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

17 In the Matter of:

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 19
 20 **Application for Certification For the
 21 Eastshore Energy Center**

Docket No. 06-AFC-06

**CHABOT-LAS POSITAS COMMUNITY
 COLLEGE DISTRICT INTERVENORS'
 POST-HEARING BRIEF**

Date: December 17-18, 2007; January
 14, 2008

CEC: Jeffrey D. Byron
 Commissioner and Presiding
 Member

Hearing Officer: Susan Geffer

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**TO THE COMMISSION, COMMISSIONER BYRON, HEARING OFFICER
GEFTER, AND THE PARTIES AND THEIR ATTORNEYS OF RECORD:**

Intervenors Chabot-Las Positas Community College District (“District”) and Chabot Faculty Association (collectively “Chabot Intervenors”) hereby submit their post-hearing brief, requesting the Commission to deny certification to the Eastshore Energy Center (“Eastshore”). Allowing a second power plant in this minority and low income community would be a great injustice, resulting in violations of the principles of environmental justice and equal protection and endangering the public health of students and staff at Chabot College and the surrounding community.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

It is undisputed that the proposed site for the Eastshore Power Plant is located in an area that is predominantly minority and low income. As such, it is also undisputed that both the law, and the Energy Commission’s internal procedures, require that Energy Commission Staff (“Commission Staff” or “Staff”) analyze the possibility of disproportionate impacts of the proposed plant on this “environmental justice” community. Unfortunately, what the evidence also makes clear is that Commission Staff failed to conduct the required analysis. Rather, Staff’s inquiry circumvented critical steps that it identifies as part of its own procedure, and which the intervenors’ experts identified as essential to any sound environmental justice analysis.

Specifically, Staff constructed a framework for inquiry designed to ignore the very question that environmental justice analysis must ask: *Would the proposed plant cause a significant and disproportionate impact on the health, public services, air quality, etc., of the “environmental justice” community?* Instead, contrary to its own stated methodology, Staff asked: *does the proposed plant significantly impact air quality generally, public health generally, public services generally, etc.?* Because it answered these generalized questions in the negative, it reached the tautological conclusion that no environmental justice analysis was necessary. In other words, Staff reasoned that because the proposed plant did not cause any significant impacts on the general population, it could not disproportionately impact the environmental justice community. But of course, this conclusion only begs the question, because it does not permit analyzing whether and how the proposed plant might significantly impact the environmental justice population, when it does not significantly impact the population at large. And by failing to consider this possibility, Staff ignored the possibility of a profound disparate impact whereby the population at large is not affected, but the environmental justice community is significantly affected.

As discussed below, this failure violates both Staff’s own procedures, and the laws and constitutional principles that are the underpinnings for this procedure. Chabot Intervenors respectfully submit that in the face of this glaring failure, the application must be denied, or at

1 least delayed, until Staff conducts a proper environmental justice analysis. To grant the
2 application despite the inadequacy of Staff's analysis will render environmental justice a paper
3 tiger—all show, no teeth.

4 Additionally, Staff did not follow its regulatory and statutory duty of providing notice and
5 the opportunity to be heard to the District, although it is a local interested agency. Given that
6 public outreach is a core principle of environmental justice, and that the District serves an
7 "environmental justice" community, this failure is particularly troubling.

8 Finally, Staff did not correctly assess the socioeconomic impacts upon the District—
9 despite Staff's admission that the District constitutes a public service facility. For all of the above
10 reasons, the Chabot Intervenors respectfully requests the Commission to deny certification to
11 Eastshore.

12 II. FACTS

13 The District governs two community colleges in Alameda County--Las Positas College
14 located in Livermore, and Chabot College located at 25555 Hesperian Boulevard, in Hayward.
15 The District is a public agency that plays a significant educational and economic role in the
16 community. (Ed. Code, § 66700.) Chabot College is located less than one (1) mile northeast of
17 the Eastshore site, located at 25101 Clawiter Road in the City of Hayward. Chabot College is
18 located less than 1.5 miles northeast of the Russell City site. The proposed Eastshore plant sits in
19 between Chabot College and Russell City.

20 During the course of the hearing, Chabot Intervenors presented the testimony of three
21 separate witnesses in opposition to the Eastshore power plant, on grounds Commission Staff did
22 not conduct a proper environmental justice analysis, especially with respect to public health and
23 socioeconomics, in its Final Staff Assessment ("FSA") report (Exh. 200). Chabot Intervenors'
24 first two witnesses, Rachel Ugale and Dr. Carolyn Arnold testified by way of declaration, and
25 their testimony is unrefuted. No rebuttal testimony or evidence was proffered by any party.¹ Dr.
26 Susan Sperling testified as an expert in the field of environmental justice.

27 _____
28 ¹ Although given the opportunity to do so, no party cross-examined Ms. Ugale or Dr. Arnold, and no rebuttal
evidence was proffered or produced.

1 Chabot College employs approximately 226 classified staff (non-faculty members). Many
2 of these employees' jobs require them to work outside and engage in strenuous outside activities
3 for all or part of the day. These jobs include grounds maintenance, repairs, security,
4 transportation, and providing athletic training to the college's sports teams. (Exh. 602, Ugale
5 Testimony, at p. 2:4-11.) Chabot College's classified staff is very concerned that the Eastshore
6 plant may adversely affect the health of employees, because of their high level of exposure to the
7 outside during their employment. (*Id.*) The FSA nowhere considers the unique characteristics of
8 the affected population, included potential disproportionate impacts on the classified service of
9 Chabot College.

10 The cumulative impact of the recently-approved Russell City power plant and the
11 proposed Eastshore plant could also negatively impact student enrollment, which in turn threatens
12 staffing levels. (Exh. 602, Ugale Testimony, at p. 2:17-26.) Health concerns and fears caused by
13 the close proximity of both plants will negatively impact student enrollment, which in turn
14 threatens staffing levels. This is because the District's funding is keyed to student enrollment, and
15 if enrollment declines, so will funding. If student enrollment and funding decreases, staffing
16 would necessarily be reduced. (Exh. 602, Ugale Testimony, at p. 2:17-26.) The FSA, because it
17 failed to recognize Chabot College as a public service, nowhere analyzed the potential
18 socioeconomic impacts—such as impacts on enrollment—of the Eastshore plant.

19 During the course of a full academic year, Chabot College serves approximately 22,000
20 students, approximately 70 percent of whom are minorities. (Exh. 600, Arnold Testimony, at
21 p.2.) Almost 40 percent of the Chabot College students are in their family's first generation to
22 attend college and that 60 percent of the students are low income by either federal or local
23 standards. (Exh. 600, Arnold Testimony, at p.2:5-22.)

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1 **III. LEGAL ARGUMENT**

2 **A. COMMISSION STAFF IGNORED ITS INTERNAL PROCESS—**
3 **EVISCERATING ITS ENVIRONMENTAL JUSTICE ANALYSIS**

4 1. **Commission Staff’s Environmental Justice Impact Assessment**
5 **Analysis Requires Five Critical Steps**

6 As set out in Government Code section 65040.12, “‘environmental justice’ means the fair
7 treatment of people of all races, cultures, and incomes with respect to the development, adoption,
8 implementation, and enforcement of environmental laws, regulations, and policies.” (Gov. Code,
9 § 65040.12, subd. (e); see Exh. 200, at p. 2-4.) In compliance with this proposition, the Energy
10 Commission conducts an “environmental justice” analysis as part of its power plant application
11 review. (Exh. 200, at pp. 1-4 to 1-5; 7-1 to 7 -3.) As explained by Commission Staff expert,
12 William Pfanner, the Energy Commission’s methodology for assessing environmental justice
13 impacts is consistent with the federal Environmental Protection Agency 1998 Guidance, and is
14 composed of three primary factors: Demographics, Public Outreach and Impact Assessment.
15 (Dec. 17, 2007 TR at pp. 448:19-451:15, 471:3-472:21; Exh. 710 [California Energy
16 Commission’s Staff Approach to Environmental Justice].)

17 With respect to impact assessment, Commission Staff notes that the technical areas that
18 typically deal with environmental justice issues include: air quality, public health, hazardous
19 materials, noise, waste management, and transmission line safety and nuisance. (Exh. 200, at pp.
20 1-4, 7-1 to 7-3; Exh. 710 [California Energy Commission’s Staff Approach to Environmental
21 Justice].) Within each of these areas, technical staff conducts a five-step analysis:

- 22 a. Describe the existing setting.
- 23 b. **Analyze “unique circumstances,” if any, of the affected population.**
- 24 c. **Analyze the project’s direct, indirect and cumulative impacts.**
- 25 d. Assess and recommend appropriate mitigation.
- 26 e. Determine whether the project creates an unavoidable significant adverse impact
27 on the affected population and, if so, considers whether the impact is disproportionate.

28 (See http://www.energy.ca.gov/env-justice/staff_env_justice_approach.html,

1 administrative notice taken on Dec. 17, 2007, TR, at p. 340:20-23 & Exh. 710 (emphasis added).
2 Commission Staff witness William Pfanner testified that these five steps accurately described the
3 Commission's environmental justice process and the process that Staff utilized for the Eastshore
4 project. (Dec. 17, 2007, TR, at pp. 471:3-472:22.)

5 **2. Commission Staff Failed To Apply Its Own Process, Ignoring The**
6 **Unique Circumstances Of, And Cumulative Impacts On The**
7 **Environmental Justice Population**

8 As reflected in the Final Staff Assessment and the Staff witnesses' testimony,
9 Commission Staff ignored its stated procedures for analyzing "impact assessment." Although the
10 procedure described above entails five critical steps, Commission Staff witness Mr. Pfanner
11 admitted that Staff used only one combined step. He explained that, when preparing the Final
12 Staff Assessment, each technical discipline expert, such as ones for public health,
13 socioeconomics, and air quality, conducted its own environmental justice analysis as follows:

14 First, technical staff determined whether there was a significant impact identified under
15 CEQA or in compliance with LORS. (Dec. 17, 2007, TR, at p. 450:10-19.) Importantly, this
16 "significant impact" analysis was conducted in terms of the general population, *not* the affected,
17 environmental justice population.

18 Second, if Staff found no significant environmental impacts, or no non-compliance with
19 LORS, Staff found that there was no environmental justice issue. (Dec. 17, 2007, TR, at 450:20-
20 23.) However, if there were a significant impact, then Staff would consider whether there was a
21 disproportional impact on the environmental justice population. (Dec. 17, 2007, at p. 450:23-
22 451:1.)

23 Based upon Mr. Pfanner's summary, Staff erroneously concluded that—since there were
24 no significant impacts generally—there could not be disproportionate negative impacts on the
25 environmental justice community. In addition, since Staff did not find any significant impacts
26 upon public health, socioeconomics, and air quality, no such analysis was conducted in these
27 technical areas. (Dec. 17, 2007, TR, at 450:10-451:15.)

28 The serious error in this truncated approach was two fold. Staff omitted:

- 1 ■“step 2” -- Analyzing the “unique circumstances” of the affected community; and
- 2 ■“step 3” -- Analyzing the project’s direct, indirect and cumulative impacts.

3 a. Staff Ignored the Unique Circumstances of the Affected
4 Community

5 Staff illogically reasoned that, if there was no significant impact on the population at
6 large, it could not have a disproportionately negative impact on the environmental justice
7 population. (Exh. 200, at p. 7-2 [stating, with respect to Public Health, “According to the staff’s
8 health risk assessment, emissions from Eastshore would not contribute significantly to morbidity
9 and mortality in any age or ethnic group residing in the project area. Therefore, there would not
10 be a disproportional impact on an environmental justice population.” & with respect to
11 Socioeconomics, “The facility, as proposed, is consistent with applicable LORS. Therefore, there
12 would not be a disproportional impact on an environmental justice population.”]; Dec. 17, 2007,
13 TR, at p. 450:20-23.) By framing the issue in this manner, Staff never considered the possibility
14 that there could be negative impacts on the affected community that it did not detect by analyzing
15 impacts against the general population. If, instead, Staff had truly looked at the unique
16 characteristics of the affected population, as described in its procedures, this error would not have
17 occurred.

18 Staff witness Eric Knight asserted at hearing that, by measuring potential impacts against
19 “sensitive receptors” Staff reasonably concluded that there would be no negative impacts on the
20 affected population. Specifically, Mr. Knight pointed to portions of the “public health” section,
21 contending that Staff considered “asthma cases” and that it considered standards designed to
22 protect the “most sensitive members of the population.” (Dec. 18, 2007, TR at 12:6-13:20.)
23 However, Staff offered no evidence to support its conclusion that this narrow definition of
24 sensitive receptors (which appears to have been defined as infants, the elderly, and in some cases
25 asthmatics) corresponds to the “unique characteristics” of the affected population. Indeed, the
26 testimony of Drs. Sperling and Witt directly refuted this contention.

27 As expert witness Dr. Sperling explained, Commission Staff failed to conduct an
28 appropriate environmental justice analysis in two respects. First, she concluded that Staff did not

1 implement the methodology described in its own internal procedures. Second, she concluded that
2 the methodology it utilized was unsound and did not comport with accepted practices in the field.
3 Specifically, she explained that Staff improperly conducted its analysis of impacts on the general
4 population *before* examining the unique vulnerabilities and susceptibilities of affected
5 populations in proximity to the proposed site. (Exhs. 601 [Sperling testimony], 605 [Sperling
6 resume].) Dr. Sperling explained that Staff’s methodology—in which it assumed that the general
7 population contained “sensitive receptors”—was wholly inadequate to ensure that the potential
8 impacts on the environmental justice community had been considered. As she explained, Staff’s
9 narrow interpretation of sensitive receptors in terms of infants and elderly individuals in no way
10 captured the myriad ways that the siting of a power plant can significantly impact low income and
11 minority communities. (Dec. 17, 2007, TR, at p. 334:14-21.) Rather, people who fit within the
12 environmental justice categories (such as those with low income who then have poor access to
13 health care; those whose second language is English, and those who are minorities) are at a
14 special risk and do not have the same thresholds as the non-environmental justice communities.
15 (*Id.* at p. 335:22-336:19.)

16 Yet, these unique characteristics were made invisible by Staff’s approach. Indeed, Dr.
17 Greenberg admitted that Staff’s process nowhere took into consideration: (1) the population’s
18 income, (2) the population’s access to health care; (3) the population’s language abilities and
19 housing conditions; (4) the population’s potentially greater susceptibility to illness; and (5)
20 employment status. (Dec. 17, 2007, TR, at pp. 237:1-238:7, 239:20-240:11; Exh. 200, at pp. 4.7-
21 1, 4.7-5.)

22 b. Staff Failed To Consider the Project’s Direct, Indirect And
23 Cumulative Impacts On the Affected Population

24 In assessing the areas of socioeconomics, public health, and air quality, Staff determined
25 that there would be no impacts upon the population “at large,” and thus found no need to assess
26 potential cumulative impacts on the affected population. (See Exh. 200, at pp. 4.1-40 to 4.1.41
27 [air quality], 4.7-22 [public health]; 4.8-1 to 4.8-14 [socioeconomics].) Thus, Staff erroneously
28 cut short its environmental justice analysis as soon as it determined there were no significant

1 impacts on the general population. As such, Staff failed to consider the unique ways in which the
2 siting of the plant could cause negative cumulative impacts on the affected population. As
3 testified to by Dr. Sperling, as well as by the County’s expert witness Dr. Sandra Witt, (Dec. 17,
4 2007, TR, at p. 365:12-371:2), Commission Staff should have assessed the impacts upon the
5 unique environment before it.

6 As Dr. Sperling explained, and as clearly set out in the National Environmental Justice
7 Advisory Council (“NEJAC”) report, (Exh. 604), Staff’s methodology ignored the impact of
8 multiple stressors—which effectively masks the negative impacts on poor and low income
9 communities. Dr. Sperling testified that multiple stressors within a community could not be
10 understood in an additive fashion, as the FSA determined, but rather must be understood in terms
11 of a “synergy.” (Dec. 17, 2007, TR, at p. 335:14-21.) Dr. Sperling discussed the concept of
12 “cumulative impacts,” which was defined in the FSA, as “two or more individual effects which,
13 when considered together, are considerable or which compound or increase other environmental
14 impacts.” (Exh. 200, at p. 4.1-28 [citing CEQA Guidelines, § 15355.]) Such impacts can be
15 relatively minor and incremental, yet still be significant because of the existing environmental
16 background, particularly when considering other closely related past, present, and reasonable
17 foreseeable future projects. (*Id.*) As Dr. Sperling testified, cumulative impacts should be looked
18 at synergistically, because of an environmental justice community’s increased susceptibility to
19 multiple stressors. Dr. Sperling pointed out that Commission Staff failed to consider whether the
20 cumulative impacts resulted in a synergy. (Dec. 17, 2007, TR, at pp. 337:13-338:10.)

21 Dr. Sandra Witt, Director of Planning, Policy and Health Equity for the Alameda County
22 Public Health Department, similarly testified that poor health and premature death were not
23 randomly distributed in the county. (Exhs. 532, 533.) She stated that communities of color and
24 low income communities are disproportionately burdened by an abundance of environmental
25 hazards, including toxin-emitting power plants and other noxious pollution. She determined that
26 Commission Staff failed to reference any analysis of the existing burden of toxic pollution in the
27 area of the proposed power plant and thus effectively ignored the compounding effects of various
28 sources of toxicity (including non-airborne sources) to which residents in the surrounding

1 Hayward community are already exposed. (Exh. 532 at p. 2.) She testified that the potential for
2 multiple and varied air pollutants to act synergistically, rather than additively as assumed by
3 Commission Staff, required Commission Staff to perform an analysis of the overall toxic burden
4 associated with this site location. (*Id.* at p. 5.)

5 Ironically, Staff's witness Dr. Alvin Greenberg *agreed* with the NEJAC report that
6 communities with a population consisting of low-income and minorities, who typically have low
7 access to health care, have difficulty engaging in health care services, and have multiple stressors
8 in their lives, making them more susceptible to environmental impacts. (Dec. 17, 2007, TR at
9 248:1-249:4.) A socioeconomic stressor can include the lack of needed health care which could
10 lead to adverse effects. (Dec. 17, 2007, TR at 246:6-17.) Yet, Staff simply did not incorporate
11 these factors or concepts into their analysis. Staff also failed to examine the "synergy" of
12 impacts. Instead, it looked at the impacts in isolation.

13 Finally, by virtue of its failure to implement a thorough environmental justice analysis at
14 steps 2 and 3, Staff acknowledged it did not even attempt to comply with the fourth and fifth
15 steps. As a result, the FSA is clearly incomplete. Moreover, as the parties stipulated, applicant
16 Eastshore also did not conduct an analysis of disproportionate impact or otherwise analyze unique
17 impacts on the environmental justice community because applicant concluded that Eastshore did
18 not have significant adverse impacts on any community. (Dec. 18, 2007, TR, at pp. 41:18-42:7.)

19 As such, the application should be denied, or at the very least delayed until Staff conducts
20 a compliant environmental justice analysis. Any other result will send the clear message that
21 environmental justice is irrelevant to the process, and irrelevant to the outcome.

22 **B. TO THE EXTENT COMMISSION STAFF FOLLOWED ITS OWN**
23 **STATED GUIDELINES, THESE GUIDELINES ARE INCONSISTENT**
24 **WITH CONSTITUTIONAL, STATUTORY, AND REGULATORY**
25 **PROVISIONS**

26 As noted above, "'environmental justice' means the *fair treatment* of people of all races,
27 cultures, and incomes with respect to the development, adoption, implementation, and
28 enforcement of environmental laws, regulations, and policies." (Gov. Code, § 65040.12, subd. (e))

1 (Emphasis added.) Thus, the Public Advisor’s Office correctly recognizes that environmental
2 justice analysis is grounded in law, and the constitutional principle of equal protection. Indeed,
3 the Public Advisor identifies the specific statutes and constitutional provisions that are the
4 underpinnings for the Commission’s environmental justice analysis. (Exh. 710.) This legal
5 framework for environmental justice includes the equal protection clauses of the U.S. and
6 California Constitutions, Government Code section 65040.12, and Public Resources Code section
7 71111, which adopts the Government Code’s definition for environmental justice. In particular,
8 the Public Adviser cites to Public Resources Code section 71110, subdivision (b), which requires
9 the California Environmental Protection Agency (“EPA”) to promote enforcement of all health
10 and environmental statutes within its jurisdiction in a manner that ensures the fair treatment of
11 people of all races, cultures, and income levels, including minority populations and low-income
12 populations in the state.

13 Staff’s perfunctory environmental justice analysis has failed to follow the directives in
14 these authorities. The “purpose of an environmental justice analysis is to determine whether a
15 project will have a disproportionately adverse effect on minority and low income populations.”
16 (*Mid States Coalition for Progress v. Surface Transportation Board* (8th Cir. 2003) 345 F.3d 520,
17 541.) However, as demonstrated above, the methodology utilized here does not allow any
18 meaningful conclusions to be drawn regarding adverse impacts on the affected population. This
19 is because Staff never inquired into the unique characteristics of the affected population and
20 possible negative impacts on that population—cumulative or otherwise. Rather, it merely
21 concluded that there could not be any significant effects upon the affected community, without
22 conducting the individual analysis of the unique circumstances required. Without that critical
23 information, the potential negative impacts on the affected community remain unknown, and it is
24 impossible to compare the effects on the general population with the effects on the environmental
25 justice population.

26 Thus, the process utilized by Staff did not comport with the basic principles of equal
27 protection, violated the statutory requirements to conduct environmental justice analyses, and
28 failed to ensure the “fair treatment” of the low income and minority community that surrounds

1 Eastshore. (*Cf. Colonias Development Council v. Rhino Environmental Services Inc.* (2005) 138
2 N.M. 133 [New Mexico Supreme Court stating that interested parties or members of the public
3 might build a strong case against the proliferation of landfills in a certain geographical area by
4 demonstrating how an additional landfill in a low-income, undeveloped, minority community
5 without access to adequate health care would cause harmful physical, economic, psychological,
6 and social effects. The Court cited Edward Patrick Boyle, Note, *It's Not Easy Bein' Green: The
7 Psychology of Racism, Environmental Discrimination, and the Argument for Modernizing Equal
8 Protection Analysis*, 46 V and. L. Rev. 937, 967 & n. 167 (1993).]) Thus, even if Staff were able
9 to demonstrate that its environmental justice analysis comported with its internal procedures, it is
10 still fatally defective, and the Commission should deny certification.

11 **C. NOT ONLY DID COMMISSION STAFF FAIL TO CONDUCT A PROPER**
12 **PUBLIC OUTREACH, IT FAILED TO GIVE THE DISTRICT THE**
13 **REQUISITE NOTICE AND OPPORTUNITY TO BE HEARD**

14 The Warren-Alquist State Energy Resources Conservation and Development Act (Public
15 Resources Code, § 25500 et seq.) (“the Act”) requires that notice of the filing of a thermal power
16 plant application be made to a wide range of federal, state and local government agencies, as well
17 as to the public. (See, e.g., Pub. Resources Code, § 25519.) The plain language of the statute
18 reflects the State legislature’s intent that the Commission should broadly construe its notice
19 obligations to government agencies.

20 While Commission Staff may have contacted numerous local agencies as part of its duties
21 under the regulations, it neglected to notify the District as a local interested agency. (Dec. 18,
22 2007 TR at 36:24-37:25.) This failure of notice constitutes prejudicial error, as this deprived the
23 District, its staff, and its students and the Commission of the benefit of the District’s participation
24 from the outset of these proceedings. The District was entitled to this notice on two separate
25 bases set out below.

26 First, the Act requires that—in addition to providing notice to certain specified public
27 agencies and categories of agencies—the Commission “shall transmit a copy of the application to
28 any governmental agency not specifically mentioned in this act, but which it finds has any

1 information or interest in the proposed site and related facilities.” (Pub. Resources Code, §
2 25519, subd. (k).) The District was entitled to notice because it is a “governmental agency”
3 which has an interest in the Eastshore application. Yet, despite the District’s significant
4 educational and economic role in the community; its responsibility for approximately 15,000
5 students; and the close proximity of its Chabot College campus to the proposed site, it received no
6 notice.

7 Second, not only did the Commission fail to comply with the relevant statutory law, it also
8 failed to comply with its own regulations relating to notice. Under the regulations, the
9 Commission was required to “transmit a copy of the notice or [Eastshore’s] application” to any
10 “...state, regional, or local agency which has been identified as having a potential interest in the
11 proposed site and related facility, and shall request analyses, comments, and recommendations
12 thereon.” (Cal. Code Regs., tit. 20, § 1714, subd. (c).) It is clear that at a minimum, the District
13 had a “potential” interest. Yet, Commission Staff failed to give the requisite notice. It
14 disregarded the plain language contained in its own regulation.

15 When posed with a hypothetical, the Staff’s witness William Pfanner testified that the
16 siting staff would provide notice to Peralta Community College District as an interested local
17 agency if an applicant proposed to build a power plant within one mile of the college. (Dec. 18,
18 2007, TR, at pp. 39:17-40:16.) Similarly, Commission Staff should have included the District as
19 an interested local agency when Eastshore’s application for certification was first submitted.
20 Whether or not the Commission held a site hearing at Chabot College campus is irrelevant; this
21 did not meet the requirements for notice to an interested local agency and request for comments.

22 In addition to not providing notice to the District, the Commission failed to solicit
23 analyses, comments and recommendations from the District, as was required pursuant to both
24 Public Resources Code section 25519, subdivision (k) and Title 20, California Code of
25 Regulations, section 1714, subdivision (c). These provisions allow the Commission to obtain the
26 information necessary to make requisite findings under the Act and the Commission’s other
27 regulations that the proposed site plan conforms to applicable local standards, ordinances or law,
28 or that the public benefit of the project outweighs any noncompliance. (See Pub. Resources

1 Code, §§ 25523, subd. (d)(1), 25525; see also Cal. Code Regs., tit. 20, §§ 1769, subd. (a)(3)(B),
2 1755.)

3 Specifically, under Public Resources Code section 25519, subdivision (k), the
4 Commission “shall invite comments and recommendations” of “any governmental agency,”
5 which it finds has any information or interest in the proposed site and related facilities. (See Pub.
6 Resources Code § 25519, subd. (k).) The Commission and its Staff failed to invite the District to
7 make these comments and recommendations. Similarly, under the pertinent regulations, the
8 Commission “shall request analyses, comments, and recommendations” from any “...state,
9 regional, or local agency which has been identified as having a potential interest in the proposed
10 site and related facility.” (Cal. Code Regs., tit. 20, § 1714, subd. (c).) Commission Staff
11 presented no evidence of compliance with the regulation.

12 Commission Staff’s failure to allow the District to participate and provide its analyses,
13 comments, and recommendations, warrants denial of the Eastshore site plan. Commission Staff’s
14 procedural errors have prevented the District from having enough notice and time to sufficiently
15 examine potential concerns, which include: the impact of air pollution from the Eastshore plant
16 on Chabot College students and employees, given that Chabot College is in the area identified as
17 most highly impacted by the proposed site; the site’s effect on Chabot College’s staff and student
18 recruitment; and the cumulative effects that Russell City and Eastshore will have on the Chabot
19 College population.

20 The failure to notify and solicit input from the District is particularly troubling considering
21 that community colleges generally—and Chabot College specifically—serve historically
22 disenfranchised populations. Chabot College’s student body is approximately 70 percent
23 minority. (Exh. 600, Arnold Testimony, at p.2.) Over one-third of the students are in the first
24 generation of their family to attend college. (*Id.*) Further, students attending Chabot College
25 struggle financially, with approximately 60 percent of students reporting low, or very low,
26 household income levels based on federal poverty rate guidelines. (*Id.*) Given these
27 demographics, failure to give proper notice to the District of these proceedings not only deprived
28 the District—as an interested governmental agency—the right and opportunity to be heard, but it

1 deprived a largely non-white and impoverished community an equal access and an important
2 voice in these proceedings—through their community college district.

3 **D. COMMISSION STAFF DID NOT PROPERLY ASSESS THE SOCIO-**
4 **ECONOMIC IMPACTS UPON THE DISTRICT**

5 In the FSA, Commission Staff witness Joseph Diamond, Ph.D., testified that Staff
6 determines that a project has a significant effect on population, housing, and public services, if
7 the project will:

- 8 • Induce substantial population growth in an area, either directly or indirectly;
- 9 • Displace substantial numbers of people and/or existing housing, necessitating the
10 construction of replacement housing elsewhere; or
- 11 • Adversely impact acceptable levels of service for fire and police protection,
12 schools, parks, and other public facilities.

13 (Exh. 200, at p. 4.8-3.) Dr. Diamond noted that a socioeconomic analysis reviews the potential
14 adverse impacts on public services. (*Id.*) In order to determine if a project would have any
15 significant impacts, the Staff analyzed whether the current status of these community services
16 could absorb the project-related impacts. (*Id.*) If the project's impacts could appreciably strain or
17 degrade these services, the Staff considered this to be a significant adverse impact and would
18 propose mitigation. (*Id.*)

19 Mr. Pfanner, as project manager for the Commission's Staff, admitted that Chabot College
20 was a public services facility. (Dec. 17, TR, at p. 469:16-470:15.) Yet, Commission Staff also
21 admitted that it failed to consider Chabot College, its students, and its employees, when
22 conducting the socioeconomic analysis. Chabot Intervenors' witness Dr. Carolyn Arnold testified
23 that, during the course of a full academic year, the college served approximately 22,000 students,
24 and approximately 70 percent of the students are minorities. Dr. Arnold also testified that almost
25 40 percent of the Chabot College students are in their family's first generation to attend college
26 and that 60 percent of the students are low income by either federal or local standards. (Exh. 600,
27 Arnold Testimony, at p.2:5-22.) None of this information is mentioned anywhere in the FSA.

28 Chabot Intervenors' evidence supports a finding that approving Eastshore would create a

1 significant effect on the environment. The overwhelming amount of public comments against
2 Eastshore evidences that the District's staff and students perceive Eastshore, a second power plant
3 in close proximity to the Chabot College, as creating a detrimental effect upon their health. (See
4 also Exh. 602, at p. 2:4-16.) The District anticipates a reduction in its enrollment, since students
5 have many options of where to attend community college. (Exh. 602, at p.2:18-20.) This
6 reduction in enrollment is a physical change that Commission Staff did not consider as part of its
7 analysis, but should have. (See CEQA regulation, 14 C.C.R. § 15064, subd. (e) [economic or
8 social changes may be used, however, to determine that a physical change shall be regarded as a
9 significant effect on the environment].) Indeed, it is clear that Eastshore would have a significant
10 effect on the environment since it will conflict with established educational uses. (*Goleta Union*
11 *School District v. Regents of University of California* (1995) 37 Cal.App.4th 1025, 1031.) In
12 light of its failure to consider the public services that Chabot College offers to students, staff, and
13 the community, Commission Staff also failed to propose any type of mitigation. Commission
14 Staff does not contend, nor can it, that it pays the District any local school impact fees that are
15 paid to school districts. Commission Staff simply failed to consider how the Eastshore's adverse
16 impact upon Chabot College would be mitigated. The evidence reflects that the Eastshore Energy
17 Center will conflict with the established educational uses of Chabot College. Eastshore should
18 not be approved.

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IV. CONCLUSION

Chabot Intervenors respectfully request the Commission to deny certification to Eastshore. Allowing Eastshore to build a second power plant in this small community so close to Chabot College would be detrimental to the college, its students, its staff, and the community at large.

Dated: February 11, 2008

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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 1/18/2008)

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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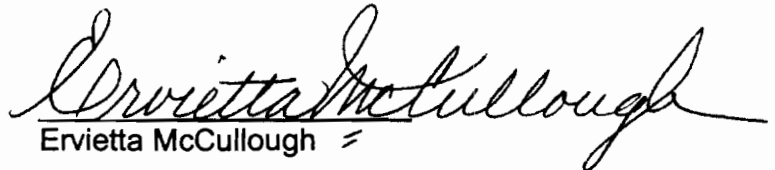
DECLARATION OF SERVICE

I, Ervietta McCullough, declare that on February 11, 2008, I deposited copies of the attached CHABOT-LAS POSITAS COMMUNITY COLLEGE DISTRICT INTERVENORS' POST-HEARING BRIEF 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.

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.


Ervietta McCullough =