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14 **STATE OF CALIFORNIA**  
15 **State Energy Resources**  
16 **Conservation And Development Commission**

17	_____	)	
18	In the Matter of:	)	Docket No. 06-AFC-6
19		)	
20	APPLICATION FOR CERTIFICATION	)	CITY OF HAYWARD
21	FOR THE EASTSHORE ENERGY	)	PREHEARING BRIEF REGARDING
22	CENTER	)	LEGAL STANDARDS UNDER
23		)	PUBLIC RESOURCES CODE §25525
24	_____	)	

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

<b>DOCKET</b>	
<b>06-AFC-6</b>	
DATE	DEC 07 2007
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1 the City and others, the Project does not comply with all applicable laws, ordinances,  
2 regulations and standards ("LORS"). The Committee has indicated to the parties that it  
3 nonetheless may consider certifying the Project pursuant to its authority under Public  
4 Resources Code § 25525 (i.e., an override). As requested by the Committee, the City  
5 submits this brief to identify and describe the legal standards that would apply to an  
6 override decision.<sup>1</sup>

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

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

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

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

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

3           Public Resources Code § 25525 provides:

4           “The commission ***may not certify a facility*** contained in the application when it  
5           finds, pursuant to subdivision (d) of Section 25523, that the facility does not  
6           conform with any applicable state, local, or regional standards, ordinances, or laws,  
7           ***unless*** the commission determines that ***the facility is required for public***  
8           ***convenience and necessity and that there are not more prudent and feasible***  
9           ***means of achieving public convenience and necessity.*** In making the  
10          determination, the commission shall consider the entire record of the proceeding,  
11          including, but not limited to, the ***impacts of the facility on the environment,***  
12          ***consumer benefits, and electric system reliability.*** ***The commission may not make***  
13          ***a finding in conflict with applicable federal law or regulation.*** The basis for these  
14          findings shall be reduced to writing and submitted as part of the record pursuant to  
15          Section 25523.”

16                     *(Emphasis added).*

17          Section 25525 begins with the general admonition that the CEC “may not certify a  
18          facility” that does not comply with LORS. We believe the Committee must approach its  
19          override analysis with a presumption that it should not certify the EEC because it does not  
20          comply with LORS. It is then the applicant’s burden – not Staff’s, the interveners’, or the  
21          Committee’s – to submit additional evidence to overcome this presumption and meet the  
22          standards of § 25525.<sup>2</sup>

23          In previous override decisions, the Committee has supported the finding that a  
24          facility “is required for public convenience and necessity” by citing to the CEC’s general  
25          purpose to approve facilities to provide electricity to California. *See Commission Decision,*  
26          *Los Esteros Critical Energy Facility II, Phase II, 03-AFC-2, Oct. 2006, pp. 367-368.*  
27          However, that statutory mandate alone is not enough. *See Topanga Assn. for a Scenic*  
28          *Community v. County of Los Angeles*, (1974) 11 Cal.3d 506, 517, fn. 16 (holding, in a case  
decided under the California Environmental Quality Act (“CEQA”), that a mere recitation  
of statutory language alone does not provide the necessary factual basis to approve a

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

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

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

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

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

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

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

6 The CEC regulations also contain a presumption against certifying a facility with  
7 unavoidable environmental impacts and noncompliance with LORS. *See* Title 20 Cal.  
8 Code Regs. §§ 1001-1003, 1101-1237, 1701-2031, 2301, 2305, 2306, 2308, 2501-2557.<sup>3</sup> In  
9 addition to the standard set forth in § 25525, the regulations add additional detail regarding  
10 the findings that the Committee must make to support an override. *See* §§ 1741, 1752,  
11 1755.

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

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

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

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24 <sup>3</sup> Unless otherwise stated, all citations to regulations refer to Title 20 Cal. Code Regs.

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

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

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

5 “(c) The commission *shall not certify* any site and related facilities for  
6 which one or more significant adverse environmental effects have been identified  
7 *unless the commission makes both of the following findings:*

8 (1) With respect to matters within the authority of the commission, that  
9 changes or alterations have been required in, or incorporated into, the project which  
10 mitigate or avoid the significant environmental effects identified in the proceeding.

11 (2) With respect to matters not within the commission's authority but within  
12 the authority of another agency, that changes or alterations required to mitigate such  
13 effects have been adopted by such other agency, or can and should be adopted by  
14 such other agency.

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

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

21 “(1) That *specific economic, social, or other considerations make infeasible* the  
22 *mitigation measures or project alternatives* identified in the application proceeding; and

23 (2) That the *benefits of the project outweigh the unavoidable significant adverse*  
24 *environmental effects* that may be caused by the construction and operation of the facility.


25 Put simply, in order to make a decision to override LORS or unavoidable  
26 environmental impacts, the Committee must be able to make findings that (1) all other  
27 mitigation is infeasible; (2) all other alternatives are infeasible; and, (3) Project benefits  
28

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

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

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