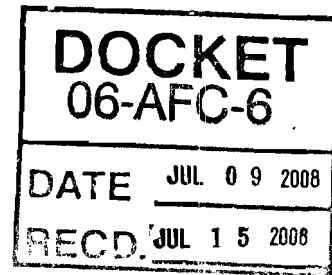


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STATE OF CALIFORNIA
STATE ENERGY RESOURCES
Conservation and Development Commission

In the Matter of:

APPLICATION FOR CERTIFICATION FOR
THE EASTSHORE ENERGY CENTER

Docket No.: 06-AFC-6

**GROUP INTERVENORS COMMENTS IN
SUPPORT OF PRESIDING MEMBER
PROPOSED DECISION AND LIMITED
OBJECTIONS TO ALTERNATIVES
SECTION AND REFERENCES TO RCEC.**

Hearing Date: July 21, 2008

**Location: Hayward City Hall Chambers
Time:**

**Before: Evidentiary Committee.
Presiding Member Jeffrey D. Byron**

(Hearing Officer: Susan Gefter)

THE COMMISSION SHOULD SUPPORT THE PMPD

Group interveners California Pilots Association (“Calpilots”), San Lorenzo Village Homes Association and Hayward Area Planning Association (“Hapa”), compliment the presiding member’s proposed decision (“PMPD”) and urge the Commission to fully support the PMPD properly refusing to override the numerous non-conformities with local and state law. As briefed earlier by Group intervenors, this project proposal additionally conflicts with federal regulations relating to Hayward Airport’s traffic patterns, and as a matter of law, must be rejected at this site.

The Alternatives Analysis And Findings Should Be Modified To Recognize Group Intervenors’ Evidence.

Although this Commission’s 2007 IEPR’s executive summary states, “We can’t solve problems by using the same kind of thinking we used when we created them,” the alternative analysis in the PMPD continues plodding on with the “same old” analysis. (PMPD, p. 28.) In the final briefs, Group Intervenors pointed out that there is no “indisputable energy shortage” requiring the construction of fossil fuel peaking plants in a moderate coastal climates which detrimentally impacts an environmental justice population’s nearby schools and neighborhoods and undermines smart growth plans that would satisfy goals set out in the CEC’s 2007 IEPR, in a comparative low load need area which the 2007 IEPR establishes has the least need for a peaking plant. (Opposition Brief served and filed on March 23, 2008, pp. 24-27.)

On January 14, 2007, Group Intervenors offered the testimony by Professor Sherman Lewis specifically relying on the 2007 IEPR:

A Would you please in that case turn to page two at the top where I say Tierra Eastshore is not needed. The source of my testimony is the policy of the California Energy Commission. There are two policy documents. One of them is the

Eastshore Staff Assessment on page 6-12 which says that -- it has several paragraphs explaining the potential for alternatives to peak energy. It then has a paragraph that says, quote:

"Current demand side programs are not sufficient to satisfy future electricity needs, nor is it likely that even much more aggressive demand side programs could accomplish this at the economic and population growth rates of the last ten years."

That statement is a conclusion not supported by evidence. *The evidence that perhaps is the most important is the 2007 Integrated Energy Policy Report, the IEPR Committee Final pages 60 to 68, 108 to 111, page 120 and 199 to 200. I would like in particular to look at page 108 of the Commission's own policy findings that deal with --*

.....

MR. LEWIS: You'll see that I have in fact attached some of those pages, 108 and following, to the testimony on alternatives. **So if you look through this you'll find attached to my testimony part of the CEC document entitled using demand responses to meet electrical systems.**

HEARING OFFICER GEFTER: Right, we have it, thank you.

MS. HOLMES: That's attached to the back.

HEARING OFFICER GEFTER: It's attached to your testimony, we have it, thank you.

MR. LEWIS: **It makes a very strong case for elasticities of demand that can meet the need without peaking plants.** So if you read your own document on policy you would be led to conclude that we should be relatively optimistic about alternatives to meet peaking demand. And these pages, I don't want to read all of your policy to you but I think if you read your policy you'll

discover a very strong case for alternatives. It is very well substantiated in some depth.

And that is basically what I put before you. You need to pay attention to your own document from your own basic policies and to have a study to see if your peaking policies and how they apply to this plant. Because reading this document it's clear that you don't need this plant. You have a conflict between your documents.

You've got great ideas for avoiding the need for peaking plants, you need to execute them.

HEARING OFFICER GEFTER: Right, okay.

MR. LEWIS: The decision before you is fundamentally political. The evidence favors avoiding these peaking plants if we're going to deal with global warming and other problems.

(Jan. 14, 2007 R.T. 60-63.) In response to staff's inquiry whether its alternative analysis satisfied CEQA, Professor Lewis testified to the following:

A The California Environmental Quality Act only requires the creation of information. It really doesn't get into substantive analysis of policy.

Q So would it be fair to say that it is not your testimony that the staff's alternatives analysis violates those CEQA informational requirements?

A It depends on the standard to which you wish to hold the staff analysis.

Q Well can you reference a particular section of the CEQA statute, of the CEQA guidelines with which this analysis is inconsistent?

A No. No, I would just say that having read the Commission's policy and having read the staff assessment **the staff assessment does not**

respond to the detail and the information and the policy direction of the Commission's policy.

(Jan. 14, 2008 R.T. 65-66, emphasis and italics added.)

Under the summary and discussion of evidence, p. 30, the PMPD states that “Applicant and Staff were the only parties to submit substantive evidence on this topic.” Footnoted is that “Group Petitioners” “witness’ testimony did not deal with the substantive merits of alternative project configurations or locations, but rather contended that the project was not needed. . . “

(PMPD p. 30, fn. 6.)

Group Intervenors object that the Applicant and staff were the “only parties to submit substantive evidence” and propose the following deletions and modifications:

Page 30:

Applicant, Group Intervenors and Staff were the only parties to submit substantive evidence on this topic.Fn. 6

~~FN 6/Intervenor Group Petitioners~~ Intervenors also proffered a witness, Professor Emeritus Sherman Lewis, a professor of political science at California State University at the East Bay, who has been active in local and state environmental land use resource issues; Applicant ~~challenged the witness’ qualifications. (1/14/08 RT 56-59.) This witness’ testimony did not deal with the substantive merits of alternative project configurations or locations, but rather~~ Professor Lewis contended that the project was not needed, based ~~upon various policy statements the substantial research published contained~~ in the Commission’s 2007 Integrated Energy Policy Report (IEPR). (1/14/08 RT 60-64.) We are, of course, aware of the IEPR and have taken official notice of it in this proceeding. (1/14/08 RT 65:23-24.) Notably, Professor Lewis ~~Intervenor~~ queried whether assert Staff’s Alternatives analysis met the purpose of failed to comply with CEQA. (1/14/08 RT 66:13-67:2.)

Page 36:

~~The unrefuted evidence establishes applicant~~ applicant contends that measures such as energy conservation and programs that increase energy efficiency, reduce electricity use, or shift electricity use away from peak hours of demand are not currently sufficient to satisfy the State’s electrical needs. (1/14/08 RT 72:14-18.) ~~Both new generation and transmission facilities will likely be needed. (Ex. 200, p. 6-12.)~~ We disagree that such a conclusion can be drawn given at this time those efforts still have yet to be implemented. Further, the region to be serviced is a moderate coastal climate and the applicant proposes to provide 115 megawatt of peaking power to an area which at most utilizes no more than 100 megawatt. (2007 IEPR, p. 108.: Specifically offered by Group

Intervenors witness Professor Lewis was our observation that “price-responsive demand response is expected to reduce peak demand” but has not been as aggressively pursued to achieve the needed goals; compare applicant’s expert Mackin testimony that “San Leandro and Hayward I think is around 100 megawatts or thereabouts. So on a percentage basis Eastshore is much bigger relative to the area it is serving.” (III R.T. 29-30.)

~~Moreover, none of these technological alternatives could be counted upon to provide quick start capability to respond to unexpected changes in regional demands, thus not fulfilling a basic objective of the proposed project. (1/14/08 RT 72:19-22; Ex. 200, p. 6-14.)~~

Group Intervenors suggest deleting this based on the objection that the statement that the area to be serviced experiences “unexpected changes in regional demands” lacks foundation.

Pages 36-37:

~~In the near future existing plants, many of which produce higher levels of pollutants, could operate more. (1/14/08 RT 72:23-25 to 73:1-4; Ex. 200, p. 6-14.) Failure to construct the EEC could also deprive the local area of a relatively clean and efficient source of generation, as well as the positive electrical system attributes discussed in the LOCAL SYSTEM EFFECTS portion of this Decision. (Ex. 200, pp. 6-14 to 6-15.)~~

Group Intervenors suggest deleting the above given it improperly assumes that the CEC would not require that older plants be re-powered to reduce their pollution and object and dispute that EEC would provide the “local area . . . a relatively clean and efficient source of generation.” The testimony and public comments, including scientific commentary, disputing this conclusion was voluminous.

Page 37:

~~All The objectives appear proper to us. The electrical system attributes are similar to those in other areas and arguably will to improve the overall system. This is certainly a legitimate project goal, as is the desire to avoid causing the need for transmission system upgrades. However, While it is true that no specific interconnection was specified at the commencement of the RFO process (which stated a preference only for the general Bay Area; 1/14/08 RT 84: 21-23, 86), it is also true that and the interconnection at the Eastshore Substation is specifically only a contract purpose in the contract between Applicant and PG&E, to which Group Intervenors’ have consistently objected and sought to strike all references to this “non-evidence.” (1/14/08 RT 84:15-18.) We note it appears that this interconnection point was essentially determined before a thorough environmental analysis was performed. While this situation may seem anomalous to some, it reflects adherence to the current state of the RFO~~

~~scheme. Whether or not the RFO process is flawed is beyond the scope of this Decision. Therefore, on balance, we believe that it is reasonable for Applicant to seek to honor its contractual obligations by including connection at the Eastshore Substation as a basic project objective. Given this interconnection is not sought in the RFO, and the applicant relies on a contract which it has refused to produce for this evidentiary hearing, we decline to rely as a project goal an interconnection to the PG&E substation.~~

.....

~~Finally, as summarized above, the evidence uniformly establishes that renewable generation resources or demand reducing programs are either not practical or currently unable to satisfy most project objectives.~~

Such a conclusion directly contradicts this Commission’s important research and conclusions drawn in its 2007 IEPR. See testimony above of Professor Lewis, including declaration and supporting exhibits of which the PMPD takes administrative notice.

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FINDINGS AND CONCLUSIONS

Based upon the weight of the evidence of record before us, we make the following findings and reach the following conclusions:

1. The evidence of record contains an analysis of ~~a reasonable~~ traditional range of alternatives to the proposed project, including alternative locations, with some discussion of alternative technologies, demand-side management, renewable energy sources, and the “no project” alternative.
2. The project objectives of the applicant are properly described.
3. ~~Renewable, non-fossil fuel technology alternatives such as biomass, geothermal, hydroelectric, solar or wind resources are either unavailable in the Greater Bay Area or are not capable of meeting project objectives.~~
4. ~~Renewable, non-fossil fuel alternatives would not reliably provide quick start capability to respond to unexpected changes in regional demand.~~
5. ~~Conservation and other demand side management programs are currently not sufficient to satisfy California’s electricity needs.~~
6. The “no project” alternative would avoid the significant adverse unmitigable adverse impacts discussed in the Traffic and Transportation and Land Use portions of this Decision;
7. The EEC project would provide local area generation and positive electrical

system benefits.

8. The “no project” alternative would not provide local area peaking generation and ~~positive~~ electrical system attributes.

9. Interconnecting the EEC at the Newark Substation would fail to meet a basic project objective of the applicant but would satisfy the objective of the RFO.

10. No feasible alternative site exists which would satisfy most project objectives of the applicant, objectives, some of which we do not accept.

We conclude, therefore, that the evidence of record contains a sufficient analysis of a ~~reasonable~~ range of alternatives and limitedly complies with the requirements of the California Environmental Quality Act, the Warren-Alquist Act, and their respective regulations. ~~No~~ Conditions of Certification are ~~required~~ reserved for this topic.

These modifications are suggested to make the findings and conclusions consistent with the above discussion and to further support the PMPD’s denial and this Commission’s 2007 IEPR.

Modifications for Traffic & Transportation

Page 358

~~EEC thus stands in contrast to the RCEC, which we approved because “see and avoid” mitigation was feasible. (RCEC Decision, Docket No. 01-AFC-7C, CEC 800-2007-003-CMF, Condition TRANS-10, pp. 190-191.) RCEC is located approximately 1.5 miles to the southwest of the Hayward Airport, and aircraft do not need to fly over the RCEC site; indeed, we determined that no flight paths would be affected by restricting the airspace above the RCEC. (Id. at pp. 184, 186-187.)~~

Group Intervenors disagree that “aircraft do not need to fly over the RCEC site” or that that “see and avoid” mitigation is feasible for either EEC or RCEC. In fact, the evidence presented by California Pilots by Carol Ford, including tracking data, establishes that such a restriction for RCEC would affect flight paths. Group Intervenors note that they, the County and Chabot-Las Positas were precluded from re-opening the evidentiary hearing in the “amendment one” proceedings and have demanded in response to RCEC’s recent petition for an extension to

construct that absent this Commission's denial (due to the facial inadequacies of RCEC's petition), it appoint an evidentiary committee.¹

Page 361:

The City's witness testified that there was an opinion that there is a significant difference between the location of the RCEC, approved with mitigation [temporary Notice to Airmen (NOTAM) with "see and avoid" instructions], and the EEC site. ~~FN-119~~

~~FN. 119/ RCEC Decision, Docket No. 01 AFC 7C, CEC 800-2007-003-CMF: RCEC Condition TRANS-10, pp. 190-191. As noted, supra, RCEC is located approximately 1.5 miles to the southwest of the Hayward Executive Airport, to the west of the airport's two parallel runways. Aircraft do not need to fly over the RCEC for airport landing or departure. Indeed, the Commission's RCEC Decision determined that no flight paths would be affected by restricting the airspace above the RCEC. (RCEC Decision, Docket No. 01 AFC 7C, pp. 184, 186-187.) The EEC is ~~much~~ closer to the existing air traffic pattern and based on the records presented at the evidentiary hearing more aircraft fly over the area, requiring more pilots to be concerned about other traffic as well as potential turbulence from stack exhaust. (12/18/07 RT 134, 136-137, 141-142; Exs. 208, 417, 418.)~~

The records presented were solely for the month of April, a month when visibility is at its peak in the San Francisco Bay Area. Group Intervenors suggest eliminating this language given the evidence is that many planes fly over the RCEC location and are required by FAA regulations to do so below 1,000 AGL ("above ground level") and that the RCEC "amendment one" proceedings approving this alleged mitigation of a "NOTEM" (which Group Intervenors have consistently pointed out is not a "mitigation") were without the benefit of the substantial evidence presented in this proceeding which the parties here have offered again in support of the argument that the Commission should deny RCEC's recent petition.

¹ Group Intervenors further suggest modifying footnote 2 at page 4 to reflect that absent this Commission's action, RCEC may not be constructed given the expiration of their present authority to construct: ". . . The RCEC is a 600 MW, combined cycle, gas-fired power plant first certified in 2001 that ~~will~~ might be constructed about one mile from the EEC site, depending

Page 362:

The ALUC's rationale included: the increase in Hayward Airport operations expected over the next 10 to 20 years; restricted airspace due to noise abatement flight procedures; ~~the NOTAM warning pilots to avoid overflights of the RCEC further restricting available airspace~~; and the potential for thermal plumes to create a safety hazard to aircraft flying over the EEC. (*Ibid.*)

Based on Group Intervenors' records, and as confirmed by the declaration of Jay White in support of the petition for reconsideration in the RCEC "amendment one" proceedings, who attended the EEC hearing, the ALUC expressly rejected a "NOTAM" as a "mitigation."

Page 365:

In this regard, we again clarify that our Decision in the RCEC proceeding for amendment one, a proceeding which many of the parties in this proceeding had been precluded from presenting evidence, is not precedential and neither the RCEC Decision nor this Decision establishes

Commission policy on the practicalities of locating power plants near operating airports.

Page 367:

17. Applicant conducted an empirical, helicopter fly-over test at the Barrick power plant, a facility similar to the EEC in Reno, Nevada to identify the altitude at which vertical plume turbulence would occur and applicant determined the worst-case for a helicopter would not exceed 300 feet AGL. Group Intervenors' objected to admission of this alleged "test" given it was performed after this Committee's pre-conference hearing and without notice to either CEC staff or California Pilots Association to enable third party verification or observation.

Socioeconomics: p. 373

Without waiving any entitlement to supplement these limited objections, Group Intervenors simply note that the socioeconomic section traditional analysis suffers from similar structural flaws as the Alternatives in that it is limited to exclude the detrimental socioeconomic impacts of such a project on the surrounding communities and neighborhoods (such as increased upon the Commission's action on the second petition by RCEC to again extend its permit to

health costs, decreased property values), including undermining the economic viability of the Hayward Executive Airport, an important economic engine for the region which the evidence admitted in this proceeding establishes generates over \$90 million annually. As argued in the briefs by Group Intervenors, the socio-economic regional impacts on Oakland and Hayward's airports and the regional community's health and safety far outweighs any alleged disputed local systems savings which may be better achieved by not disrupting redevelopment's growth plans and pursuing efficiency goals.

Dated: July 9, 2008

Respectfully Submitted,

Jewell J. Hargleroad, Attorney for
Group Petitioners California
Pilots Association, San Lorenzo Village
Homes Association, and Hayward Area
Planning Association

construct.”

**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, Jewell J. Hargleroad , declare that on July 9, 2008, I transmitted electronic copies of the attached **GROUP INTERVENORS COMMENTS IN SUPPORT OF PRESIDING MEMBER PROPOSED DECISION AND LIMITED OBJECTIONS TO ALTERNATIVES SECTION AND REFERENCES TO RCEC** addressed to those identified on the Proof of Service list above 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. Executed on July 9, 2008 in Hayward, California.

Jewell J. Hargleroad