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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
HAYWARD BY TIERRA ENERGY**

DOCKET NO. 06-AFC-6
(AFC Accepted 11/8/06)

**EASTSHORE ENERGY CENTER'S BRIEF ON THE CALIFORNIA ENERGY
COMMISSION'S OVERRIDE STANDARD**

December 7, 2007

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Eastshore Energy Center ("Eastshore") provides this brief on the California Energy Commission's (CEC) standard for overriding state, local, or regional standards, ordinances, or laws and how that standard has been applied. This brief responds to the CEC's request for briefs on the CEC's standard for override. The request for briefs from all parties was made at the November 26, 2007 Eastshore Prehearing Conference. Eastshore supports the CEC's override standard as presented in the four cases below and, if necessary, encourages the CEC to apply that standard to the Eastshore project.

The CEC override standard, as set forth in California Public Resources Code section 25525 and applied in the four licensing cases described below, calls for the CEC to consider whether a project is required for public convenience and necessity and whether there are not more prudent and feasible means of achieving such public convenience and necessity. The public convenience and necessity element looks to whether the project in question would provide a local benefit to the community and add reliability to the state-wide system. The more prudent and feasible means element looks at whether the project, as proposed, is the most prudent and feasible means out of all the alternatives to achieve these benefits. This has been interpreted to require the CEC to consider the project's environmental impacts, efficiency, consumer benefits and contribution to electric system reliability.

The California Public Resources Code Override Statute

Section 25525 of the California Public Resources Code presents the statutory standard for override and reads as follows:

The commission may not certify a facility contained in the application when it finds . . . that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws, unless the commission determines that the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity. In making the determination, the commission shall consider the entire record of the proceeding, including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability.

This standard has been applied in the four cases presented below where the CEC has used its override power to override the local laws of the City of San Jose in licensing the Metcalf Energy Center and the Los Esteros II Project, as well as the Coastal Act and the El Segundo Local Coastal Program in licensing the El Segundo Power Plant Project. The CEC's first override decision occurred in the licensing of the Geysers Unit 16 (79-AFC-5) and is mentioned in the case *Sonoma County v. State Energy Resources Conservation and Development Commission* (1985) 40 Cal.3d 361 (the Geysers 16 Case).

The Geysers 16 Case

The decision in *Sonoma County v. State Energy Resources Conservation and Development Commission*, does not directly address the issue of a CEC override, but instead focuses on the issue of California Supreme Court versus superior court jurisdiction. The controversy arose when Pacific Gas and Electric (PG&E) filed an Application for Certification (AFC) for its Geysers Unit 16 and an appurtenant major electric transmission line facility. Sonoma County attempted to assert control over the transmission line siting process through its own county and city land use plans. For the first time in its history, the CEC chose to override the laws of the local government.

The CEC's decision on the AFC (79-AFC-5) established the standards for override that have been used in the remaining three cases presented below. These standards defined the showing necessary for a finding of public convenience and necessity and also emphasized consideration of alternatives to the applicant's proposal. These standards are more thoroughly discussed in the analysis of the more recent cases below.

The CEC's Override Decision in the Metcalf Energy Center Application for Certification

In Chapter IX of the CEC's September 2001 Decision to certify the Metcalf Energy Center (MEC), the CEC addresses its decision to override the local laws, ordinances, regulations and standards (LORS) of the City of San Jose.

Prior to issuance of the CEC's official override decision, the CEC staff published "Staff's Brief on Whether the Commission Should Make Override Findings" ("Staff Brief") which provides a more detailed discussion of CEC staff's rationale supporting an override.

Pursuant to California Public Resources Code § 25525, the CEC cannot license a project unless it finds "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." The CEC stated that this determination must be made on the totality of the evidence of record and consider environmental impacts, consumer benefits, and electric system reliability. (*Final Decision* at 461). "In essence, the lack of conformity of a project with LORS is to be balanced against its benefits." *Id.*

The CEC's Final Decision

The CEC's override analysis was divided into two sections: 1. whether a project is required for "public convenience and necessity" and; 2. whether there are not "more prudent and feasible means of achieving such public convenience and necessity." *Id.* at 463.

In deciding whether the MEC project was required for public convenience and necessity, the CEC first determined if MEC was reasonably related to the goals and policies of the Warren-Alquist Act (the enabling legislation). The Warren-Alquist Act expressly recognizes that electric energy is essential to the health, safety, and welfare of the people of California, and to the state's economy. Moreover, the Warren-Alquist Act declares it is the responsibility of state government to ensure the state is provided with an adequate and reliable supply of electrical energy. (See Public Resources Code § 25001).

The CEC found the evidence of record conclusively established that:

- The MEC project would generate electrical energy, and that energy would be consumed in the local area.

- The San Jose area uses much more electrical energy than is generated locally and, consequently, there is a need for more generation to address both demand and reliability concerns.
- The hallmark industries in the San Jose/Silicon Valley area are heavily dependent upon a reliable and adequate supply of electrical energy.

Id. at 464-465.

In addition to the local context, the statute also focuses on electricity's essential nature to the welfare of the state as a whole, recognizing the interconnected nature of the electrical grid and the interdependence of the people and the economy in one sector of the state upon the people and the economy in the balance of the state. *Id.* at 465. The CEC concluded: "since the MEC will provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy, we conclude that this project is required for public convenience and necessity within the meaning of section 25525." *Id.*

Under the Warren-Alquist Act, the existence of a prudent and feasible means of achieving the public convenience and necessity does not prevent an override; only the existence of a more prudent and feasible means prevents the CEC from overriding local LORS. *Id.* at 466. The Final Decision looked at the MEC project's impacts on the environment, consumer benefits, and electric system reliability, while giving substantial but not overwhelming weight to avoiding LORS noncompliance.

As explained throughout the Final Decision, the CEC found that MEC would not create any significant direct or cumulative adverse environmental impacts. In addition, the CEC specified numerous mitigation measures and Conditions of Certification to ensure that all of the project's impacts are reduced to below levels of significance.

As stated in the Final Decision, uncontested evidence of record established that MEC would provide consumer benefits in the form of lower energy prices. The evidence quantified these benefits in a range of \$1.2 billion to \$1.8 billion between 2003 and 2010. The MEC project would also reduce transmission losses and will displace approximately 945 MW of reliability-must-run generation, saving approximately \$11.4 million per year. *Id.* at 467.

The CEC also declared that the evidence of record is unrefuted in establishing that MEC would result in benefits insofar as the factor of electric system reliability is concerned and referenced the Local Systems Effects portion of the Final Decision.

In summary, the CEC made the following findings:

- The MEC project could be interconnected to the existing system without creating adverse reliability implications.
- The project would serve local loads and allow more power to flow from the Moss Landing generator into the local area.
- The project would reduce San Jose's vulnerability to catastrophic outages by providing real and reactive power and reduce the occurrence of voltage collapse problems.

Id. at 467.

The CEC specifically used its authority to override the provisions of the General Plan, zoning ordinances and other local LORS identified in the Final Decision, which would prohibit construction and operation of the MEC project at the site discussed.

Appendix E to the Final Decision identified all noncompliances based on the record.

CEC Staff's Brief on Whether the CEC Should Make Override Findings

The Staff Brief was similarly divided into two sections: 1. how the benefits of the MEC project outweighs the adverse environmental impacts; and 2. how there is no prudent and feasible alternative to the project.

In deciding that the benefits of the MEC project outweighed the adverse environmental impacts, the Staff Brief based its analysis on the fact that MEC would provide increased electrical system reliability and efficient use of energy. This conclusion was supported by the following factors: (1) San Jose needs new generation to achieve reliable electric service; and (2) the MEC site provides an ideal strategic location for new San Jose generation. *Staff Brief* at 4.

The Staff Brief asserted the City of San Jose was the focal point of vulnerability in the Bay Area, which was the most vulnerable area in the state for transmission outages. San Jose had substantially less local generation than any other major metropolitan area in California but

also had electric demand growth that was substantially greater than the state as a whole. Even assuming all newly licensed power plants in northern California were constructed, the San Jose area would not meet Western Systems Coordinating Council (WSCC) criteria for prevention of voltage collapse at some time between 2003 and 2008. *Id.*

The location of MEC had the unique benefit of interconnection with no adverse liability implications for the system. Seventy-five percent of transmission capability for the service area comes in at the Metcalf substation and will then serve local load, with important "thermal" benefits. *Id.*

The Staff Brief also concluded the MEC project would increase protection against catastrophic outages and rolling blackouts. The Staff Brief noted that San Jose was the most vulnerable urban area in California to catastrophic outages and the MEC location was strategically important for preventing N-2 outages. By providing 600 MW of real power and 400 MW of reactive power to a critical reliability point, the project would substantially improve electric reliability in San Jose and reduce both the number and duration of power outages. *Id.* at 5.

The Staff Brief found MEC would significantly reduce line losses, thereby increasing the efficient use of energy. The Staff Brief estimated MEC would reduce transmission congestion and system losses worth \$34 million in 2005. The "free megawatts" that would result from line loss reductions would have no additional costs or environmental impacts associated with them. *Id.*

The MEC project would reduce the current cost to ratepayers of "reliability must run" (RMR) generation in the Bay Area. The Independent System Operator (ISO) and Staff testified in agreement with the applicant that the RMR costs would be significantly reduced by MEC. The applicant calculated this benefit to be the displacement of 945 MW of RMR generation, saving approximately \$11.4 million per year. *Id.* at 6.

The Staff Brief noted MEC would avoid or defer major capital facilities. At least four transmission projects, comprising almost 60 linear miles of new line, could be deferred by MEC. In addition, the ADCC to Newark circuit breaker could be deferred, and 104 substations with inadequate voltage would meet criteria. *Id.*

The Staff Brief found MEC would lower ratepayer costs because the project would be more efficient than most power plants in the existing system. The applicant filed an extensive economic study indicating the project will provide a substantial savings to consumers – between \$1.2 billion and \$1.8 billion for the years 2003 to 2008. The deferral of transmission upgrades could avoid ratepayer costs of as much as \$42 million, and line loss reductions equal to \$23 to \$34 million. *Id.*

The Staff Brief determined that MEC would also displace older, dirtier plants. The MEC project would be a highly efficient, Best Available Control Technology (BACT) equipped, low-emissions generator and an applicant study showed it would inevitably displace less efficient generators with higher air emissions. *Id.* at 7.

Finally, the Staff Brief stated that MEC, by increasing electric reliability, would reduce the dependency on diesel backup generators and reduce or avoid the effect of electric outages. In addition to the economic consequences of blackouts, there also existed significant environmental and public health risks that could occur as a result of blackouts include traffic accidents and heat mortality. The MEC project would significantly mitigate the risk posed by such outages. *Id.*

The Staff Brief cautioned that the CEC should avoid a "false choice" with alternative sites. The Staff Brief warned that its decision to recommend an override stems from the idea that the CEC should not be placed in a position where a choice of one of the alternative sites would place the CEC in the same override position it was currently in (at the time the Staff Brief was written). *Id.* at 9-10.

There was really no "choice" between the alternative sites because of the timing issue. There was only one application on file, and that was for MEC. The identified project objective of being on line as soon as possible was critical and could not be met by any of the alternatives. There were no other applications for large power plants in San Jose. Therefore, at the time, the alternative site locations were not "feasible" under CEQA, in that they could not be accomplished "within a reasonable period of time, taking into account economic, environmental, legal, social and technological factors." *Id.* at 11 (citing Cal. Code of Regs., Title 14, § 15364).

The CEC's Override Decision in the Los Esteros Critical Energy Facility II Application for Certification

In its Final Commission Decision ("Final Decision"), the CEC noted, pursuant to the Alviso Master Plan, the land use designation for the Los Esteros Critical Energy Facility II (LECEF) project site was Light Industrial (LI). *Final Decision* at 308. According to the City of San Jose General Plan, the LI land use designation allowed a wide variety of industrial uses as long as any hazardous or nuisance effects were mitigated. Only low intensity uses (those with low employment densities) are permitted in the LI areas near Coyote Creek. Given the small number of operational employees and the applicant's intent to mitigate for air emissions and other potential impacts, the CEC concluded the project was consistent with the light industrial designation, and compatible with other light industrial uses in the area. However, the City of San Jose ("City") later adopted an ordinance to re-zone the area that included the LECEF site. The applicant applied to conform to the re-zoning and frequently met and conferred with the City but the City failed to act. Therefore, on May 26, 2006, CEC Staff filed its Motion for Override of LORS Noncompliance (Override Motion). *Id.* at 308-310.

Staff Motion for Override of LORS Compliance

The Override Motion began with the history of the conflict with the City. It then discussed, element by element, how the applicant addressed the City's air quality impact concerns with offsets and mitigation measures.

The Override Motion ended with the following statement:

The long story above describes an impasse. The impasse is based on factual issues regarding the significance [of] air quality impacts and the sufficiency of mitigation that have already been decided by the Committee based on evidentiary hearings in which the City participated. Those issues need not and should not be revisited by the Committee. Instead, the impasse should be overcome by the Commission acting to make "override" findings that Phase 2 is "required for the public convenience and necessity and that there are not more prudent means of achieving public convenience and necessity," as set forth in Public Resources Code section 25525. There is ample basis for such findings.

Override Motion at 19.

The Override Motion then argued the San Jose regional transmission system was studied intensively during the Metcalf AFC proceedings in 2000-2001. Because of the system benefits

recently studied for Metcalf, the Override Motion recommended the CEC should simply make the override finding, for which Staff would provide additional evidence in support. *Id.* at 19.

The CEC's Final Decision

Section VIII of the Final Decision addressed the subject of LORS override. Just as in the MEC override discussion, the LECEF Final Decision organized the discussion into: 1. whether the project is required for public convenience and necessity and 2. whether there are not more prudent and feasible means of achieving such public convenience and necessity.

In discussing public convenience and necessity, the Final Decision made three points. First, the Final Decision stated the evidence conclusively establishes that the LECEF project will meet the goals and policies of the Warren-Alquist act by generating electrical energy and having that energy consumed in the local area. *Final Decision* at 368.

Second, the evidence established that the San Jose area uses much more electrical energy than is generated locally, and consequently, there was a need for more generation to address both demand and reliability concerns. *Id.*

Third, the Final Decision noted the enabling statute focuses on electricity's essential nature to the welfare of the state as a whole and substantial additions to the state's generating system are needed. "Since the LECEF will provide a portion of the electrical energy supply essential to the well-being of the state's citizens and its economy, we conclude that this project is required for public convenience and necessity within the meaning of section 25525." *Id.*

In making the determination of more prudent and feasible means, the CEC must balance a variety of relevant factors, including the project's impacts upon the environment, consumer benefits, and electric system reliability as specified in the statute, while giving substantial but not overwhelming weight to avoiding LORS noncompliance. *Id.* at 369.

Looking at environmental impacts, the CEC found the LECEF would not create any significant direct or cumulative adverse environmental impacts. Furthermore, there were numerous mitigation measures and Conditions of Certification in place to ensure all of the project's impacts were reduced to below levels of significance. In fact, the LECEF could provide environmental benefits by displacing or encouraging the retirement of older plants which do not meet current environmental performance standards. *Id.*

The Final Decision found the LECEF was in an advantageous location from an electric system reliability perspective because it was next to the recently constructed Silicon Valley Power Switching Station. The LECEF would serve San Jose from the north and MEC would serve it from the south. The addition of LECEF Phase 2 power at this location would not contribute to any overloads in the transmission system but would instead slightly reduce existing overloads. Finally, generation of additional power at this location would make the system less susceptible to the loss of two critical transmission lines in the San Jose area. *Id.* at 370.

The conversion of the then-existing LECEF from simple-cycle to combined-cycle mode would result in an 8 percent increase in fuel efficiency. This would reduce the cost of producing electricity and the savings would be shared with consumers of electricity. *Id.*

In addition, the Final Decision determined that generating more power to meet San Jose's demand at LECEF rather than some more distant facility, would avoid transmission system losses of 9.1 MW in 2008, the net present value of that savings over a 20 year period would be \$17 to \$23.5 million, at the time of the Final Decision. *Id.*

Finally, with regards to consumer benefits, the Final Decision declared the LECEF would provide consumer benefits in the form of enhanced system reliability and efficiency and lower electricity prices, as described above. *Id.* at 371.

The CEC's Override Decision in the El Segundo Power Plant Project Application for Certification

This project had a potential conflict with the provisions of the Coastal Act and the City of El Segundo's Local Coastal Program (LCP). The CEC decided to override those LORS in its decision to certify the El Segundo Power Plant (aka El Segundo Redevelopment Project). Its findings are summarized below.

The CEC's Final Decision

Just as in the other override analyses, the CEC began by assessing whether the El Segundo project was reasonably related to the goals and policies of the enabling legislation (the Warren-Alquist Act). The El Segundo project satisfied this objective in that it would generate electricity, which would be available for consumption in the local area. *Final Decision* at 296.

In addition, the Final Decision noted the El Segundo project would provide electricity to the state as a whole. "The evidence establishes that the El Segundo project's duct-firing capability will provide the electrical system with flexible peaking capacity that is necessary to keep the electrical grid stable." *Id.* at 297. The CEC then explained the need for increased supplies of electrical energy in Southern California and throughout the state over the next several years. In fact, the CEC found the retirement of several aging power plants in the South Coast region, along with continued economic and population growth, were contributing to a tight supply-demand situation. *Id.*

The CEC asserted the El Segundo project would also serve the public convenience and necessity in several other ways because the project would:

- be located on the site of the existing El Segundo Generating Station and will make use of substantial existing infrastructure;
- reduce the impacts of the existing plant on the El Segundo and Manhattan Beach communities by replacing a 50-year-old facility with a cleaner, more efficient, and less visually-intrusive project;
- result in increased revenue to the City of El Segundo and other local jurisdictions from taxes, employment, and sales of services, manufactured goods, and equipment; and
- enhance the biological health of Santa Monica Bay.

Id.

The Final Decision then turned to the issue of more prudent and feasible means. In the "Alternatives" section of the Final Decision, the CEC found a review of alternative technologies, fuels, and the no project alternative lead to a conclusion that no feasible technology alternatives such as geothermal, solar, hydroelectric, or wind resources were capable of meeting the project objectives. *Id.* at 298.

Moreover, the CEC found the use of alternative generating technologies would not prove efficient, cost-effective or mitigate any significant environmental impacts to levels of insignificance. Plus, no significant environmental impacts would be avoided under the "no

project" alternative. The use of a dry cooling alternative was considered infeasible on the project site and would cause greater noise and visual impacts to the neighboring communities. *Id.*

The Final Decision stated that the net result of the potential use of any of the alternative sites or alternative cooling options appeared to be reasonably likely to create potential problems at least comparable to or greater than those encountered by the proposed project. Therefore, the various alternative proposals did not equate with a more prudent and feasible means of achieving public convenience and necessity. *Id.*

Conclusion

The CEC override standard, as set forth in California Public Resources Code section 25525 and applied in the four cases described above, calls for the CEC to consider whether a project is required for public convenience and necessity and whether there are not more prudent and feasible means of achieving such public convenience and necessity. The public convenience and necessity element looks to whether the project in question would provide a local benefit to the community and add reliability to the state-wide system. The more prudent and feasible means element looks at whether the project, as proposed, is the most prudent and feasible means out of all the alternatives to achieve these benefits. This has been interpreted to require the CEC to consider the project's environmental impacts, efficiency, consumer benefits and contribution to electric system reliability. Eastshore endorses the override standard set forth by the CEC in the Geysers 16, Metcalf Energy Center, Los Esteros II and El Segundo licensing cases and, if necessary, encourages the CEC to apply that standard to the Eastshore project.

DATED: December 7, 2007

DOWNEY BRAND LLP

By: 

Nicolaas W. Pullin

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PROOF OF SERVICE

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, Lois Navarrot, declare that on December 7, 2007, I deposited copies of the attached EASTSHORE ENERGY CENTER'S BRIEF ON THE CALIFORNIA ENERGY COMMISSION'S OVERRIDE STANDARD in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

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



Lois Navarrot