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8 STATE OF CALIFORNIA

9 State Energy Resources

10 Conservation And Development Commission

11 In the Matter of:

12
13 **EASTSHORE ENERGY CENTER**
14

Docket No.: 06-AFC-6

County of Alameda's Opposition to
Applicant's Motion to Reopen the
Evidentiary Record

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18 DATED: July 28, 2008

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16 **I. INTRODUCTION**

17 County of Alameda ("the County") hereby opposes Applicant's Motion to Reopen the
18 Evidentiary Record to challenge the Presiding Member's Proposed Decision that the aviation
19 impacts of the Eastshore Energy Center ("Facility") can not be mitigated. As set forth more fully
20 below, Applicant's last minute request to submit additional unsolicited anecdotal evidence lacks
21 good cause. Not only is the proposed evidence not new or material, it also will inevitably contain
22 the same flaws as the previous Barrick test. As such, this motion will result an undue time
23 burden on all involved, and should be denied.

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1 **II. PROCEDURAL BACKGROUND**

2 Evidentiary hearings on the Eastshore Energy Center's Application were held on the 17th
3 and 18th of December, 2007, at the conclusion of which the record was closed.¹ (RT 12/18/07
4 403:8) A Notice of Continued Evidentiary Hearing Date on January 14, 2008 indicated that "no
5 additional witnesses or exhibits shall be offered by the parties without a showing of good cause
6 to be determined by the Presiding Committee Member." On or about June 20, 2008, the
7 Presiding Member's Proposed Decision for the Eastshore Energy Center (06-AFC-6) ("Facility")
8 recommended that the Application for Certification be denied, specifically citing the Facility's
9 aviation hazards as the basis of two of the four deficient and immitigable reasons for
10 recommending denial of the Application.

11 On July 16, 2008, Applicant submitted its request to reopen the record to submit
12 supplemental evidence *including* an additional flyover test. At the July 21, 2008 oral argument
13 on its motion, Applicant indicated that it intended on jointly creating a protocol with Staff and the
14 other parties, and then submitting as evidence all protocol, results, responses and other
15 associated materials. In other words, Applicant would like to reopen the evidentiary record to
16 introduce all sorts of information that *might be connected* with the proposed flyover test.

17 The proposed evidence that Applicant moves to introduce will not overcome its burden
18 of showing there are no immitigable hazards, and will not be sufficient to compel a change in the
19 Presiding Member's well reasoned Proposed Decision. As such reopening the evidentiary
20 record for this purpose will resolve nothing and further delay resolution of this matter.

21 **III. ARGUMENT**

22 **A. Applicant's Last Minute Motion Lacks Good Cause to Reopen the Record**

23 "No additional witnesses or exhibits may be offered by the parties without a showing of
24 good cause". (Notice of Continued Evidentiary Hearing Date, 1/14/08) Applicant now seeks to
25 introduce "supplemental evidence including an additional flyover test of a facility similar to
26 _____

27 ¹ The Evidentiary Hearing schedule had already been extended as Presiding Commissioner Byron noted
28 at the start of the hearing, "I believe we have extended a great deal of latitude over the last number of

1 Eastshore.” (Applicant’s Motion to Reopen Record, p.1) However, Applicant made no effort to
2 present a showing of good cause as to why the record should be reopened.²

3 The reliability of the November 28, 2007 helicopter flyover at the Barrick Plant in Nevada
4 (“Barrick test”) was scrutinized during the evidentiary hearing on December 18, 2007. (RT
5 12/18/07; Applicant’s Ex. 20) Staff filed a Reply Brief on March 3, 2008 indicating that the
6 Barrick test was unreliable and done in great haste. (Staff’s Reply Brief, p. 11) Now that the
7 record has closed, and the Proposed Decision has recommended that the application be
8 denied, Applicant wants to reopen the record to refute those conclusions. However, wanting a
9 second chance to meet the burden of proof is not good cause to reopen the record. No good
10 cause being shown, the motion should be denied.

11 **B. Evidence From the Proposed Flyover is Not New Or Material**

12 New or additional evidence at hearing on adoption of the Presiding Member’s Proposed
13 Decision shall not be considered “unless due process requires or unless the commission
14 adopts a motion to reopen the evidentiary record.” (20 CCR § 1754(b).) This provision is further
15 explained in the CEC Siting Process Guidebook, which states:

16 “At the conclusion of the formal hearings but before issuance of a decision, a party may
17 file and serve on all other parties a petition to reopen the proceeding for the taking of
18 additional evidence. The request should specify the facts claimed to justify the petition,
19 including material changes of fact or of law alleged to have occurred since the
20 conclusion of the hearings. The petition should contain a brief statement of the
21 proposed additional evidence and explain why such evidence was not previously
22 presented.” (p.118)

20 While there appears to be no authority to reopen the record after issuance of the
21 *proposed* decision, but before issuance of the decision itself, such provides persuasive
22 guidelines for a “good cause” analysis. A motion to reopen the record for good cause could
23 conceivably be entertained if the Applicant had offered to provide new evidence that was not
24

25 weeks since our prehearing conference in order to allow testimony to come in a little bit late.” (RT
26 12/17/08 3:6-9)

27 ² The County complied with the good cause requirements in requesting that it be allowed to introduce
28 additional testimony when it submitted the December draft of the Airport Land Use Commission Plan for
the Hayward Airport. In that case, good cause was shown where evidence was both new and material
because the ALUC plan had just been released and the new restrictions on power plants in that Plan
made it material to the PMPD.

1 available when the evidentiary record was open. Similarly, good cause could arise because
2 new law had developed after the close of the record. However, as discussed above, Applicant
3 does not show good cause to reopen the record, because the proposed evidence could have
4 been made available before the close of the evidentiary record.

5 Applicant provides no explanation of why, when it realized that the Barrick test was
6 insufficient, it did not conduct a second test before the record was closed. Applicant's proposed
7 second flyover would not be *new* evidence. It would simply be *supplemental* evidence that will
8 likely cause the proceeding to be delayed by nearly one year. (RT 7/21/08 41:20-42:1-43:22)
9 Assuming that this motion was granted, and the Presiding Member justifiably maintained its
10 recommendation that the Application be denied, would the Applicant try again to do yet another
11 test?

12 Even if all of the evidence relating to a second flyover test was admitted into the
13 *reopened* record, it would have no material affect on the outcome of this proceeding. The
14 aviation concerns raised in the Proposed Decision were two-fold; even assuming the Applicant
15 could satisfy the thermal plume concern, which the County believes it cannot, the supplemental
16 evidence would have no effect on the regulatory concern of available airspace and congestion.
17 (PMPD VII(B)(3)(a), p. 350, separately addressing "Hayward Airport and the EEC Site" from
18 "Flights over the EEC Site")

19 Moreover, this supplemental evidence would not remedy the other outstanding concerns
20 relating to land use which formed the basis of the Proposed Decision's recommendation for
21 denial of the Application. As described in the Proposed Decision, the Facility is inconsistent
22 with the City of Hayward's General Plan and Zoning, and conflicts with the Airport Approach
23 Zoning Regulations and Alameda County Land Use Policy Plan. (PMPD, p. 2) Moreover, the
24 Facility will require the installation of the OPTICOM system, of which Applicant is only willing to
25 fund 50%.³ (PMPD, p. 8; Applicant's Comments on PMPD, 3 -4)

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³ It remains unclear who will fund the other 50% of OPTICOM.

1 While the County disputes that the proposed flyover test would allay the thermal plume
2 concerns, *even if* Applicant was able to obtain a reliable test, *and* those results were consistent
3 with its position, the other problems relating to land use compatibility would remain as a barrier
4 to certification. As such, reopening the record to introduce immaterial evidence is unwarranted.

5 **C. The Proposed "Plains End" Over Flight Test will Suffer the Same Deficiencies as**
6 **the Barrick Test**

7 The Proposed Decision found that the Barrick fly-over test was unreliable because of
8 numerous dissimilarities between the Facility and the Barrick Plant. (PMPD, p. 356.)
9 Nonetheless, a fly-over test was unnecessary anyway because on Staff's conservative
10 modeling which had been accepted by the FAA "as a valid representation of hazardous exhaust
11 velocities (Ex. 200, p. 4.10-20; Ex. 39, p. 6)" was reliable evidence upon which to make its
12 decision. (Id.)

13 Inasmuch as Applicant's believe that reopening the record to introduce supplemental
14 evidence including the another fly-over test using another power plant will substantiate its
15 position, Applicant will not be able to eliminate the uncertainties of uncontrollable variances
16 between the Facility and any other power plant. The Presiding Member "must be assured that
17 [the Committee is] accounting for the worst-case conditions that could arise." (PMPD, p. 356) It
18 is also a responsibility for the Presiding Member, when faced with uncertainty, to err on the side
19 of public health and safety. (See, RT 7/21/08 8:18-19) While Applicant in its motion offers to
20 "supply the Committee with the necessary factual, and empirical data derived *at least* a second
21 flyover test" there is no guarantee that any test will be representative of the worst-case
22 conditions at the Facility. (Motion, at p.3, emphasis added)

23 The proposed Plains End plant flyover would present no greater similarities to mimic the
24 Facility's conditions. For example, the Proposed Decision noted that the Barrick test was
25 unreliable because of the different geography and higher altitude of the Barrick site compared
26 with the Facility. (PMPD, p.354) Applicant's motion presents very little detail about the
27 specifications of the Plains End power plant other than it has its stacks in a linear arrangement
28 and sits at more than one mile about sea level. (Motion, at p. 1) No mention is made of the

1 height of the stacks at the Plains End site. If the Barrick site, at 4,340 MSL, is already
2 incomparable because of its altitude, surely the Plains End site will be even less reliable.
3 Additionally, use of only one type of aircraft will not represent the varied type of crafts that use
4 the Hayward airspace and airport. (RT 7/21/08 14:24-25)

5 Neither of these sites would produce representative data. Another non-identical test at
6 either the Barrick or Plains End sites will be no more conclusive than the theoretical modeling.
7 However, because the Presiding Member's Proposed Decision determined that its modeling,
8 and results approved by the FAA, were sufficient evidence, no further inquiry is appropriate.

9 **D. The FAA Will Not Accept the Results of the Proposed Test**

10 The FAA itself will not accept results for test methodology it has not sanctioned. As it has
11 stated it cannot accept the results from the Barrick test, there is no reason to believe that the
12 FAA would accept the results from any other test proposed by the Applicant. As the Applicant
13 notes in its motion, it is not legal to fly a fixed-wing aircraft at less than 500 feet over such a
14 facility without FAA approval. Moreover, no protocol for the test will be approved without
15 coordination with the FAA and Caltrans Aeronautics. (RT 7/21/08 23:3-6) Additionally, the FAA
16 has already accepted Staff's modeling as sufficient. (Ex. 39)

17 One supplemental test will not satisfy the need for extensive and rigorous in-flight scientific
18 testing required by the FAA to create guidelines. (RT 12/18/07 254:13-255:5) Without such
19 systematic and precise testing, the FAA will not waive the recommendation to avoid overflights
20 below 1000 feet AGL. (RT 12/18/07 254:15-19) Instead, to make any such testing useful, the
21 empirical data that Applicant seeks to introduce would need to be collected per developed
22 protocol designed and peer reviewed by federal and state aviation agencies. (See RT 7/21/08
23 4:25 - 5:7)

24 **IV. CONCLUSION**

25 Applicant's last minute motion to reopen the evidentiary record is simply an attempt to
26 remedy its failure to adequately satisfy its burden of proof. Applicant presented its evidence
27 while the record was open, and now, learning that the Presiding Member's Proposed Decision
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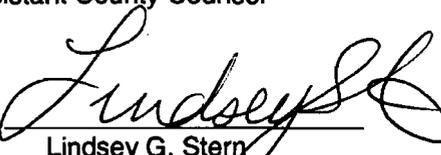
1 recommends denial of the Application, wants a second chance. However, even granting a
2 second chance to augment the record will be fruitless as no material evidence will be revealed
3 by the proposed supplemental flyover. As with the Barrick test, any additional test by the
4 Applicant will be anecdotal. Applicant has effectively conceded that the evidence in the record
5 does not meet its burden of proof. Thus if this motion is denied, the Committee must deny
6 certification. For all of the reasons stated herein, Applicant's motion should be denied.

7 For the reasons stated herein, the County opposes Applicant's motion.

8
9 Respectfully Submitted this 28 of July, 2008.

10
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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:

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DECLARATION OF SERVICE

I, Dalia Liang, declare that on July 28, 2008, I deposited copies of the following documents:

1. *County of Alameda's Opposition to Applicant's Motion to Reopen the Evidentiary Record; and,*
2. *County of Alameda's Supplemental Comments on Presiding Member's Proposed Decision and Supplemental Evidentiary Hearing;*

in the United States mail at Oakland, California, with first-class postage thereon fully prepaid and addressed to the those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of 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.

OR

I deposited the same documents at a designated place for collection maintained by Federal Express, an express service carrier, with fully-prepaid delivery fees, and addressed to those identified on the Proof of Service listed above.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge.

Executed on this 28th day of July, 2008



Dalia Liang

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To: "'docket@energy.state.ca.us'" <docket@energy.state.ca.us>, "greg.trewit...
Date: 7/28/2008 3:33 PM
Subject: RE: Eastshore Energy Center, 06-AFC-6
Attachments: Eastshore Suppl Comments 07-28-08.pdf; Eastshore Opposition to Reopen 07-28-08.pdf; Eastshore POS 07-28-08.pdf

On behalf of County of Alameda, I am serving each of you the attached documents authored by Associate County Counsel Lindsey G. Stern:

1. County of Alameda's Opposition to Applicant's Motion to Reopen the Evidentiary Record; and,
2. County of Alameda's Supplemental Comments on Presiding Member's Proposed Decision and Supplemental Evidentiary Hearing.

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