO-8 requires pre-construction nest surveys be conducted if construction or demolition activities occur between February 1 and August 31. (Ex. 2000, pg. 4.3-74; 7/27/17 RT pg. 253.) In addition, indirect impacts, such as those from the noise of demolition, are subsequently mitigated under conditions BIO-8 and BIO-10. (7/27/17 RT, pgs. 100; 253.)
> . . .
>
> 2. Pre-construction surveys for special-status wildlife shall be conducted in all impact areas and within 500 feet of said areas. If special-status species are found onsite or within 500 feet of the site, all individuals of these species shall be avoided *or relocated* (BIO-10 #8A and #8B).
>
> 3. Vegetation in the construction area shall be removed prior to March 1 (the beginning of the bird-nesting season) to avoid conflicts with nesting birds during the nesting season. *Pre-construction surveys for nesting birds that are listed* (including California least tern and western snowy plover) and all non-listed bird species shall be conducted in all areas within 500 feet of the perimeter of the project site. Construction during the breeding season (generally March 1 – August 30) is not allowed.
> . . .
>
> The project owner *shall submit the Outfall Removal Impacts Avoidance Plan to the CPM for approval at least 30 days prior to the start of ground disturbing activities* associated with the outfall removal.

(TN # 220999 [Staff's Opening Br.] at 16, 22, 24 [BIO-10 Outfall Removal Impacts Avoidance Plan; emphasis added]; *see also* FSA at 4.2-74 to 4.2-75 [BIO-8 requiring pre-construction, post-decision surveys].)

Similarly, for the impacts to the peregrine falcon (the presence of which on the site was only recently disclosed) the Staff asserts it need not actually look at the potential impacts but can just rely on general requirements in BIO-8 to protect the species:

> Staff testified that no direct impacts would occur to the Peregrine falcon with implementation of Condition of Certification BIO-8. (7/27/17 RT, pg.100.)

(Staff Opening Br. at 16.) However, BIO-8 in the FSA is aimed at addressing impacts of construction or demolition to nesting plovers and terns, not peregrine falcons or great horned owls nesting on the existing power plant that will be decommissioned. (*See* FSA at 4.2-74 to 4.2-75.) Staff's attempt to skip over the essential CEQA requirements of identification and analysis of impacts to special status species and rely on conditions of certification to avoid or mitigate impacts is both inadequate and unlawful. Indeed, the First District Court of Appeal recently invalidated an EIR that purportedly relied on a set of project conditions to avoid significant impacts, but failed in the first instance to examine the significance of those impacts. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-57.) Staff makes precisely the same error here.

Finally, the Applicant's brief somewhat bizarrely suggests that foraging habitat for the peregrine falcon on the Project site has little value because the Project will destroy the falcon's nest. (Applicant Opening Br. at 40-41, citing testimony of Julie Love.) By this logic, no habitat would ever have any value, provided that a project could simply eliminate the species relying on it. The Applicant's suggestion turns the entire concept of sensitive species and habitat protection on its head.

In sum, therefore, the Commission has thus far failed to adequately investigate, disclose, analyze the significance of, and provide lawful mitigation for Puente's effects on biological resources.

E. Environmental Justice

The Center agrees with the California Environmental Justice Alliance, FFIERCE, and the City of Oxnard that both the Applicant and Staff take a flawed and legally insufficient approach to addressing environmental justice issues. (See TN # 221006 [Opening Brief of the California Environmental Justice Alliance ("CEJA Opening Br.")] at 7-14, 21-28; TN # 221026 [FFIERCE Opening Brief]; City Opening Br. at 59-62.)

Even under Staff's and the Applicant's flawed approach, moreover, their conclusions are unsupportable. Contrary to assertions in the Applicant's opening brief (at 15-16, 88), Puente will have significant unmitigated air quality impacts, as discussed in Part II.B, above. Because Staff and the Applicant erroneously concluded there are no significant impacts, they never even asked the question, much less reached a supportable conclusion, as to whether the Project would have a disproportionate impact.

Staff asserts that it followed applicable guidance, but does not discuss or defend any of its actual conclusions in the FSA. (Staff Opening Br. at 24-27.) As CEJA's Opening Brief demonstrates, however, the FSA's conclusions are baseless. The fact that ozone and $PM_{2.5}$ concentrations in specific census tracts from 2009 to 2011 were within California standards (CEJA Opening Br. at 24-25, citing FSA at 4.1-62) might reveal something about the environmental baseline, but it reveals nothing about the Project or its effects in relation to that baseline. Data about past air quality cannot establish that future Project effects on local communities will be less than significant. Indeed, the FSA's analysis on this point contradicts its own significance threshold, which deems *any* project emissions of non-attainment criteria pollutants (including ozone) significant. (FSA at 4.1-30.) In other words, the FSA used one approach to determining the significance of air pollution impacts in general, and then used another approach to dismiss impacts on environmental justice communities. The FSA does not even follow its own flawed approach to environmental justice analysis—and, in fact, applies that flawed approach in a way that makes it impossible to assess whether the Project will have disproportionate impacts.

Applicant similarly claims the Project will have no health impacts based on the testimony of its expert referring to a health risk assessment conducted by the VCAPCD. (Applicant Opening Br. at 88-89.) That health risk assessment, however, considered only the cancer and non-cancer effects of toxic air contaminants. (TN # 214005-9 [Exh. 2015, FDOC Appendix G Ambient Air Quality Analysis and Risk Management Review] at 27-29). The health risk assessment did not address the Project's cumulative contribution to non-attainment criteria pollutants—which the FSA deemed significant in *any* amount (FSA at 4.1-30)—or associated health concerns. It is therefore both inaccurate and misleading for the Applicant to argue that someone standing at the Puente fenceline for 70 years would be just fine. (Applicant Opening Brief at 89.)

F. Hazards/Flood Risk

The Center agrees with the City of Oxnard and Sierra Club that the FSA's assessment of threats from flooding and sea level rise is dangerously flawed. (City Opening Br. at 36-59; Sierra Club Opening Br. at 29-33; see also Center Opening Br. at 43-44.) Specifically, the City of Oxnard is correct that the CoSMoS model inaccurately modeled the Project site as undeveloped, which would allow dunes to migrate and to continue to protect the site from flooding, when in actuality development of Puente will prevent dune migration, cause dune erosion, and expose the site to flooding. (City Opening Br. at 51-52, 57-58.) The Project thus will exacerbate existing environmental risks of flooding and sea level rise, both of which must be addressed as environmental impacts under the Supreme Court's decision in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, 388.

III. Alternatives

As discussed above, the Commission bears the affirmative burden of complying with CEQA. As the First District Court of Appeals recently explained, this burden applies where an agency acts under a certified regulatory program, and it encompasses the need to consider a range of alternatives.

> Our Supreme Court has held that in a review conducted under a certified regulatory program, "the public agency bears the burden of affirmatively demonstrating that, notwithstanding a project's impact on the environment, the agency's approval of the proposed project followed meaningful consideration of alternatives." (*Mountain Lion, supra*, 16 Cal.4th at p. 134.) Indeed, consideration of alternatives is one of the hallmarks of CEQA analysis. Public Resources Code section 21001, subdivision (g) declares it is the policy of the state to "[r]equire governmental agencies to consider alternatives to proposed actions affecting the environment." (Pub. Resources Code, § 21001, subd. (g).) Public Resources Code section 21002 states that "it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives . available which would substantially lessen the significant environmental impacts of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying . feasible alternatives . which will avoid or substantially lessen such significant effects." (Pub. Resources Code, § 21002.) Content requirements for the documentation of a certified program must include "a description of the proposed activity with alternatives to the activity." (Pub. Resources Code, § 21080.5, subd. (d)(3)(A).)
>
> The CEQA Guidelines also call for analysis of alternatives in any functionally equivalent document prepared in a certified program: "The document used as a substitute for an EIR or negative declaration in a certified program shall include [¶] . [¶] [e]ither [¶] "(A) Alternatives to the activity and mitigation measures to avoid or reduce any significant or potentially significant effects that the project might have on the environment, or [¶] (B) A statement that the agency's review of the project showed that the project would not have any significant or potentially significant effects on the environment and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. This statement shall be supported by a checklist or other documentation to show the possible effects that the agency examined in reaching this conclusion." (Cal. Code Regs., tit. 14, § 15252, subd. (a)(2)(A) & (B).) Thus, "a legally sufficient [environmental review document] must include some consideration of feasible alternatives even if the project's significant environmental impacts will be avoided through mitigation measures." (*Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1395.)

(*Pesticide Action Network of North America v. Cal. Dept. of Pesticide Regulation et al.* (September 19, 2017) 2017 Cal. App. LEXIS 803, *26-*28; see also *id.* at *33 [finding the department failed to consider reasonable alternatives and rejecting the department's contention that plaintiffs "had the burden to identify feasible alternatives"].)

A. The Project Objectives Improperly Narrowed the Range of Alternatives for Analysis

The project objectives frame the alternatives analysis critical to an adequate CEQA process. The purpose of alternatives analysis in an environmental review document under CEQA is to enable the agency or commission to fulfill the statutory requirement that feasible alternatives that avoid significant impacts of a project must be implemented.

> [I]t is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects, and that the procedures required by this division are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects.

(§ 21002.) The Commission must consider a range of reasonable alternatives based on properly framed project objectives. (CEQA Guidelines § 15126.6(a).) "An EIR need not consider every conceivable alternative to a project. Rather, it must consider a reasonable range of *potentially feasible alternatives* that will foster informed decision making and public participation." (*Ibid.* [emphasis added].)

CEQA requires the Commission to consider a reasonable range of alternatives "which would feasibly attain most of the *basic objectives of the project* but would avoid or substantially lessen any of the significant effects of the project." (CEQA Guidelines § 15126.6(c) [emphasis added].) Nothing in CEQA states that an alternative may be found infeasible solely due to a conflict with one of the applicant's objectives. In fact, the CEQA Guidelines expressly provide that a feasible alternative may impede achievement of the project objectives to some degree, or may be more costly. (CEQA Guidelines § 15126.6(a), (b).) Indeed, if applicants could thwart consideration of all potentially feasible alternatives simply by adopting overly narrow objectives, CEQA would be rendered meaningless. (See *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 736-37 [holding that applicant's prior commitments could not foreclose analysis of alternatives].) Accordingly, nothing in CEQA states that the project objectives utilized by the agency in developing feasible alternatives must meet all of the

applicant's proffered objectives. The statutory definition of "feasible" does not even mention the applicant's objectives. (§ 21061.1.)

A project's underlying purpose should be included in the objectives and a lead agency "may not give a project's purpose an artificially narrow definition" in order to exclude alternatives. (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1166.) Applying this rule, the court in *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, concluded that an EIR addressing methods for control of light brown apple moths failed to include the project's underlying purpose as an objective, and as a result gave project objectives an "artificially narrow" definition that precluded consideration of a full range of potential alternatives. (*Id.* at 668.)

Here, the Project Objectives formulated by Staff and relied on in the PSA and FSA were also artificially narrow and improperly truncated CEQA review. Most importantly, the Staff relied on project objectives that assumed the reliability need identified by the California Public Utilities Commission ("CPUC") could be met only by the Puente project as designed. Staff even included as a project objective fulfillment of the requirements of NRG's private contractual arrangement (the "RA contract") with Southern California Edison ("SCE"), which the CPUC approved in May 2016. In so doing, Staff ignored the CPUC's expressly stated admonition that its decision in approving that RA contract could *not* be used to prejudge the Commission's environmental review. (TN # 215446-5 [Exh. 7015, Decision 16-05-050 (May 26, 2016)] at 22.)

Staff's improper formulation of project objectives was raised by the Center,[9] other parties, and members of the public in comments as early as the PSA and throughout the proceeding. The Center also sponsored testimony from Bill Powers that addressed the overly narrow project objectives in the FSA and explained how a broader range of alternatives could meet the underlying purpose of the project. (Exh. 7000 at 1-2, 15-19.) Mr. Powers suggested

[9] As explained in the Center's opening brief (at 21), the Center raised concerns with the formulation of the project objectives and alternatives analysis throughout this process. (See, e.g., TN # 213621 [Center PSA Comments] at 9-13; TN# 215440-1 [Exhibit 7000, Opening Testimony of Bill Powers]; TN # 216408 [February 7, 2017 Transcript ("2/7/17 Tr.")] at 150.)

specific modifications that would achieve the performance criteria while allowing for consideration of a reasonable range of alternatives. (*Id.* at 1-2.) At hearing Mr. Powers reiterated this point. (TN # 216408 [February 7, 2017 Transcript ("2/7/17 Tr.")] at 150 ["the project objectives need to be modified, so that your listing performance objectives as opposed to specifically identifying the make and model of turbine or a simple cycle turbine, is the only solution to the need."].) Staff offered no rebuttal to Mr. Powers' testimony on this point.

Rather than address this critical and foundational flaw in its CEQA analysis, Staff has continued to rely on the same Project Objectives stated in the PSA throughout this proceeding. As detailed below, Staff's claim that it "broadly interpreted" the applicant's project objectives is both unlawfully vague and unsupported on this record. In fact, the opposite appears to be the case—Staff's rejection of preferred resources alternatives and consideration of too narrow a range of alternatives in the FSA is tightly bound with the unlawfully narrow project objectives supplied by the Applicant. Because the CEQA review unlawfully truncated consideration of alternatives in the FSA and Staff's later filings, the CEQA alternatives analysis is invalid.

1. Staff Improperly Relied on the Applicant's Narrow Project Objectives

In the PSA, Staff summarized "the applicant's objectives for the [Puente] proposal" as follows:

> • Fulfill NRG's obligations under its 20-year Resource Adequacy Purchase Agreement (RAPA) with SCE requiring development of a 262-MW nominal net output of newer, more flexible and efficient natural-gas generation [FN 1];
>
> • Provide an efficient, reliable, and predictable power supply by using a simple-cycle, natural gas–fired combustion turbine to replace the existing once-through cooling (OTC) generation;
>
> • Support the local capacity requirements of the California Independent System Operator (CAISO) Big Creek/Ventura local capacity reliability (LCR) area;
>
> • Develop a 262-MW nominal net power-generating plant that provides operational flexibility with rapid-start and fast-ramping capability;
>
> • Be designed, permitted, built, and commissioned by June 1, 2020;

> • Minimize environmental impacts and development costs by developing on an existing brownfield site and reusing existing infrastructure;
>
> • Site the project on property that has an industrial land use designation with consistent zoning [FN 2]; and
>
> • Safely produce electricity without creating significant environmental impacts.
>
> [FN 1.] On May 26, 2016 the California Public Utilities Commission approved a 20 year contract between SCE and NRG to provide electrical generating power from the P3.
>
> [FN 2] On June 7, 2016 the Oxnard City Council voted 5-0 to approve an amendment to the city's Oxnard General Plan to prohibit power generation facilities greater than 50 MW in areas subject to coastal hazards (which includes the MGS and P3 sites). Unless rescinded or otherwise reconsidered, the general plan amendment will become effective July 7, 2016. Staff will address any inconsistencies between the P3 and local land use plans arising from approval of the general plan amendment in the Final Staff Assessment.

(PSA at 1-3.) Ignoring comments that these Project Objectives—particularly the objective calling for fulfillment of NRG's contractual obligations with SCE—were too narrow, staff reiterated the same list of objectives in the FSA:

> The AFC describes the applicant's objectives for the Puente proposal, which are summarized as follows:
>
> • Fulfill NRG's obligations under its 20-year Resource Adequacy Purchase Agreement (RAPA) with SCE requiring development of a 262-MW nominal net output of newer, more flexible and efficient, natural-gas generation [FN 1];
>
> • Provide an efficient, reliable, and predictable power supply by using a simple-cycle, natural gas–fired combustion turbine to replace the existing once-through cooling (OTC) generation;
>
> • Support the local capacity requirements of the California Independent System Operator (CAISO) Big Creek/Ventura local capacity reliability (LCR) area;
>
> • Develop a 262-MW nominal net power-generating plant that provides operational flexibility with rapid-start and fast-ramping capability;
>
> • Be designed, permitted, built, and commissioned by June 1, 2020;

> • Minimize environmental impacts and development costs by developing on an existing brownfield site and reusing existing infrastructure;
>
> • Site the project on property that has an industrial land use designation with consistent zoning [FN 2]; and
>
> • Safely produce electricity without creating significant environmental impacts.
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> [FN 1] On May 26, 2016 the California Public Utilities Commission approved a 20-year contract between SCE and NRG to provide electrical generating power from the P3.
>
> [FN 2] On June 7, 2016 the Oxnard City Council voted 5-0 to approve an amendment to the city's Oxnard General Plan to prohibit power generation facilities greater than 50 MW in areas subject to coastal hazards (which includes the MGS and Puente sites). The general plan amendment became effective July 7, 2016. Staff addresses project compliance with local land use plans arising from approval of the general plan amendment in the Land Use section of this Final Staff Assessment.)

(FSA at 1-3 to 1-4; see also FSA at 3-4 [listing same objectives without footnotes].) Several of these objectives describe the Project itself with such great specificity that they could be satisfied only by building the Project as proposed: a 262-MW gas-fired power plant that satisfies the specific terms of a contract between NRG and SCE. Other objectives—for example, supporting local capacity requirements, minimizing environmental impacts, enabling timely retirement of OTC units, and safely producing electricity—better reflect the underlying purpose of the Project.

The FSA even admitted that the Applicant's project objectives were too narrow. But instead of developing another clear set of objectives based on the Project's underlying purpose, Staff merely stated that it would "broadly interpret" the Applicant's objectives in formulating alternatives.

> The applicant's narrowly drawn project objectives address developing a specific project on the existing MGS site. These objectives would rule out any off-site alternatives with the potential to support local capacity requirements in the Big Creek/Ventura local reliability area. CEQA requires an analysis of potentially feasible alternatives, a set that cannot be unduly limited by project objectives that can only be satisfied by the proposed project. Therefore, staff's alternatives analysis *broadly interprets the applicant's project objectives to foster a robust analysis of potential alternatives to the applicant's proposed project*. This approach is consistent with CEQA's purpose for an alternatives analysis.

(FSA at 4.2-8 to 4.2-9 [emphasis added]; see also 4.2-146 [response to comments 51].)

Staff's approach was inadequate. First and foremost, Staff was required to explain its development of alternatives sufficiently so that they can be compared. CEQA requires that environmental review documents must provide "sufficient information about each alternative to allow meaningful evaluation, analysis and comparison with the proposed project." (CEQA Guidelines § 15126.6(d); see also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564 [the purpose of the EIR requirement is to *inform* the public and decision makers *before* a decision is made].) The discussion of alternatives must be sufficiently detailed to foster informed decision-making and public participation, not simply vague and conclusory. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th at pp. 1456, 1460.) "Conclusory comments in support of environmental conclusions are generally inappropriate." (*Laurel Heights Improvement Assn. v. Regents* (1989) 47 Cal. 3d 376, 404 [citations omitted].) The obligation to inform the public and decision makers is not met by a vague statement that artificially narrow project objectives (which call out the precise technology and contract terms that the applicant provided rather than focus on the underlying purpose of the project) will be "broadly interpret[ed]" in Staff's review of potential alternatives. Even if this approach to CEQA—which provides no clarity to the public or decision makers regarding what standards are being used—were acceptable, which it is not, the record shows the Staff's CEQA review repeatedly relied on the contract terms and the specific quantified project objectives provided by the applicant to reject other alternatives. As a result, the Commission's CEQA review fails to comply with the law.

2. Staff Prejudged Any Evaluation of Preferred Resources Alternatives Based on the CPUC's Approval of the RA Contract

The FSA briefly describes preferred resources, reliability needs, and the use of preferred resources "as substitutes for dispatchable natural gas-fired generation." (FSA at 4.2-8 to 4.2-15.) However, the FSA dismisses the use of preferred resources to meet the reliability need identified by the CPUC based on the CPUC's approval of the Puente RA contract. Staff concludes:

> On May 26, 2016, the CPUC approved SCE's contract for a new 262-MW simple-cycle natural gas-fired facility at the project site. In approving the contract, the CPUC has effectively found that preferred resources, beyond those assumed to be developed in setting the LCR for the Moorpark sub-area, a share of which was procured by SCE in response to its RFO, could not feasibly and reliably be counted on to cost-effectively meet local reliability needs.

(FSA at 4.2-14 to 4.2-15.) The Staff's argument is completely conclusory and ignores the CPUC's express admonition that its decision on the contract should not be used to pre-judge the Commission's CEQA review.

The CPUC repeatedly stated that the approval of the RA contract should not be used to limit or interfere with the Commission's CEQA review. The CPUC's initial decision approving the contract in May 2016 specifically addressed this issue as to the Commission's review of flooding/sea level rise, environmental justice, and alternatives generally:

> This determination in no way prejudices the CEC's separate review of the project. All further environmental review of flooding related issues will be conducted under the CEC's CEQA review process.
>
> . . .
>
> Environmental justice issues are also applicable within the CEC's CEQA review. The CEC will more fully develop the environmental justice and siting issues in CEC Docket 15-AFC-01 (Application for Certification of Puente Project by NRG). The CEC may disapprove or determine that mitigation measures are required due to environmental justice concerns. If the CEC determines that the project should not be permitted for environmental justice or other reasons within its jurisdiction, it will not go forward.
>
> . . .
>
> Consideration of the NRG Puente Project contract by this Commission does not prejudge the CEC review.

(TN # 215446-5 [Exh. 7015, CPUC Decision 16-05-050 (May 26, 2016)] at 13-14, 18-19, 22.) And in the December 2016 decision modifying the May 2016 contract approval, the CPUC again emphasized this point:

> We have no discretionary power to approve or deny any aspect of the certification or construction of the Puente Project. Nor do we have any jurisdiction over the project proponent (NRG).

> Our involvement is limited to the utility's request to procure power from the Puente facility *if* it is ultimately certified and constructed. Our approval confers no lease, permit, license, certificate, or other entitlement on NRG. It means only that should the project become operational, SCE may take energy deliveries from that resource and recover certain costs in rates.
>
> . . .
>
> [T]he CEC has an independent responsibility to conduct a thorough and neutral certification process. And the Commission has been clear that its *approval of a power purchase contract should not be used by any parties to influence whether the CEC determines to certify the project and find it CEQA compliant.*

(TN#215440-2 [Exh. 7001, Decision 16-12-030 modifying D. 16-05-050 (Dec. 5, 2016)] at 13-14 [first emphasis in original; second emphasis added].) The CPUC could hardly have been clearer that among all the Applicant's objectives, fulfillment of the RA contract should not be used to constrain evaluation of alternatives. Yet this is exactly how Staff used the RA contract in the FSA. (FSA at 4.2-14 to 4.2-15.)

At the September 14, 2017 evidentiary hearing, SCE's witness Randir Sekhon complained that discussion of preferred resources alternatives before the Commission somehow undermines the "integrity of the process" because these alternatives should have been raised earlier, in proceedings before the CPUC. (See, e.g., TN # 221283 [Transcript of Sept. 14, 2017 Evidentiary Hearing ("9/14/17 Tr.")] at 238:3-25, 242:6-11.) However, Mr. Sekhon may not have been aware that the Center, the City of Oxnard, CEJA, and other parties *did* attempt to raise these issues in the CPUC proceedings. As described above, the CPUC declined to conduct its own CEQA analysis of alternatives to the Puente contract, instead insisting that the Commission would conduct a full assessment of alternatives as the CEQA lead agency. Discussing less-damaging alternatives now does not threaten the "integrity of the process"; rather, it follows the process the CPUC and Commission themselves have created.

In sum, Staff's reliance on the fact of the contract approval in order to reject preferred resources alternatives is both improper and profoundly unfair. Notwithstanding its claim that the Project Objectives were broadly construed, Staff used the CPUC's prior approval of the final Puente contract to constrain CEQA review. If allowed to stand, this approach would dramatically

undermine this Commission's ability to comply with CEQA in evaluating power plant siting proposals. Because CPUC contract approval almost always occurs prior to the Commission's CEQA analysis, this issue threatens to recur again and again. If Staff's approach were to prevail, this Commission's analysis of alternatives would become largely an empty, foreordained exercise in virtually every instance where CPUC approval of a contract precedes the Commission's evaluation of an AFC—a result both untenable and unlawful under CEQA.

B. Preferred Resources Can Feasibly Satisfy the Project's Underlying Reliability Purpose

1. The CAISO Study Shows Feasible Alternatives Exist

At the Commission's request, the CAISO conducted a study of three basic alternative scenarios under which preferred resources (various combinations of energy storage and reactive power added to a common base portfolio of solar PV/storage hybrid resources and storage-enabled demand response) could feasibly meet the local capacity requirement Puente was proposed to fulfill. (See Exh. 9000 at 1-2.) At hearing, the CAISO's primary witness, Niel Millar, confirmed that the study "does demonstrate that there are technologically feasible alternatives relying on preferred resources that could meet the need otherwise met by the proposed Puente Project. These alternatives meet the relevant mandatory planning standards the ISO considers in our studies of grid reliability." (TN # 221283 [Transcript of Sept. 14, 2017 Evidentiary Hearing ("9/14/17 Tr.")] at 13:9-15; see also *id.* at 17:6-10 ["the ISO does consider the study to demonstrate that there are feasible preferred resource options and that an optimal mix of preferred resources can be only determined through an RFO or further study."].)

At hearing, the Applicant's witnesses quibbled with the CAISO Study's assumptions regarding energy storage and demand response, but neither witness's testimony provided a basis for this Commission to reject any of the CAISO scenarios as infeasible. For example, Brian Theaker opined that batteries do not always charge and discharge perfectly in the "real world" (*id.* at 215:1-15, 220:20-24), but he did not specify any factual basis or evidence for this opinion. Absent any specific factual foundation, Mr. Theaker's vague and general opinions—"I don't

think the world quite works that way" (*id.* at 215:15)—should be given little to no weight. Even if Mr. Theaker's testimony were fully credited, however, it would not show that preferred resources alternatives are infeasible. As James Caldwell testified, gas plants do not run perfectly all the time either, but may be subject to a wide range of conditions affecting their performance (from ambient temperature to fuel supply disruptions). (See *id.* at 315:16-317:11.) If anything, distributed preferred resources may have significant reliability advantages over large, single-shaft gas-fired turbines, in that if any one resource performs imperfectly, the others are not affected, reducing the risk of voltage collapse. (*Id.* at 316:16-318:13.)

Dawn Gleiter's testimony that there is an insufficient number of commercial and industrial customers in the Moorpark area willing to enter into long-term demand response contracts similarly fails to show that the CAISO's feasibility conclusions were wrong. First and foremost, all of Ms. Gleiter's testimony on this topic was grounded in unattributed hearsay. Ms. Gleiter conceded that she neither conducted the analysis of demand response potential herself (*id.* at 300:23-25 ["You mean like I was the one sitting at the computer looking at each one of the numbers? No."]), nor even personally oversaw the analysis. (*Id.* at 301:2-3 ["At the time it was my predecessor, so no."].) Ms. Gleiter's opinions on the feasibility of additional demand response in the Moorpark area thus lack foundation and consist solely of hearsay. Under the Commission's rules, "[h]earsay evidence . . . shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions." (Cal. Code Regs., tit. 20, § 1212(c)(3).) Nothing in Ms. Gleiter's hearsay testimony would be admissible over objections in a civil action.[10]

Ms. Gleiter's testimony was contradicted by more credible evidence in any event. Doug Karpa testified as to his review of the results of a Lawrence Berkeley National Laboratory ("LBNL") study of the Moorpark area showing a substantial amount of available demand

[10] The Center recognizes that the Hearing Officer overruled the City of Oxnard's objection to Ms. Gleiter's hearsay testimony, promising instead to "give it the weight that it's entitled to." (9/14/17 Tr. at 299:10-11.) Under the Commission's regulations, Ms. Gleiter's hearsay testimony is entitled to little or no weight.

response, depending on the price offered.[11] (9/14/17 Tr. at 329:1-25.) Unlike Ms. Gleiter, who filed no written testimony and relied entirely on unattributed, anonymous information compiled by others, Dr. Karpa provided a clear citation and link to the study in written testimony. (Exh. 7034 at 5 n.2.) No other party rebutted this testimony with similarly credible evidence.

The CAISO Study and the conclusions of CAISO's witnesses at the hearing should thus be taken at face value: feasible preferred resources alternatives to Puente exist, and they can satisfy the basic purpose and core objective of the Project: to ensure reliability in the Moorpark sub-area.

2. The Record Does Not Show Preferred Resources Alternatives Are Infeasible Due to Cost

Although the CAISO Study concluded that preferred resources alternatives to Puente are feasible, it also stated that the capital costs of those alternatives exceed the capital cost of the Puente project. (See Exh. 9000 at 2-3 and Table 1-1.) The cost comparison in the CAISO Study, however, is based on inaccurate and outdated assumptions, does not present a full picture of the capacity costs or benefits provided by generation resources, and cannot establish that preferred resources are infeasible for purposes of CEQA.

CEQA imposes an exacting standard for determining that an alternative is economically infeasible. A finding of economic infeasibility must be based upon quantitative, comparative, factual evidence showing that the alternative would render the project economically impractical. (See, e.g., *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 884 [affirming that a county's rejection of an alternative as financially infeasible was erroneous where the county had "no meaningful comparative data pertaining to a range of economic issues"]; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1461-62 [holding that applicant's inability to achieve "the same economic objectives" under a

[11] Dr. Karpa's testimony on this point is incorrectly attributed to Mr. Theaker in the transcript. As Dr. Karpa's written testimony makes clear, Dr. Karpa was the witness who relied on the LBNL study's conclusions regarding the availability of demand response resources in the Moorpark area. (TN # 220959 [Exh. 7034, Supplemental Testimony of Dr. Doug Karpa Re: CAISO Study] at 4-5 & n.2.)

proposed alternative does not render the alternative economically infeasible]; *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600 [requiring evidence that comparative marginal costs would be so great that a "reasonably prudent property owner" would not proceed with the project].) Moreover, a project proponent's mere assertion that a condition or alternative will not be feasible for them to build on their preferred timeline does not render an alternative economically infeasible. (See *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1356-57 [holding that evidence of economic infeasibility must consist of facts, independent analysis, and meaningful detail, not just the assertions of an interested party].) Agencies tasked with complying with CEQA "must independently participate, review, analyze and discuss the alternatives in good faith," and may not merely rely on a project proponent's assertions about the feasibility of alternatives. (*Save Round Valley, supra*, 157 Cal.App.4th at p. 1460.)

In comparing potential alternatives, the Commission must consider "sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project." (CEQA Guidelines § 15126.6(d).) In addition, the Commission's written findings pertaining to consideration of alternatives must "include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 405.) "[T]here must be a disclosure of the 'analytic route the . . . agency traveled from evidence to action.'" (*Center for Biological Diversity, supra*, 185 Cal.App.4th at p. 883 [*quoting Laurel Heights, supra*, 47 Cal.3d at p. 404].)

If the Commission considers economic factors, it must first disclose what economic metric it will utilize in order to evaluate the proposed project on a level playing field with other alternatives. The Commission cannot rely on a scattershot approach to economic feasibility ranging from speculation about costs of various alternatives to the Applicant's concerns with timing based on contract deadlines. Indeed, "speculation, unsubstantiated opinion or narrative . .

. or evidence of social or economic impacts which do not contribute to . . . physical impacts on the environment" is not sufficient to satisfy CEQA's substantial evidence requirement. (CEQA Guidelines § 15384(a).)

a. Evidence in the Record Does Not Support a Finding of Economic Infeasibility

As the cases and regulations discussed above demonstrate, any finding by the Commission of economic feasibility must be grounded in specific, relevant comparative evidence showing that costs render an alternative economically impracticable. The Commission cannot support such a finding on this record.

First and foremost, there is no evidence in the record as to what Puente will actually cost SCE's ratepayers. Witnesses could not testify as to either the actual cost of Puente, or the actual cost of preferred resources procured during the Moorpark RFO, because the cost information is confidential. (See 9/14/17 Tr. at 116:13-20 [testimony of Randir Sekhon]; see also *id.* at 307:7-20 [Brian Theaker testifying that he did not put any information related to operation and maintenance ("O&M") costs in the record and was unaware of any such information in the record].) Witnesses could not even testify as to relative costs (i.e., as to whether Puente or preferred resources would be more expensive than, or roughly equivalent to, one another) due to confidentiality restrictions. (*Id.* at 117:19-23 [colloquy between Paul Kramer and SCE counsel Tristan Reyes Close].) As a result, there is no evidence in the record establishing either the actual capacity cost to ratepayers of either building Puente or procuring preferred resources.[12]

Nor was the CAISO Study designed to show, much less support a finding, that any particular alternative is infeasible due to cost. As Mr. Millar testified, "[t]he study was not attempting to determine the lowest cost combination of preferred resources to meet [the local capacity requirement] need." (9/14/17 Tr. at 14:2-4; see also *id.* at 89:5-12.) According to Mr. Millar, the study considered only "high-level capital costs . . . to provide a starting point for the

[12] SCE's witness, Randir Sekhon, nonetheless confirmed that preferred resources procured in the Moorpark RFO were "cost-competitive" with Puente. (9/14/17 Tr. at 119:3-12.)

cost considerations, while recognizing that the preferred resource costs are trending downward and are reasonably expected to be lower in the future." (*Id.* at 15:1-9.) Mr. Millar clarified that CAISO was "not trying to conduct an actual procurement exercise," but rather "trying to get our foot against whether or not the costs are prohibitive from a feasibility point of view. *We concluded they weren't.*" (*Id.* at 47:3-7 [emphasis added].) "The ISO does not believe that the capital costs identified in the ISO study render the preferred resource alternatives infeasible. The ISO does not believe that feasible options need to be the least expensive, either on an up-front or lifecycle basis in order to be feasible. Especially given the other environmental and performance issues that need to be considered." (*Id.* at 15:17-24; see also *id.* at 76:4-11 ["the costs did not, in our view, render the alternatives infeasible"], 88:21-24 [We were trying to explore if there was a reasonable range of preferred resource scenarios that were feasible. And we saw them [storage and reactive power] both being feasible."].) Accordingly, the CAISO Study cannot support a finding that preferred resources alternatives are economically infeasible.

b. The CAISO Study's Capital Cost Estimates Were Based on Outdated and Inaccurate Data

The CAISO Study's capital cost estimates were excessive in any event. With the exception of Mr. Theaker, who did not squarely address the accuracy of the study's estimates, witnesses' written testimony in response to the CAISO Study was unanimous in criticizing CAISO's reliance on a single, outdated consultant report, as well as other errors, in calculating capital costs. (See, e.g., Exh. 7034[Testimony of Dr. Doug Karpa] at 3-5 [critiquing, *inter alia*, CAISO's reliance on an outdated Navigant Consulting report and failure to consult more recent, published, industry-standard data, as well as CAISO's unrealistic assumptions regarding PV solar output profiles, component costs, battery dispatch, price trends, and demand response costs]; TN # 220976 [Exh. 4045, Testimony of Damon Franz Re CAISO Study] at 2-3 [criticizing CAISO's reliance on Navigant Consulting report]; TN # 220975 [Exh. 4046, Testimony of Matt Owens Regarding CAISO Analysis] at PDF page 7 [criticizing CAISO's reliance on outdated capital cost information, including Navigant Consulting report]; TN #

220974 [Exh. 3090, Testimony of James H. Caldwell Regarding the CAISO Study] at 4 [criticizing outdated cost assumptions and failure to reference more recent, industry-standard sources of information].)

Testimony at the hearing underscored these criticisms. Matt Owens testified that the CAISO report used a single, outdated, and inaccurate reference in estimating capital costs of storage. (9/14/17 Tr. at 182:5-11.) Mr. Owens identified several more current sources of cost information, all of which estimated capital costs lower than those assumed in the CAISO Study. (*Id.* at 182:12-184:2.) Andy Schwartz cited multiple references showing that storage costs had declined 70-80 percent from 2010 to 2016 and are expected to decline another 70 percent by 2030. (*Id.* at 185:14-186:6.) Doug Karpa also testified that component cost and solar installation estimates used in the CAISO Study were too high. (*Id.* at 190:19-191:1.)

Neither CAISO's witnesses nor SCE's witnesses claimed the study's cost assumptions were completely accurate. For example, Neil Millar, CAISO's witness, could not recall checking cost assumptions used in study against actual costs SCE was seeing in recent preferred resources RFOs. (9/14/17 Tr. at 45:14-18; *id.* at 73:24-75:8 [both CAISO witnesses confirming they were unaware of any discussion about costs between the CAISO and SCE, the Applicant, the CPUC, the Commission, the Governor's office, or anyone else outside CAISO].) Randir Sekhon of SCE confirmed that he had seen bid prices for preferred resources decline since the time of the Moorpark RFO in 2013. (9/14/17 Tr. at 133:7-11.) Mr. Sekhon stated that those bid prices reflected both capital and non-capital costs (including financing risk, contingencies, and profit), so the overall decline he had seen was not as "significant" as "some of the comments" on the CAISO Study that considered only capital costs. (*Id.* at 133:11-24.) However, Mr. Sekhon did not identify any error in any specific witness's testimony. Nor did he testify that any of the "comments" to which he referred generally had erred in describing the overall downward trend in capital cost of energy storage.

Accordingly, the unanimous testimony of intervenors' witnesses concerning the CAISO Study's excessive cost assumptions for storage and demand response is effectively undisputed

and should be credited. The capital cost comparison in the CAISO Study cannot be used as the basis of a finding that preferred resources alternatives are infeasible.

c. Capital Costs Alone Provide an Insufficient Basis for Comparison of Alternatives

As discussed at length in the written testimony of intervenors' witnesses, capital costs alone cannot provide a sound basis for a comparison between Puente and preferred resources alternatives because (1) they do not take into account a number of other factors—including benefits to consumers—that determine actual capacity costs; and (2) they do not consider operational costs or externalized costs (such as damage to health from pollution). (See, e.g., Exh. 7034 at 3-5; Exh. 4045 at 1-2; Exh. 4046 at PDF pages 5, 7; Exh. 3090 at 4-5.)

Testimony at hearing confirmed that capital costs are not an accurate proxy for (or basis for comparison of) the costs of capacity that would be reflected in an RFO or RA contract. SCE's witness, Randir Sekhon, confirmed that capital costs are only one component of costs reflected in resource adequacy bids and contracts. (See 9/14/17 Tr. at 120:17-121:4 [describing evaluation of costs (including capital costs, cost of financing, risk premiums and profit) against "value streams that will be generated for the customer"]; see *id.* at 121:8-13, 121:19-122:8 [describing process of calculating "net cost to customers" from costs and benefits of generation].) Matt Owens testified that capital costs are not a good indicator of the capacity costs SCE will ultimately pay; storage alternatives in particular can tap into multiple "value streams"—i.e., provide numerous valuable services to the grid—that a project like Puente cannot. (See *id.* at 184:11-185:5.) Andy Schwartz similarly identified multiple services and benefits that ultimately could reduce costs to SCE's consumers. (See *id.* at 186:7-187:2.) James Caldwell concurred, testifying that batteries can provide services and revenue streams far beyond the 150 hours or so each year during which high loads are expected to trigger LCR needs. (*Id.* at 195:15-196:4.) The vast majority of the time, therefore, preferred resources may offer value superior to Puente, which would have little to no value to the system or ratepayers when LCR conditions are not occurring. (See Exh. 3090 at 6-7 ["leaving aside for a moment the legitimate question of how to meet the LCR need for the

Moorpark area, Puente will be one of the highest cost facilities on the grid, will have no system capacity value, and no net renewable integration value."].)

Doug Karpa pointed out that using capital costs alone ignores fuel costs, operations and maintenance (O&M) costs, and health externalities, all of which are very different for preferred resources and gas-fired generation. (9/14/17 Tr. at 191:2-11.) Dr. Karpa's written testimony concluded that Puente's operating costs, assuming its permitted capacity factor of 25 percent, would raise the cost of the Project by about $870 million over 30 years. (Exh. 7034 at 5.) At the hearing, Dr. Karpa explained that while a lower capacity factor might reduce those costs somewhat, not all O&M costs are variable, so the reduction in cost would not necessarily be linear. (9/14/17 Tr. at 347:20-348:5.) Dr. Karpa also pointed out that his assumptions regarding fuel cost reflect historically low prices for natural gas, which could increase in the future. (*Id.* at 348:6-19.)

The Applicant's witness, Brian Theaker, admitted that he did not understand Dr. Karpa's cost comparison spreadsheet. (9/14/17 Tr. at 230:2-4.) As Dr. Karpa explained, however, his spreadsheet presented an extremely simple model that effectively duplicated the CAISO Study's analysis, with minor variations on the components, expected performance, and cost assumptions used. (*Id.* at 323:13-326:12.) Mr. Theaker also claimed—although he failed to state a basis for his opinion—that the multiple value streams available to energy storage facilities are not "there yet" in the real world. (See *id.* at 223:7-16.) Matt Owens, however, testified based on his company's actual development experience that numerous projects are currently drawing on multiple value streams. (*Id*. at 248:18-250:18.)

Both Mr. Theaker and Ms. Gleiter acknowledged that externalized health impacts due to air pollution are important costs of power generation. (See *id.* at 354:18-21, 356:8-14, 357:9-12.) Accordingly, the net benefit of avoided air quality impacts to the community must be factored into any cost analysis in order to allow the "meaningful evaluation, analysis, and comparison" CEQA requires. (CEQA Guidelines § 15126.6(d).) The evidence shows that electricity generation and asthma impose substantial costs on society. (9/14/17 Tr. at 358:3-359:3

[testimony of Dr. Karpa regarding health-related costs of asthma and power generation]; see also TN # 221085 [Exh. 7040, Nunes et al. 2017] [article from the journal *Asthma Research and Practice* entitled "Asthma costs and social impact" that estimated the "mean cost per patient per year, including all asthmatics (intermittent, mild, moderate and severe asthma" in the United States to be "$USD 3,100"]; TN # 221145[Exh. 7039, Markandya and Wilkinson 2007] [article from the British medical journal *The Lancet*, series on Energy and Health 2, entitled "Electricity generation and health," that assessed the costs of various types of energy production including natural gas in terms of human health including minor illness, serious illness and death].) It was clear from testimony at the hearing that Mr. Theaker did not take these costs into account.[13]

For all of these reasons, the capital cost comparisons in the CAISO Study do not provide a basis for concluding that any particular preferred resource alternative is infeasible.

d. The Record Shows Alternatives Similar to Those in the CAISO Study Could Be Deployed at Significantly Lower Cost

Notwithstanding the CAISO Study's remarks on comparative costs, written testimony submitted in response to the study showed that similar preferred resources options could be deployed at a lower capital cost, and lower O&M cost, than Puente. (See Exh. 7034 at 6-9 [testimony of Dr. Karpa concluding that a hybrid groundmount solar and storage scenario based on CAISO Scenarios 1 and 3 could be developed at a lower capital cost, and with lower lifetime O&M costs, than Puente]; TN # 220961 [Exh. 7035, Puente Scenarios Cost Models]; Exh. 3090 at 7-10 [testimony of James Caldwell describing a "true preferred resources" scenario consisting of shorter-duration storage, solar, and energy efficiency that would cost less than Puente].)

At the evidentiary hearing, Dr. Karpa explained that he modeled CAISO Study scenarios with updated cost assumptions and a different configuration of resources (solar plus storage versus batteries alone), and concluded that a solar-plus-storage facility could meet the gap between the CAISO's base case and the identified local capacity need at a lower cost than

[13] Exhibits 7039 and 7040, and Dr. Karpa's explanation of those exhibits, are therefore relevant and admissible for impeachment purposes. (See September 12, 2017 Committee Conference Transcript at 92.)

building Puente. (9/14/17 Tr. at 192:6-25.) James Caldwell similarly pointed out that CAISO's battery-only solutions were unnecessarily expensive; hybrid approaches to charge the batteries and provide power would help limit the need for costly nine-hour discharges. (*Id.* at 194:9-195:2; see also *id.* at 203:1-11 [discussing need for batteries only during hours between afternoon solar peak and evening peak load].)

In sum, although most witnesses at the hearing seemed to agree that an RFO would be necessary to determine the true capacity cost of alternatives, the testimony of Dr. Karpa and Mr. Caldwell makes clear that there is a very good chance that a preferred resources RFO, targeted to procure the kinds of resources identified in their testimony, would produce an alternative that meets reliability needs at a lower cost to ratepayers and society than Puente.

3. The Record Does Not Show Preferred Resources Alternatives Are Infeasible Due to the Time Required to Procure and Bring Resources Online

From comments at the hearing and at Committee Conferences, it appears that the Committee may be concerned that if the Puente AFC is denied, replacement resources will not be online in time to meet the once-through-cooling ("OTC") retirement deadline for MGS 1 and 2. As the record shows, however, preferred resources—particularly storage—can be deployed very quickly. Moreover, existing generation resources can be converted and/or used as a temporary "bridge" while preferred resources are procured and brought online. Accordingly, the record does not support a finding that alternatives are infeasible due to the time necessary for procurement and deployment. Indeed, although a conflict with one project objective is not sufficient to render an alternative infeasible (see CEQA Guidelines § 15126.6(a), (b)), it appears from the record that the objective of meeting the OTC retirement deadline for MGS (FSA at 1-3) can be satisfied without building Puente.

a. Preferred Resources Can Be Procured and Deployed Quickly

The record shows that preferred resources, particularly storage resources and demand response, can be procured and deployed very quickly if public agencies make procurement and deployment a priority. Andy Schwartz from Tesla testified that the 20 MW, 80 MWh Mira Loma

project, procured as part of the Aliso Canyon Energy Storage offering, was installed and commissioned within three months of groundbreaking. (9/14/17 Tr. at 176:17-23.) Mr. Schwartz also testified that two other companies, Greensmith and AES, were able to bring their Aliso Canyon storage projects online within six months of the solicitation being directed by the CPUC. (*Id.* at 176:24-177:4.) Mr. Schwartz further testified that Tesla participated in the demand response auction mechanism ("DRAM") program, under which about 200 MW of demand response contracts were executed with delivery dates in 2018 and 2019. (*Id.* at 177:5-13.) As Mr. Schwartz observed, this shows "the timeliness with which these projects can come to fruition and begin delivering those benefits to customers." (*Id.* at 177:13-15.) Mr. Schwartz also pointed out that California utilities are statutorily obligated to procure a substantial amount of storage in the next few years; a preferred resources solution to the Moorpark capacity requirement would help satisfy SCE's obligation to procure hundreds of megawatts of storage. (*Id.* at 187:3-188:7.)

Randir Sekhon testified that SCE was able to move expeditiously on the Aliso Canyon Energy Storage RFO largely because the CPUC adopted a resolution directing the utilities to move quickly. (9/14 17 Tr. at 244:4-14.) In order to move quickly, SCE sought developers with existing sites and interconnections, and accelerated other projects already in the works. (See *id.* at 245:4-24.) Nothing in Mr. Sekhon's testimony indicates that a similar effort would be impossible here. The CPUC could direct SCE to conduct a rapid solicitation and procurement of preferred resources. SCE and developers could respond, as they did in the Aliso Canyon solicitation, by looking for existing sites with existing interconnection facilities in the Moorpark sub-area. There is no evidence, in Mr. Sekhon's testimony or elsewhere in the record, that no such sites and facilities exist.

Brian Theaker pointed out in his written testimony that preferred resources are sometimes delayed. (See TN # 220971 [Exh. 1151, Expert Declaration of Brian Theaker in Response to CAISO Study] at 7-8.) Yet Neil Millar, from CAISO, confirmed that gas-fired power plants are sometimes delayed as well. (9/14/17 Tr. at 34:19-36:7 [discussing delay in bringing Carlsbad Energy Center online and resulting need for extension of OTC deadline for Encina facility].) The

record evidence also cautions against drawing any present negative inferences about the timing or availability of preferred resources from the fact that only a few preferred resources projects were bid into the 2013 Moorpark RFO. Matt Owens testified that in the years since the Moorpark RFO, both his company and the wider industry have expanded dramatically; during the same time period, costs have declined significantly. (9/14 17 Tr. at 179:7-181:13.) Tesla's Andy Schwartz confirmed that the industry has grown substantially in recent years. (9/14/17 Tr. at 181:15-22.) Mr. Schwartz testified that the response of preferred resources developers to a Moorpark RFO would likely be very different today than it was in 2013. (9/14/17 at 181:20-22.) On balance, the evidence in the record shows that an expedited preferred resources RFO in the Moorpark sub-area, under present industry conditions, would produce a robust response and a set of projects that could be deployed quickly.

b. Synchronous Condenser Conversions and Existing Resources Can Be Used as a Short-Term "Bridge" to Allow On-Time Retirement of OTC Facilities

Procurement and deployment of alternative resources may take time. But this alone does not render alternatives infeasible. James Caldwell laid out a scenario in which conversion of MGS 1 and 2 to synchronous condensers and execution of a year-to-year RA contract for MGS 3 could provide ample time to conduct a preferred resources RFO. (9/14/17 Tr. at 197:11-198:22.) Neil Millar testified that the conversion of the Huntington Beach facility to a synchronous condenser was completed "very quickly" in order to provide a "bridge" until further resources necessary to replace San Onofre could be brought online. (*Id*. at 26:13-27:10.) Mr. Millar also stated that conversion of MGS 1 and 2 to synchronous condensers could be feasible. (*Id.* at 27:11-22.) Moreover, witnesses confirmed that a synchronous condenser conversion project within an existing substation might not need an RFO, but rather potentially could be approved by CAISO through its transmission planning process. (See *id.* at 144:18-145:22 [testimony of Garry Chinn], 156:16-157:11 [testimony of Neil Millar].)

Dawn Gleiter testified that conversion of MGS 1 and 2 to synchronous condensers might not be feasible, might not produce the full 240 Mvar of reactive power identified under Scenario

2 of the CAISO Study, and might not be completed within eight months (as was the case with the Huntington Beach conversion). (See 9/14/17 Tr. at 275:2-277:22.) But all of the substantive assertions in Ms. Gleiter's testimony—for example, that a six-month engineering study would be required to determine whether conversion would be feasible (*id.* at 276:9-11) and that generators would potentially need to be relocated (*id.* at 277:20-22)—were grounded not in her own personal knowledge, but rather in hearsay statements attributed to Ms. Gleiter's "engineers," or "engineering team," or an unspecified "we" that seemed to refer to NRG as a whole. (See, e.g., *id.* at 275:4, 7, 18 ["we" conducted "high-level analysis"], 276:9 ["my engineering team has told me"], 277:18-19 ["I understand from my engineers"], 293:17-20 ["they told me . . . from their first-level screening" MGS 1 and 2 conversion would produce Mvar in the "low-200 range"].) Indeed, Ms. Gleiter conceded that her entire opinion on the feasibility of converting MGS 1 and 2 to synchronous condensers was based on "my team's assessment of whether or not that's possible." (*Id.* at 299:1-3.)

Again, under the Commission's rules, "[h]earsay evidence . . . shall not be sufficient in itself to support a finding unless it would be admissible over objections in civil actions." (Cal. Code Regs., tit. 20, § 1212(c)(3).) The vague, unattributed statements of unnamed "engineers" or "teams"—much less an unidentified "we" or "they"—would not be admissible over objections in a civil action, and cannot be used to support a finding.[14]

Even if Ms. Gleiter's testimony had an adequate foundation, it would not prove that Mr. Caldwell's alternative "bridge" scenario is infeasible. Mr. Millar of CAISO testified that reliability requirements could be met with less reactive power if there were more real power available. (291:3-7 ["if we have a smaller reactive control device we would need some other resource, more batteries, more something else, to still maintain system performance"].) The CAISO Study simply did not attempt to find an optimal balance of reactive control and real

[14] Again, the Center recognizes that the Hearing Officer overruled the City of Oxnard's objection to Ms. Gleiter's hearsay testimony, promising instead to "give it the weight that it's entitled to." (9/14/17 Tr. at 299:10-11.) Again, under the Commission's regulations, this hearsay testimony is entitled to little or no weight.

power. (*Id.* at 291:7-9.) Accordingly, if more real power could be procured through a preferred resources RFO, less reactive power—potentially within the range Ms. Gleiter suggested could be achieved by converting MGS 1 and 2 to synchronous condensers—could prove sufficient.

Finally, Mr. Caldwell suggested that MGS 3 could be kept in operation, perhaps by way of a year-to-year RA contract, only to ensure that reliability needs are met during the time necessary to procure preferred resources. (9/14/17 Tr. at 197:19-198:92.) The Applicant's expert, Brian Theaker, stated that it was not reasonable to assume that an "uncontracted resource" like MGS 3 would remain in operation (*id.* at 218:6-16), but a year-to-year RA contract would presumably address that concern.

In sum, ample evidence in the record shows that a preferred resources alternative to Puente is, in fact, feasible. By the same token, the record would not support a finding that preferred resources alternatives are infeasible. Because Staff's examination of alternatives has been deficient to this point, the Commission cannot approve Puente absent a full exploration of potentially feasible alternatives, including cost-effective variations on the CAISO Study scenarios outlined in the testimony of Dr. Karpa and Mr. Caldwell. Alternatively—and preferably—the Commission can and should simply deny the Puente AFC. Denial is necessary to clear the way for a preferred resources solicitation that will bring the Moorpark sub-area into step with California's overall climate and energy policy goals while avoiding yet another disproportionate environmental burden on the Oxnard community.

IV. The Commission Cannot Make the Findings Required to Override the Project's LORS Conflicts and Significant, Unmitigated Environmental Impacts

As discussed in the Center's Opening Brief (at 49-54), the Project cannot be approved unless the Commission makes specific findings under both the Warren-Alquist Act and CEQA.[15] As the discussion above and in the Center's Opening Brief makes clear, those findings cannot be made on the current record.

[15] Although the Center addressed the applicable legal standards in its Opening Brief, those standards are once again summarized below for the Commission's convenience.

A. Warren-Alquist Act

In order to approve a project that conflicts with LORS, the Commission must make two independent findings: (1) that public convenience and necessity require the project, and (2) that there are not more prudent and feasible means of achieving public convenience and necessity. (§ 25525; Cal. Code Regs., tit. 20, §§ 1752(k), 1755(b).) "[T]he Commission has consistently regarded a LORS override [as] an extraordinary measure which . . . must be done in as limited a manner as possible." (*Eastshore Energy Center,* Final Commission Decision, October 2008 (06-AFC-6) CEC-800-2008-004-CMF, at p. 453 [quotation omitted].) Where, as here, the proposed project is in the coastal zone, the Commission's decision must include the "specific provisions to meet the objectives of Division 20 (commencing with Section 30000) as may be specified in the report submitted by the California Coastal Commission pursuant to subdivision (d) of Section 30413, unless the commission specifically finds that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible." (§ 25523(b).) Moreover, "[i]f the commission finds that there is noncompliance with a state, local, or regional ordinance or regulation in the application," before considering an "override" the Commission "*shall consult and meet with the state, local, or regional governmental agency* concerned to attempt to correct or eliminate the noncompliance." (§ 25523(d)(1) [emphasis added].)

1. The Commission Cannot Find that Public Convenience and Necessity Require the Project

The Applicant bears the burden of presenting substantial evidence to support a finding that public convenience and necessity require this project. (See Cal. Code Regs., tit. 20, § 1748(d).) The phrase "public convenience and necessity," depending on the facts presented, can mean anything from "indispensable" to "highly important" to "needful, requisite, or conducive." (*San Diego & Coronado Ferry Co. v. Railroad Com. of California* (1930) 210 Cal. 504, 511-12.) A more recent decision defines the phrase as meaning "a public matter, without which the public is inconvenienced to the extent of being handicapped in the practice of business or wholesome pleasure or both, and without which the people of the community are denied, to their detriment,

that which is enjoyed by others similarly situated." (*Luxor Cab Co. v. Cahill* (1971) 21 Cal.App.3d 551, 557-58.) In *Eastshore*, the Commission stated that its practice is to balance the benefits of each project against the public purposes of the LORS with which it conflicts. (See *Eastshore* at p. 455.)

The record shows that public convenience and necessity do not require this Project, and as a result it cannot be certified. Meeting local capacity needs and avoiding grid disruptions in the Moorpark sub-area is certainly important, but the Puente Project is not the only means of achieving those goals. Applicant's witnesses discussed the downsides of load shedding at length (see, e.g., 9/14/17 Tr. at 219:12-220:1), but Neil Millar, CAISO's witness, confirmed that in a N-1-1 contingency during a 1-in-10 peak demand event, load shedding may occur even with Puente. (*Id.* at 284:8-13.)

The City of Oxnard's witness, James Caldwell, put an even finer point on it: "LCR mitigation is the sole value for the $300M Puente project. There is a large surplus of generic natural gas plants in California, and this surplus looms large well into the future. All of the identified 'need' for new gas fired resources in the past 7 to 10 years arises not from system requirements for generic capacity or flexibility to integrate renewables but for local contingency related reliability considerations like the identified Moorpark LCR need." (Exh. 3090 at 5-6.) Outside those extreme conditions, however, there is simply no need for additional gas-fired capacity. Mr. Caldwell testified that preliminary modeling for the Integrated Resource Planning process currently underway at the CPUC "found no need for new natural gas plants like Puente for system capacity under a broad range of load and resource scenarios." (*Id.* at 6.) There are between 4,000 and 6,000 MW of existing gas-fired plants that are not needed for capacity or flexibility, and thus are at risk of early retirement; most of these plants "are significantly more efficient than and at least as flexible as Puente." As a result, "leaving aside for a moment the legitimate question of how to meet the LCR need for the Moorpark area, Puente will be one of the highest cost facilities on the grid, will have no system capacity value, and no net renewable integration value." (*Id.* at 6-7.)

Furthermore, as Mr. Caldwell testified, Puente "will not even be very good at performing its single remaining duty of being on standby in case of the rare but otherwise serious loss of the major electric transmission corridor into the Moorpark area" because "[a]t 262MW on one large shaft, Puente will place all of the reliability eggs in one basket." (*Id.* at 7.) In other words, if something goes wrong and Puente is not available when called upon to meet local capacity needs, the system will be short hundreds of megawatts from one facility, rather than just a few megawatts from a more distributed network of preferred resources. Moreover, as the City of Oxnard and Sierra Club have shown, Puente is highly vulnerable to flooding and sea level rise, which undermines its reliability value. And, as CEJA and FFIERCE have established, Puente will impose disproportionate impacts—that is, impacts not imposed on other communities within the Moorpark sub-area—on a community already bearing a heavy burden of environmental injustice. This is hardly the type of project that could be described as indispensable, highly important, or needful. (See *San Diego & Coronado Ferry Co.*, *supra*, 210 Cal. at 511-12.) The Applicant has not met its burden of establishing—and the Commission cannot find on this record—that the Project is required for public convenience and necessity.

2. The Commission Cannot Find that There Are Not More Prudent and Feasible Means of Achieving Public Convenience and Necessity

Even if public convenience and necessity could be established, the Commission still could not make the required finding that there are not more prudent and feasible means of achieving it. As discussed in detail in Part III, above, the record—including the CAISO Study and testimony submitted in response thereto—established that there are, in fact, feasible means of meeting local capacity requirements with preferred resources, and without continuing to impose disproportionate pollution burdens on the Oxnard community.

B. CEQA

Although certified regulatory programs are exempt from certain requirements generally applicable to environmental impact reports under CEQA, the core policy goals and substantive standards of CEQA still apply. (*Sierra Club v. Bd. of Forestry* (1994) 7 Cal.4th 1215, 1229-30;

POET, LLC v. State Air Res. Bd. (2013) 218 Cal.App.4th 681, 714.) Consistent with CEQA's fundamental substantive requirements, the Commission may not approve a Project if there are feasible mitigation measures or alternatives available that would lessen or avoid its significant environmental effects. (§§ 21002, 21002.1(b), 21081; Cal. Code Regs., tit. 20, § 1748(b)(5).) If the Commission elects to proceed with the Project despite its significant and unavoidable environmental impacts, it must adopt formal findings that specific considerations render infeasible mitigation measures and alternatives to reduce or avoid those impacts, and must further find that specific benefits of the project outweigh its significant environmental effects. (§ 21081(a)(3), (b); Cal. Code Regs., tit. 20, § 1748(b)(5)(B).) All such findings must be supported by substantial evidence in the record. (CEQA Guidelines §§ 15091(b), 15093(b).)

As discussed in the Center's Opening Brief (at 49), the Commission cannot yet make a decision under CEQA or adopt findings because its analysis of environmental impacts and alternatives remains incomplete. Even if the Commission could proceed to a decision, however, it could not make the findings required under CEQA on the current record. As shown in the Center's briefs and the briefs of the other intervenors, Puente will have a number of significant, as-yet-unmitigated environmental impacts. The Commission has not found, and cannot find, that mitigation of those impacts is infeasible; with respect to air quality, for example, the Commission could impose a capacity factor limitation of 11 percent, and even if the facility were allowed to operate beyond that level Staff's witness conceded that additional mitigation *would* be feasible and therefore would be required. (See Center Opening Br. at 42, citing testimony of Gerry Bemis, 2/7/17 Tr. at 119:11-19.) Moreover, as discussed in Part III, above, the record (including the CAISO Study and testimony submitted in response thereto) establishes that there are feasible alternatives that could avoid or reduce many of Puente's environmental impacts, including air quality impacts, environmental justice impacts, biological resources impacts, and hazards related to flooding and sea level rise. The Commission has not made, and cannot make, findings that these alternatives are infeasible on the current record. (See Part III.B, *supra*.) Finally, for the same reasons that the Puente project is not required for public convenience and

necessity, the Project lacks specific, overriding benefits that could justify proceeding with the project notwithstanding its significant environmental impacts. The Commission thus cannot approve this Project in accordance with CEQA.

V. CONCLUSION: The Commission Should Deny the Application

For all of the foregoing reasons and the reasons stated in the Center's Opening Brief and the briefs of the other intervenors, the Commission should not approve—and indeed cannot lawfully approve—the application on the current record. Accordingly, the application should be denied.

Respectfully submitted,

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Dated: September 29, 2017