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STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:	)	Docket No. 06-AFC-6
	)	
Application for Certification for the	)	
Eastshore Energy Center in Hayward	)	December 7, 2007
by Tierra Energy of Texas	)	

Staff's Brief on Override Issues

At the Prehearing conference for the Eastshore Energy Center (EEC) project, the Committee presiding over the proceeding offered parties the opportunity to file briefs identifying the appropriate standard for an California Energy Commission (Commission) finding that an application for certification should be granted notwithstanding the proposed project's noncompliance with an applicable state, regional, or local law, ordinance, regulation, or standard (LORS). This is commonly referred to as a LORS override, and this is staff's brief on that issue. Based on applicable statutory language and relevant case law, we conclude that the Commission has substantial discretion in making the findings required by statute to approve a project that does not conform with LORS.

I. Public Resources Code Section 25525 Provides the Commission with Multiple Options When a Project Does Not Conform with LORS.

Public Resources Code, section 25525 states that:

> The commission shall not certify any facility contained in the application when it finds, pursuant to subdivision (d) of Section 25523, that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that such facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity. In no event shall the commission make any finding in conflict with applicable federal law or regulation. The basis for such findings

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shall be reduced to writing and submitted as part of the record pursuant to section 25523.

(Pub. Resources Code, § 25525.)

When considering an override decision, there are three potential actions the Commission may take. First, it may determine that the project is not required for public convenience and necessity or that, even if it is, there are more prudent and feasible means of achieving such public convenience and necessity, and deny the application for certification. Second, the Commission may determine that the project *is* required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity, but still decide not to override. (This might occur if there are also unmitigable significant adverse impacts, reliability concerns, or other problems created by the project.) Third, it may determine that the project *is* required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity, and grant the application for certification (assuming that all other applicable legal requirements are met).

Regardless of its ultimate decision, the Commission must, in each case where an override is considered, describe the factors that it evaluated in determining whether the facility is required for the "public convenience and necessity" and whether "prudent and feasible alternatives" exist. It must also explain how the evidence presented in the course of the proceeding supports its findings that those factors are or are not present and how they were weighed in reaching a decision on override. (Pub. Resources Code, § 25525.)

II. <u>The Meaning of "Required for Public Convenience and Necessity"</u>

There is no judicial decision interpreting Public Resources Code, section 25525. However, a number of decisions address the phrase "public convenience and necessity" as it appears in Public Utilities Code, section 1001. That section

requires utilities regulated by the California Public Utilities Commission (CPUC) who wish to use ratepayer funds to construct a facility to obtain a certificate finding "that the present or future public convenience and necessity require or will require such construction." (Pub. Util. Code § 1001.) The decisions interpreting "public convenience and necessity" as the phrase is used in Section 1001 are relevant in interpreting the same words in Public Resources Code, section 25525, because there is a "close relationship" between the CPUC's review in granting certificates of public convenience and necessity (CPCNs) and the Commission's siting case review. (See *County of Sonoma* v. *State Energy Resources Conservation and Development Commission* (1985) 40 Cal.3d 361, 220 Cal.Rptr. 114.)[1] In addition, where the Legislature uses a phrase in one statute that also appears in another statute on a similar subject, the phrase in the former statute is presumed to have the same meaning and should be given the same interpretation that the courts have given to the phrase in the latter statute, absent evidence of legislative intent to the contrary. (*Building Material & Construction Teamsters' Union* v. *Farrell* (1986) 41 Cal.3d 651, 665, 224 Cal.Rptr. 688, 696.)

It is well-settled under the judicial decisions on Public Utilities Code, section 1001 that "public convenience and necessity" has a broad and flexible meaning. "The phrase 'public convenience and necessity' cannot be defined so as to fit all cases." (*San Diego & Coronado Ferry Co.* v. *Railroad Commission* (1930) 210 Cal. 504, 511, 292 P. 640, 643.[2]) Thus, in any individual case, "it is within the discretion of the [CPUC] to determine the factors material to public convenience and necessity." (*California Motor Transport Co.* v. *Public Utilities Commission* (1963) 59

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[1] Sections 1001 and 25525 are not exactly the same. Nevertheless, interpretations of "the present or future public convenience and necessity require or will require" in Section 1001 are applicable to "required for the public convenience and necessity" in Section 25525. There is no meaningful distinction between the phrases. In the Geysers 16 proceeding, the Commission stated that "Public Utilities Code section 1001, and administrative and judicial interpretations thereof, shall be used in determining whether the proposed facility is 'required for the public convenience and necessity.'" (Geysers 16 Decision, p. 104.)

[2] Before 1946, the CPUC was named the Railroad Commission.

Cal.2d 270, 275, 28 Cal.Rptr. 868, 871-872.) Moreover, as the court notes, "necessity" does not have its ordinary meaning:

> When the statute requires a certificate of public convenience and necessity . . . the word "necessity" is not used in its lexicographical sense of "indispensably requisite." If it were, no certificate of public convenience and necessity could ever be granted. The first telephone was not a public necessity under such a definition, nor was the first electric light . . . However, any improvement which is highly important to the public convenience and desirable for the public welfare may be regarded as necessary. If it is of sufficient importance to warrant the expense of making it, it is a public necessity. [Citation.] A thing which is expedient is a necessity. [Citation.] . . . A strong or urgent reason why a thing should be done creates a necessity for doing it. [Citation.] The word connotes different degrees of necessity. It sometimes means indispensable; at others, needful, requisite, or conducive. It is relative rather than absolute. No definition can be given that would fit all statutes. The meaning must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found. [Citation.] . . .

(*San Diego Ferry*, 292 P. at p. 643 (quoting *Wabash, C. & W. Ry. Co.* v. *Commerce Commission*, 309 Ill. 412, 418 – 419,141 N.E. 212, 214.)

In determining "the factors material to" whether a facility is required for public convenience and necessity under Section 25525, the Commission has broad discretion. (See *California Motor Transport Co.*, 28 Cal.Rptr. at pp. 871-872.) However, this discretion is not unfettered. The California Supreme Court has stated, "[t]he meaning [of 'public convenience and necessity'] must be ascertained by reference to the context, and to the objects and purposes of the statute in which it is found." (*San Diego Ferry*, 292 P. at p. 643.) Therefore, the Commission should look to the policies expressly set forth in its enabling statute, the Warren-Alquist Act (Pub. Resources Code, section 25000 et seq.), and in Commission regulations and policy reports, such as the Integrated Energy Policy Report recently adopted by the Commission. If the Commission determines that the construction and operation of a facility will assist in meeting these policies, it may determine that the project is required for the public convenience and necessity.

III. The Meaning of "Prudent and Feasible Alternatives"

Once the Commission has determined that a proposed project does not comply with a LORS, has consulted and met with the appropriate agency to try to correct or eliminate the noncompliance, has been unable to correct or eliminate the noncompliance, and has determined pursuant to Public Resources Code, section 25525 that the proposed facility is "required for public convenience and necessity", one step remains: it must determine whether there are "more prudent and feasible means of achieving such public convenience and necessity."

A. The Scope of Alternatives That Must Be Considered

There is no clear statutory or case law guidance on the scope of alternatives that must be considered. Clearly, only alternatives that would achieve, in whole or in part, the purpose of the proposed facility should be considered. (*Arizona Past and Future Found* v. *Lewis* (9th Cir. 1983) 722 F.2d 1423, 1428.) As the Commission stated in its decision on the Geysers 16 application for certification, "the Committee shall require that the applicant address only alternatives which appear to reasonably substitute for the applicant's proposal." (Geysers 16 Decision, p. 106.) And certainly the scope of alternatives should encompass only those that would avoid, either completely or partially, the LORS noncompliance of the proposed facility.[3] Beyond that, though, it is theoretically possible to consider an overwhelming number of alternatives. "However, proof of the nonexistence of [more prudent and feasible] alternatives should not be limitless and require the applicant to prove the nonexistence of alternate sites for its facility at each of the 360 degrees of the compass and all other possible electrical or engineering options." (*Id.* at p. 105-106.) "The proper inquiry is not whether

[3] An alternative could "partially" avoid LORS noncompliance by causing noncompliance that is less severe in degree, time, or space. For example, an alternative generating technology might emit fewer pollutants, but still cause a violation of a state ambient air quality standard; an alternative powerplant site might result in less frequent violations of a noise ordinance; an alternative transmission route might reduce the number of miles through which a line would traverse land in violation of a county general plan.

more options remain to be examined – for that will be true always – but whether enough have been examined to permit a sound judgment that the study of additional variations is not worthwhile." (*Eagle Foundation* v. *Dole* (7th Cir. 1987) 813 F.2d 798, 807.)

B. The Meaning of "Prudent and Feasible"

There is a long line of cases interpreting the phrase "feasible and prudent" as it appears in several federal statutes governing transportation projects.[4] The leading case is *Citizens to Preserve Overton Park* v. *Volpe* (1971) 401 U.S. 402 [91 S.Ct. 814, 28 L.Ed.2d 136]) (*Overton Park*). In *Overton Park* the U.S. Supreme Court considered the meaning of a statute stating that the Secretary of Transportation "shall not approve any program or project which requires the use of any . . . land from a public park . . . unless . . . there is no feasible and prudent alternative to the use of such land . . ." (23 U.S.C.A., section 138)

At issue was a federal highway proposed to be built through Overton Park, a public park in Memphis. The legal question was whether the Secretary could simply balance the benefits and disbenefits of the proposed route and non-parkland alternatives, or whether he had to give substantial preference to the alternatives. The Court initially addressed the meaning of "feasible," stating that the Secretary could find that no alternatives were feasible only if "as a matter of sound engineering it would not be feasible to building the highway along any other route [than the proposed route]." (401 U.S. at p. 411 [91 S.Ct. at p. 821] (footnote omitted).) The rest of the *Overton Park* opinion, and the opinions of the other courts that have considered the meaning of "feasible and prudent," focus solely on the meaning of the word "prudent."[5]

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[4] There is no meaningful distinction between "prudent and feasible" and "feasible and prudent"; therefore, cases interpreting one phrase are applicable in interpreting the other.

[5] If "feasible" in Section 25525 is interpreted according to *Overton Park*, we too can focus only on "prudent." An alternative view of "feasible" in Section 25525 is that it has the same meaning that it does in CEQA. CEQA states that "feasible" means "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic,

With regard to the meaning of "prudent," the Court noted that the statute gave "paramount importance" to the preservation of parkland. (401 U.S. at pp. 412-413 [91 S.Ct. at p. 822].) The Court therefore rejected an interpretation of "prudent" that would call for a simple balancing of all relevant factors, with no greater weight to be given to any particular factor:

> Respondents [the Secretary of Transportation and state officials supporting the parkland route] argue . . . that the requirement that there be no other "prudent" route requires the Secretary to engage in a wide-ranging balancing of competing interests. They contend that the Secretary should weigh the detriment resulting from the destruction of parkland against the cost of other routes, safety considerations, and other factors, and determine on the basis of the importance that he attaches to those other factors whether, on balance, alternative feasible routes would be "prudent." But . . . if Congress intended these factors to be on an equal footing with preservation of parkland there would have been no need for the statutes. . . . [P]ublic parks were not to be lost unless there were truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached extraordinary magnitudes. If the statutes are to have any meaning, the Secretary cannot approve the destruction of parkland unless he finds that alternative routes present unique problems.

(401 U.S. at pp. 411-413 [91 S.Ct. at pp. 821-822] (underline added).)

Thus, if the *Overton Park* interpretation of "prudent" were applied to Section 25525, the Commission could approve a facility that did not comply with a state, regional, or local LORS only if all alternatives had (1) adverse effects that "reached extraordinary magnitudes" or (2) "unique problems." (401 U.S. at p. 413 [91 S.Ct. at p. 822].)

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environmental, social, and technological factors." (Pub. Resources Code, § 21061.1; see also tit. 14, Cal. Code Regs., § 15361, which adds "legal" to the list of factors.) However, even using the CEQA definition of "feasible," it appears that any "prudent" alternative would have to be "feasible" – or, to state the obverse, any alternative that is *not* "capable of being accomplished in a successful manner within a reasonable period of time" would not be "prudent." Under either view of "feasible," then, the meaning of "prudent" will control the meaning of the entire phrase. We will therefore focus on the meaning of "prudent."

However, two important factors support the conclusion that the stringent test of *Overton Park* should *not* be applied to Commission LORS overrides. First, the federal statutes at issue in *Overton Park* contained an express declaration of policy that "special effort" should be made to preserve parklands, leading the Supreme Court to find that parkland protection was of "paramount importance." (401 U.S. at pp. 412-413 [91 S.Ct. at p. 822].) By contrast, there is no declaration that LORS conformity is of paramount importance in the Warren-Alquist Act. Second, under the federal statutes, the existence of <u>any</u> "feasible and prudent" alternative prevented approval of highways through parkland. However, under the Warren-Alquist Act, the existence of a "prudent and feasible" alternative does not prevent an override. Rather, only if the Commission finds an alternative that is "<u>more</u> prudent and feasible" is it prohibited from issuing a LORS override. (Pub. Resources Code, § 25525.) Thus, the statutory framework that underlies Public Resources Code, section 2525 is very different from that governing federal transportation projects, and there is no indication that the California Legislature intended to provide the same level of protection to local, state, or regional LORS as the federal government provides to protection of publicly-owned parks, recreational areas, wildlife and waterfowl refuges, and historical sites. As a result, the stringent *Overton Park* test should not be applied in making Section 25525 findings.

In addition, even federal cases interpreting the same statute but decided after *Overton Park* indicate a retreat from the stringent test expressed in that case. The most prominent is *Eagle Foundation, Inc.* v. *Dole* (7th Cir. 1987) 813 F.2d 798, in which the court of appeals upheld a determination by the Secretary of Transportation that all feasible alternatives to a highway route through parkland were imprudent. Although the court gave lip service to *Overton Park* as the controlling authority, it interpreted "prudent" much more broadly than the Supreme Court did in that case. In *Overton Park* the Supreme Court held that any non-park alternative is "prudent" unless its problems are "unique" or of "extra-

ordinary magnitude." (401 U.S. at p. 413 [91 S.Ct. at p. 823].) As the *Eagle Foundation* court put it, a literal reading of *Overton Park* would render an alternative imprudent only if it presented "one whale of a problem" or "a lollapalooza of a problem." (813 F.2d at p. 805.)

The *Eagle Foundation* court stated that the Supreme Court could not have meant what it said: "Nothing in the language or legislative history [of the statute] suggests such an extreme position, and the statutory use of 'prudent' cuts the other way. [Citation.] . . . *Overton Park* was being emphatic, not substituting 'unique' for 'prudent' in the text of [the statute]." (813 F.2d at p. 805.) Thus, although the court stated that there should be a "strong presumption" against the use of parkland, it ultimately allowed a simple balancing test: if an alternative is worse than a parkland proposal, the alternative may be considered imprudent: "It would be imprudent to build around the park if the Secretary were convinced that the aggregate injuries caused by doing so exceeded those caused by reducing the size of the park." (*Id.* (underline added); see also *Hickory Neighborhood Defense League* v. *Skinner* (4th Cir. 1990) 910 F.2d 159, 163.)

A less stringent standard than that found in *Overton Park* is further supported by an examination of the use of the phrase "feasible and prudent" in the laws of other states. For example, the state of Alaska has enacted several regulatory provisions governing coastal development projects. These provisions require a permitting agency to assess whether there are feasible and prudent alternatives to the proposed project. (Alaska Admin. Code, tit. 6, § 80.040 et seq.) The regulations define "feasible and prudent" as meaning "consistent with sound engineering practice and not causing environmental, social, or economic problems that outweigh the public benefit to be derived from compliance with the standard which is modified by the term 'feasible and prudent.'" (Alaska Admin Code, tit. 6, § 80.900.) Plainly stated, the state is required to perform a simple balancing test. And in one case addressing application of this standard,

the Alaska Supreme Court upheld the permitting agency's determination that an alternative was not prudent merely because developers were not interested in it. (*Ninilchik Traditional Council v. Noah* (1996) 928 P.2d 1206, 1213.)

We therefore conclude that the stringent *Overton Park* interpretation of "prudent" is not applicable to Public Resources Code, section 25525. However, the statutory scheme underlying the LORS override indicates that a simple balancing test is also inappropriate. The requirement that the Commission meet and consult with affected agencies to try to avoid or eliminate noncompliance and to proceed to an override only in the event that the noncompliance cannot be corrected indicates that the Legislature intends the Commission to carefully consider overrides and to override only in limited circumstances. Thus, the Commission should consider all relevant factors reasonably related to the statutory purposes that guide the Commission in determining whether "there are . . . more prudent and feasible means of achieving [the] public convenience and necessity," and weigh them, giving substantial -- but not controlling -- weight to the objective of avoiding LORS noncompliance. As in the Geysers 16 case, the Commission shall identify the factors it uses in this consideration, but need not give each of them equal weight. (Geysers 16 Decision, p. 113.) Similarly, in accord with Geysers 16, the applicant "need not show that all alternatives are not more prudent and feasible for each criterion" and parties opposing the applicant "need not prove that an alternative is more prudent and feasible for each criterion." (*Id.*, p. 104.)

IV. Past Commission Override Decisions

The conclusions we reach in this brief concerning the standards that are applicable to a Commission decision on LORS overrides are consistent with past Commission decisions regarding LORS overrides. We discuss those briefly here.

The first significant discussion of a LORS override in a siting case is found in the Commission's decision to certify the Geysers 16 project in 1981. The proposed transmission line in that case did not conform to multiple local land use plans. (Geysers 16 Decision, p. 72.) Therefore, the applicant requested that the Commission exercise its authority to override the nonconformity pursuant to Public Resources Code, section 25525. The Commission engaged in a detailed discussion of both public convenience and necessity, and prudent and feasible alternatives. With respect to the former, the Commission relied on findings in its then-current policy report supporting geothermal energy, as well as on the transmission losses that would occur without the project, and determined that the project was needed for the public convenience and necessity. (Geysers 16 Decision, p. 111.) The Commission also conducted a comprehensive analysis of various alternatives, and found that all but one – which only applied to a portion of the line – were not more prudent and feasible than the proposed project. The Commission examined of a variety of factors for each alternative, including conformity with laws and established policies, economic and environmental effects, social and community impacts, public health, reliability, integration with the existing transmission system, indirect impacts, timing, engineering factors, site suitability, and commercial availability of the proposed technology.

In 2001, the Commission certified the Metcalf project, notwithstanding nonconformity with local land use laws. As with Geysers 16, the Commission looked to whether the project was reasonably related to the goals and policies implemented by the Commission. (Metcalf Decision, p. 464.) In finding that the project was needed for the public convenience and necessity, the Commission relied on the fact that much of the power generated was likely to be consumed in the local community, and that the region uses more electricity than it generates. (*Id.* at p. 464-466.) The Commission also recognized that the state as a whole was in need of increased supplies of electricity. (*Ibid.*) In addressing prudent and feasible alternatives, the Commission supplemented the discussion found in its

Alternatives analysis. It found that the proposed project would not create any environmental impacts, would provide consumer benefits in the form of lower energy prices, reduced transmission losses, and the costs associated with "must-run" facilities, as well as increase local reliability. (*Id.* at 466 – 467.) In contrast, the alternatives would not provide the same level of system benefits, could create environmental impacts or other LORS nonconformities, and would create timing problems. (*Id.* at 468.)

In 2006, the Commission certified the Los Esteros facility, which, as proposed, was inconsistent with the applicable zoning designation. The Decision provides a discussion similar to that provided in the Metcalf decision. In finding that the project was needed for the public convenience and necessity, the Commission relied on the fact that the electricity produced by the facility would be consumed locally and that there was a need for local generation, as well as a need for more generation throughout the state. (Los Esteros Decision, p. 368.) In addressing prudent and feasible alternatives, the Commission focused most of its discussion the lack of impacts of the proposed project, as locational alternatives were infeasible, given that the project under review was reconfiguration of an existing simple-cycle project into a combined-cycle project. The Commission cited the lack of adverse environmental impacts associated by the proposed project as well as the environmental benefits that the project may create by displacing or encouraging the retirement of older facilities that do not meet the standards which newer facilities are required to meet. (*Id.* at p. 369.) It also referenced the fact that the project would provide transmission system benefits, would save consumers the cost of producing electricity at a less efficient facility, as well as prevent losses associated with generation at a more distant facility. (*Id.* at p. 370.)

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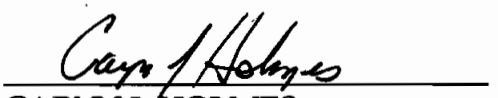
Conclusion

Should the Commission find that the EEC creates a LORS nonconformity and wish to consider whether an override is appropriate, there is a wealth of guidance available to assist it in making this determination. Language in other statutes, regulations, and court cases make it clear that the Commission has broad discretion to consider a range of factors in making its required determination. The Commission may use a liberal definition of "public convenience and necessity", as long as it bases it determination on the policies identified in its enabling statute and in policy reports it has adopted. In evaluating whether a more prudent and feasible alternative is available, the Commission should consider all relevant factors reasonably related to the statutory purposes and policies that guide the Commission and weigh them, giving substantial -- but not controlling -- weight to the objective of avoiding LORS noncompliance. Regardless of the result of such a deliberation, the Commission should be sure to carefully explain each factor it relies upon in determining whether the facility is required for the "public convenience and necessity" and whether "prudent and feasible alternatives" exist, as well as explain how the evidence presented in the course of the proceeding supports its findings that those factors are or are not present and how they were weighed in reaching a decision on override.

Date: December 7, 2007

Respectfully submitted,



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BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR THE EASTSHORE ENERGY CENTER IN CITY OF HAYWARD BY TIERRA ENERGY	**Docket No. 06-AFC-6** **PROOF OF SERVICE** **(Revised 12/4/2007)**

INSTRUCTIONS: All parties shall either (1) send an original signed document plus 12 copies or (2) mail one original signed copy AND e-mail the document to the address for the Docket as shown below, AND (3) all parties shall also send a printed or electronic copy of the document, which includes a proof of service declaration to each of the individuals on the proof of service list shown below:

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DECLARATION OF SERVICE

I, **Chester H. Hong**, declare that on **December 7, 2007**, I deposited copies of the attached **STAFF'S BRIEF ON OVERRIDE ISSUES** in the United States mail at Sacramento, CA, with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

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I declare under penalty of perjury that the foregoing is true and correct.

Chester H. Hong
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