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06-AFC-6

DATE JUL 15 2008

RECD. JUL 15 2008

1 MICHAEL LAWSON #48172
MAUREEN CONNEELY #154534
2 maureen.conneely@hayward-ca.gov
Office of the City Attorney
3 City of Hayward
City Hall, 4th Floor
4 777 B Street
Hayward, CA 94541
5 Telephone: (510) 583-4450
6 Fax: (510) 583-3660

7 PILLSBURY WINTHROP SHAW PITTMAN LLP
RONALD E. VAN BUSKIRK #64683
8 MICHAEL S. HINDUS # 88647
DIANA J. GRAVES # 215089
9 TODD W. SMITH #235566
10 diana.graves@pillsburyllp.com
50 Fremont Street
11 Post Office Box 7880
San Francisco, CA 94120-7880
12 Telephone: (415) 983-1000
13 Facsimile: (415) 983-1200
Attorneys for City of Hayward
14

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

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18 In the Matter of:

Docket No. 06-AFC-6

19
20 APPLICATION FOR CERTIFICATION
FOR THE EASTSHORE ENERGY
21 CENTER

CITY OF HAYWARD'S STATEMENT
IN SUPPORT OF PRESIDING
MEMBER'S PROPOSED DECISION
FOR THE EASTSHORE ENERGY
CENTER

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23 **I. INTRODUCTION.**

24 On June 20, 2008, the Committee issued the Presiding Member's Proposed Decision
25 ("PMPD") for the Eastshore Energy Center ("EEC") and invited initial written comments
26 on the PMPD. Pursuant to the Committee's request, Intervener City of Hayward ("City")
27 submits this statement in support of the PMPD's conclusions that: (1) construction and
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1 operation of the EEC would result in direct, indirect and cumulative land use impacts, and
2 cumulative aviation safety impacts, and therefore does not comply with applicable laws,
3 ordinances, regulations, and standards (“LORS”); and (2) the EEC does not satisfy the
4 statutory criteria for an override because the EEC is not “required for public convenience
5 and necessity.” Based on these findings, supported by substantial evidence in the record,
6 the City concurs with the Committee’s recommendation to the Energy Commission that the
7 EEC application for certification be denied.
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9 **II. The Evidence in the Record Supports the PMPD’s Conclusion that the**
10 **Proposed EEC Does Not Comply with LORS.**

11 The PMPD found the Application for Certification deficient in four areas that
12 cannot be mitigated at the proposed EEC site. As discussed below, ample evidence supports
13 the Committee’s conclusions regarding the Application’s deficiencies.
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15 A. The facility would cause a significant cumulative public safety impact on the
16 operations of the nearby Hayward Executive Airport by further reducing
17 already constrained air space and increasing pilot cockpit workload.

18 The PMPD rightly concluded that “the mere presence of the power plant creates a
19 safety hazard” because of its effect on airspace congestion. (PMPD p. 358). “The
20 project’s proximity to the traffic pattern for the Hayward Executive Airport and the
21 downwind departure route for Runway 28L would unreasonably complicate aircraft
22 maneuverability. The site location would also limit the airspace available for aircraft transit,
23 maintenance flights, training procedures, and normal departures and arrivals that currently
24 occur within this portion of the Hayward airport airspace.” (PMPD p. 359, citing Ex. 20, p.
25 4.10-21 and Ex. 203). Based on Federal Aviation Administration (“FAA”) and California
26 Department of Transportation (“CalTrans”) recommendations, the Committee rejected a
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1 proposed “see and avoid” mitigation measure as ineffective given the limited air space due
2 in part to the imposition of a similar mitigation measure on the Russell City Energy Center.
3 (PMPD p. 365 (citing 12/18/07 RT 113:17-25 – 115 and Ex. 416)).

4 B. The thermal plumes from the facility would present a significant public
5 safety risk to low flying aircraft during takeoff and landing maneuvers due to
6 close proximity of the Hayward Executive Airport.
7

8 The Committee correctly concluded that the thermal plumes from the fourteen EEC
9 stacks would present a significant health and safety risk. The evidence demonstrates that
10 the turbulence-causing thermal plums from the EEC are likely to rise to an altitude in the
11 range of 400 feet, and that aircraft are likely to fly over the site at an altitude of 300 to 400
12 feet. (PMPD p. 352 (citing Ex. 200, p. 4.10-20; Ex. 208; 12/18/07 RT 120-122)). The
13 PMPD concluded that CEC Staff’s modeling was appropriately conservative given the
14 public safety concerns related to potential aircraft upset in close proximity to high velocity
15 plumes, and refused to second guess the FAA’s acceptance of CEC Staff’s modeling “as a
16 valid representation of hazardous exhaust velocities.” (PMPD pp. 353-357 (citing, inter
17 alia, Ex. 200, p. 4.10-20; Ex. 39, pp. 6, 16-17; Ex. 416)). Finally, the Committee’s rejection
18 of the Applicant’s Barrick Power Plant Flyover Report as representative of the worst-case
19 conditions that will exist at the EEC site is wholly supportable give that not all engines at
20 the Barrick plant were operating on the day of the flyover test (*see* Ex. 20), the cold
21 conditions on that day reduced radiator fan use (12/18/07 RT 260:11-14, 62:23-25, 73:12-
22 16) and the presence of wind meant that weather conditions were not worst case (12/18/07
23 RT 240-260; Ex. 20). (PMPD pp. 354-356).

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1 C. The facility would be inconsistent with the City of Hayward's Municipal
2 Zoning Ordinance requirements for a Conditional Use Permit (CUP) since
3 the project "would not operate at a minimum of detriment to surrounding
4 properties".

5 Relying primarily on its conclusions regarding potential aviation hazards, the
6 Committee concluded the EEC is inconsistent with the requirements of the City's CUP
7 findings requiring, *inter alia*, that a project be desirable for the public convenience and
8 welfare and not detrimental to the public health, safety and welfare. (PMPD pp. 321-323
9 (citing Ex. 401, p. 8; Ex. 200, p. 4.5-18)). The Committee also concluded that siting the
10 EEC in its proposed location would be inconsistent with Policy 7 of the Land Use Element
11 of the City's General Plan by disrupting the City's planning goal of transitioning its
12 Industrial Corridor to high-tech, information based development. (PMPD p. 329). In
13 reaching these conclusions, the Committee properly deferred to the City's interpretation of
14 its land use policies and zoning regulations (Cal. Code Regs., tit. 20, §§ 1714.5(b) and
15 1744(e)).

16 D. The facility would be inconsistent with the City of Hayward's Airport
17 Approach Zoning Regulations and incompatible with the Alameda County
18 Airport Land Use Policy Plan (ALUPP).

19 The Committee concluded that the City's Airport Approach Zoning Regulations and
20 the ALUPP limit development in the vicinity of the airport that endangers the landing,
21 takeoff, or maneuvering of aircraft. (PMPD, p. 326-327, 329-330 (Ex. 535)). An airport
22 hazard is defined as "any structure or tree or use which obstructs the airspace required for
23 the flight of aircraft in landing or taking off at the airport or is otherwise hazardous to such
24 landing or taking off of aircraft." (Hayward Municipal Code ("HMC") § 10-6.12). The
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1 uncontroverted evidence in the record demonstrates that aircraft fly over the site at low
2 altitudes where the project's invisible thermal plumes have the potential to cause flight
3 turbulence. (PMPD, p. 326-327 (Ex. 513; Ex. 200, p. 4.10-20; Ex. 208; 12/18/07 RT 120-
4 122)). Further, the Applicant failed to provide substantial evidence that feasible mitigation
5 measures exist to eliminate thermal plumes or prevent the constriction of navigable airspace
6 that would impair the utility of the airport.

8 **III. The Committee Properly Concluded that the EEC Does Not Satisfy the**
9 **Statutory Criteria for an Override Because the EEC is Not "Required for**
10 **Public Convenience and Necessity."**

11 Upon finding that the EEC does not comply with the LORS, the Committee applied
12 Public Resources Code § 25525 to determine whether "such facility is required for public
13 convenience and necessity and that there are not more prudent and feasible means of
14 achieving such public convenience and necessity." (PMPD, pp. 433-437). The Committee
15 properly concluded that the EEC is not required for public convenience and necessity
16 because "the benefits of the EEC are modest at best. There is little public convenience and
17 necessity that would be served by the project." (*Id.* at 436).

19 The EEC would provide 115 MW of capacity, approximately one-
20 fifth of one percent of current statewide demand. As a result, the
21 project's electricity system reliability benefits (flexibility in
22 responding to demand), which we discuss in the **Reliability, Local
System Effects, and Transmission System Engineering** sections
23 of this Decision, are commensurately small. This is also true of the
24 consumer benefits of the project. The Local System Effects
25 section shows savings in a range of \$11.4 million to \$16.3 million
26 over 20 years, or an average of approximately \$675,000 per year
spread among all PG&E rate payers. There are no other major
benefits of the project that would serve the public convenience and
necessity. (*Id.*)

27 In sum, the Committee balanced the EEC's inconsistency with LORS and significant
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1 impacts on Land Use and Aviation Safety against the EEC's alleged benefits as proffered
2 by the Applicant, and found the EEC's benefits to be negligible at best compared to the
3 unmitigable impacts. This conclusion is amply supported by substantial evidence in the
4 record.

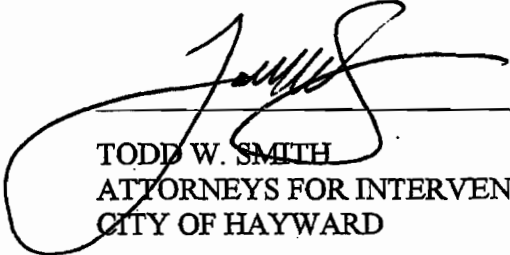
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6 **IV. CONCLUSION.**

7 The PMPD is a well-reasoned decision that more than adequately supports its
8 conclusions that the EEC is inconsistent with LORS and not necessary for the public
9 convenience and necessity. The City supports the Committee's decision and requests that
10 the PMPD be submitted to the full Commission, without modification, recommending
11 denial of EEC's application.

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14 DATED: July 15, 2008

PILLSBURY WINTHROP SHAW PITTMAN LLP

15 RONALD E. VAN BUSKIRK
16 MICHAEL S. HINDUS
17 DIANA J. GRAVES
18 TODD W. SMITH

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20 _____
21 TODD W. SMITH
22 ATTORNEYS FOR INTERVENER
23 CITY OF HAYWARD

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27
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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 4/21/2008)

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:

CALIFORNIA ENERGY COMMISSION

Attn: Docket No. 06-AFC-6
1516 Ninth Street, MS-4
Sacramento, CA 95814-5512
docket@energy.state.ca.us

APPLICANT

Greg Trewitt, Vice President
Tierra Energy
710 S. Pearl Street, Suite A
Denver, CO 80209
greg.trewitt@tierraenergy.com

Harry Rubin, Executive Vice President
RAMCO Generating Two
1769 Orvietto Drive
Roseville, CA 95661
hmrenergy@msn.com

COUNSEL FOR APPLICANT

Jane Luckhardt, Esq.
Downey Brand Law Firm
555 Capitol Mall, 10th Floor
Sacramento, CA 95814
jluckhardt@downeybrand.com

APPLICANT'S CONSULTANTS

David A. Stein, PE
Vice President
CH2M HILL
155 Grand Avenue, Suite 1000
Oakland, CA 94612
dstein@ch2m.com

INTERESTED AGENCIES

Larry Tobias
CA Independent System Operator
151 Blue Ravine Road
Folsom, CA 95630
ltobias@caiso.com

Jennifer Scholl
Senior Program Manager
CH2M HILL
610 Anacapa Street, Suite B5
Santa Barbara, CA 93101
jscholl@ch2m.com

INTERVENORS

Greg Jones, City Manager
Maureen Conneely, City Attorney
City of Hayward
777 B Street
Hayward, California 94541
greg.jones@hayward-ca.gov
michael.sweeney@hayward-ca.gov
maureen.conneely@hayward-ca.gov
david.rizk@hayward-ca.gov

*** Pillsbury Winthrop Shaw Pittman LLP.**

Att: Diana Graves, Esq
Att: Michael Hindus, Esq
Att: Todd Smith
50 Fremont Street
San Francisco, CA 94120
diana.graves@pillsburylaw.com
michael.hindus@pillsburylaw.com
ronald.vanbuskirk@pillsburylaw.com
* todd.smith@pillsburylaw.com

Paul N. Haavik
25087 Eden Avenue
Hayward, CA 94545
lindampaulh@msn.com

James Sorensen, Director
Alameda County Development Agency
Att: Chris Bazar & Cindy Horvath
224 West Winton Ave., Rm 110
Hayward CA 94544
james.sorensen@acgov.org
chris.bazar@acgov.org
cindy.horvath@acgov.org

Charlotte Lofft & Susan Sperling
Chabot College Faculty Association
25555 Hesperian Way
Hayward, CA 94545
clofft@chabotcollege.edu
ssperling@chabotcollege.edu

Law Office of Jewell J. Hargleroad
Jewell J. Hargleroad, Esq
1090 B Street, No. 104
Hayward, CA 94541
jewellhargleroad@mac.com

Jay White, Nancy Van Huffel,
Wulf Bieschke, & Suzanne Barba
San Lorenzo Village Homes Assn.
377 Paseo Grande
San Lorenzo, CA 94580
jwhite747@comcast.net
slzvha@aol.com
wulf@vs-comm.com
suzbarba@comcast.net

Richard Winnie, Esq.
Alameda County Counsel
Att: Andrew Massey, Esq.
1221 Oak Street, Rm 463
Oakland, CA 94612
richard.winnie@acgov.org
andrew.massey@acgov.org

Libert Cassidy Whitmore
Att: Laura Schulkind, Esq.
Att: Arlin B. Kachalia, Esq.
153 Townsend Street, Suite 520
San Francisco, CA 94107
lschulkind@lcwlegal.com
akachalia@lcwlegal.com

Robert Sarvey
501 W. Grantline Rd
Tracy, CA, 95376
Sarveybob@aol.com

ENERGY COMMISSION

Jeffrey D. Byron
Commissioner and Presiding Member
jbyron@energy.state.ca.us

Susan Geffer, Hearing Officer
sgeffer@energy.state.ca.us

Bill Pfanner, Project Manager
bpfanner@energy.state.ca.us

Caryn Holmes, Staff Counsel
cholmes@energy.state.ca.us

Public Adviser
pao@energy.state.ca.us

DECLARATION OF SERVICE

I, Michael R. Wilson, declare that on July 15, 2008, I deposited copies of the attached City of Hayward's Statement in Support of PMPD for Eastshore Energy Center in the overnight mail at San Francisco, CA, with postage thereon fully prepaid and addressed to the California Energy Commission as identified on the Proof of Service list above.

AND 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.

