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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 REBUTTAL BRIEF ON CONTESTED ISSUES AND OPPOSITION TO APPLICANT'S OVERRIDE BRIEF

INTRODUCTION

Group interveners California Pilots Association ("Calpilots"), San Lorenzo Village Homes Association and Hayward Area Planning Association ("Hapa")[1], set forth the following opposition to the applicant Eastshore Energy Center's ("EEC") brief urging this Commission to override the non-conformities with local and state law and rebut those related issues raised in EEC's opening brief. As established below, given this project proposal conflicts with federal regulations relating to Hayward Airport's traffic patterns, as a matter of law, this application must be rejected at this site.

Additionally, Group Interveners note that some of the CPUC decisions cited by EEC are not cited correctly to enable counsel to readily locate the opinions and that the recent decision issued on December 21, 2007 by the Public Utilities Commission (Decision 07-12-052) adopting PG& E's long –term procurement plans is not cited by EEC. Given this December 2007 opinion supersedes earlier decisions, those earlier decisions cited by EEC as to the public need for fossil fuel peaking thermal power plants are superseded and must be disregarded.

ARGUMENT

A. As A Matter Of Law, This Commission Has No Authority To Site A Thermal Power Plant Which Conflicts With Federal Regulations Or That Contradicts State Legislative Mandates Prohibiting The Creation Of Airport Hazards Or Restriction Of Airspace.

The enabling legislation by the State Legislature vesting this Commission with exclusive power to certify a location in California with a thermal power plant expressly prohibits the Commission from issuing any certificate, which would conflicts with or is not permitted by federal law or regulations. Specifically, section 25500 of the Public Utilities Code provides the following:

> In accordance with the provisions of this division, the

[1] Throughout the record, group interveners also have been referred to as Group petitioners.

> commission shall have the **exclusive power to certify** all sites and related facilities in the state, ... **The issuance of a certificate** by the commission **shall be in lieu of any permit**, certificate, or similar document **required** by any state, local or regional agency, or federal agency ***to the extent permitted by federal law,*** for such use of the site and related facilities, **and [the certificate] shall supersede any applicable statute, ordinance, or regulation of any state, local, or regional agency, or federal** ***agency to the extent permitted by federal law.***
>
> **I**

(Emphasis and italics added.)

Section 25525 outlines the Commission's authorities to abide by local, state and federal law.

> **The commission** ***may not certify*** **a facility contained in the application when it finds**, pursuant to subdivision (d) of Section 25523, **that the facility does not conform with any applicable state, local, or regional standards, ordinances, or laws,** ***unless*** the commission determines that ***the facility is required for public convenience and necessity and*** that ***there are not*** **more prudent and feasible means of achieving public convenience and necessity**. In making the determination, the commission shall consider the entire record of the proceeding, **including, but not limited to, the impacts of the facility on the environment, consumer benefits, and electric system reliability**. ***The commission may not make a finding in conflict with applicable federal law or regulation***. The basis for these findings shall be reduced to writing and submitted as part of the record pursuant to Section 25523.

(Emphasis and italics added.) Based in part on section 25525. 20 California Administrative Code section 1741 provides the following guidance to the Commission outlining its objectives in reviewing an application for site certification:

> (a) The **purpose of an application proceeding is to ensure that any sites** and related facilities certified **provide a reliable supply of electrical energy** at a level consistent with the need for such energy, **and in a manner consistent with public health and safety, promotion of the general welfare, and protection of environmental quality.**
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> (b) The **application proceeding shall be conducted in order to accomplish** ***all*** **of the following** objectives:
>
> (1) To ensure that the applicant incorporates into the project

> all measures that can be shown to be feasible, reasonably necessary, and available to substantially lessen or avoid the project's significant adverse environmental effects, **and to ensure that any facility which may cause a significant adverse environmental effect is certified only if the benefits of such facility outweigh its unavoidable adverse effects.**
>
> (2) **To ensure that the applicant takes all measures** that can be shown to be feasible, reasonably necessary, and available **to comply with applicable governmental laws and standards**; **to ensure that any facility certified complies with applicable federal law; and to ensure that any facility which fails to comply with an applicable local or state law or standard is certified *only*** if such facility is required for public convenience and necessity and there are not more prudent and feasible means of achieving such convenience and necessity. [And]
>
> (3) **To ensure safe and reliable operation of the facility**.

(Emphasis and italics added.)

Likewise, section 1748 of title 20 of the California Administrative Code sets forth the purpose of the evidentiary hearings and applicant's burden of proof as to whether the facility can be operated safely and public health and safety **ensured**:

> (b) The hearings shall consider whether the facilities can be constructed and operated **safely and reliably and in compliance with applicable health and safety standards,** and shall assess the need for and feasibility of modifications in the design, construction, or operation of the **facility or any other condition necessary to assure safe and reliable operation of the facilities.** The applicant's safety and reliability information and staff and agency assessments required by Section 1743 shall be presented.
>
> (c) **The hearings shall consider whether the facilities can be constructed and operated in compliance with other standards, ordinances, regulations and laws and land use plans applicable to the proposed site and related facility**. The applicant's proposed compliance measures and the staff and agency assessments required by Section 1744 shall be presented. The determination of compliance required by Section 1744.5 shall also be presented.
>
> (d) Except where otherwise provided by law, the applicant **shall have the burden of presenting sufficient substantial evidence to support the findings and conclusions *required* for certification** of the site and related facility.

> (e) The proponent of any additional condition, modification, or other provision relating to the manner in which the proposed facility should be designed, sited, and operated in order to protect environmental quality and ensure public health and safety shall have the burden of making a **reasonable showing to support the need for and feasibility of the** condition, **modification,** or provision. The presiding member may direct the applicant and/or staff to examine and present further evidence on the need for and feasibility of such modification or condition.

Directly in conflict with the approval of the Eastshore Plant is the State Aeronautics Act, which creates the State Department of Aeronautics of the Department of Transportation and vests Counties and Cities, such as Alameda and Hayward, with the police powers of eminent domain to protect its airports and remove airport hazards. Additionally, the creation of an airport hazard is a state criminal misdemeanor. (Pub. Utilities Code, S 21652 et al. & Gov. Code, S 50485.12.)

The purpose of the Aeronautics Act is to "further and protect the public interest in aeronautics and aeronautical progress" by "[f]ostering and promoting safety in aeronautics [and] *[e]ffecting uniformity of the laws and regulations relating to aeronautics consistent with federal aeronautics laws and regulations*." (Pub. Utilities Code, S 21002, subds. (b) (c.)) Included in the mandate to the State Aeronautics Division is to "[a]ssur[e] . . . persons residing in the vicinity of airports are protected to the greatest possible extent against intrusions by unreasonable levels of aircraft noise."

Section 21017 of the Public Utilities Code defines "**airport hazard" as "any structure**, object of natural growth, ***or* use of land**, **which obstructs the air space required for flight of aircraft in landing or taking off at an airport or which is otherwise hazardous to the landing or taking off**." Section 21402 sets forth the State's sovereignty over its airspace and "right of flight" for navigators:

> The ownership of the space above the land and waters of this State is vested in the several owners of the surface beneath, **subject to the right of flight described in Section 21403. No use shall be made of such airspace which would interfere with such right of flight;** provided, that any use

> of property in conformity with an original zone of approach of an airport shall not be rendered unlawful by reason of a change in such zone of approach.

(Emphasis added.)

Section 21403 continues setting forth the right of navigators to safe access to the public's airports such as Hayward's "without restriction or hazard" as presented by Eastshore's 500 foot high thermal plumes and Russell's thousand high thermal plumes:

> (a) **Flight in aircraft over the land and waters of this state is lawful, unless at altitudes below those prescribed by federal authority,** or unless conducted so as to be imminently dangerous to persons or property lawfully on the land or water beneath. The landing of an aircraft on the land or waters of another, without his or her consent, is unlawful except in the case of a forced landing or pursuant to Section 21662.1.
> . . . . . .
>
> (c) ***The right of flight*** in aircraft ***includes the right of safe access to public airports, which includes the right of flight within the zone of approach of any public airport without restriction or hazard.*** The zone of approach of an airport shall conform to the specifications of Part 77 of the Federal Aviation Regulations of the Federal Aviation Administration, Department of Transportation.

(Emphasis and italics added.)

1. An Approval Of Eastshore Impermissibly Conflicts With Federal Regulations Adopted For Pilots Implementing The Single Instrument Approach Into Hayward.

Before the Commission are the declarations of General Counsel for Calpilots one of the more seasoned pilots appearing before the CEC who learned how to fly fifty years ago at the Hayward Airport. (Exhibits 711 & 712.) As Mr. White explained in his December 4, 2007 declaration, his primary disagreement with staff's aviation analysis in the FSA was that it "fails to consider flight in Instrument Flight Rules (IFR) conditions when pilots utilize the published FAA approach procedures for Hayward Airport." (Exhibit 711, p. 2.)

In regulating and establishing standards for navigable airspace over and surrounding airports over which it has exclusive jurisdiction, federal law sets forth the single instrument approach for pilots having to land utilizing the flight instrument approach due to wind, visibility, or other reasons as directed by the FAA tower controller at Hayward. As Mr. Cathey explained, one reason for Hayward's airspace being one of the lowest, if not the lowest airspace traffic pattern in the State, is to "deconflict with instrument approach aircraft flying into Oakland." (II R.T. 116-117 [Cathey].) The general rule of thumb for Hayward in utilizing the instrument approach is that "[t]o avoid the overflight traffic into Oakland International, . . . pilots are instructed to remain at or below 1,000 feet east of the shoreline." (II R.T. 193 [Butterfield].)

As the reliever airport for Oakland International included in the FAA's National Plan of Integrated Airport Systems and California's Airport System Plan, the FAA has "established an Instrument Approach Procedure for Hayward," Exhibit A attached to Mr. White's declaration, relying on its Terminal Enroute Procedures Standards "based on then existing conditions and structures in the nearby airspace," which presently do not include any thermal power plants emitting hot thermal plumes hundreds of feet high into presently navigable airspace.

As FAA District manager for San Francisco Air Traffic Control District, Andy Richards, summarized for the Commission, whose jurisdiction Hayward Airport falls, "altering the Hayward Airport traffic pattern for plume avoidance . . . [¶] also affect[s] aircraft arrivals into Oakland International Airport. Raising the pattern altitude would place the aircraft at Hayward in an unsafe proximity to turbojet aircraft arrivals to runway 29 at Oakland International Airport." (Exhibit 727.) Most significantly,

> The raised traffic pattern would not have the separation the FAA requires to have both airports operate independently. If not operated independently, both airports would suffer from greatly reduced efficiency. [¶] Before the Air Traffic Organization (ATO) considers any alterations to the National Airspace System, a complete safety and risk analysis must be completed. The

> Airport Sponsor would have to put in a request to change the airport air traffic operation, and then the ATO would take the request under consideration.

(Exhibit 727.) As the record undisputedly establishes, this request has not been made for either Eastshore or for Russell.

The instrument approach was vividly described by the State's Airport Division Chief Gary Cathey, who explained that at the Hayward traffic pattern altitude of 600 feet above ground, pilots are authorized to fly as low as 393 feet above ground utilizing the instrument approach if she or he has missed the runway.

> . . . although the traffic pattern altitude is **650 feet MSL, above mean sea level or about 600 above ground level**, ***an instrument procedure missed approach will take aircraft as low as 493 feet*** **above ground level and that is part of the missed approach procedure**. On a pilot check ride **a private pilot is expected to, is given the tolerance *up to 100 feet deviation* from the altitude that he is assigned.** Therefore ***a pilot could be as low as 393 feet above ground level and still be well within the regulations of operating his aircraft.*** **Three-hundred-ninety-three feet above the *ground is not a lot of distance, in my opinion, to separate the aircraft from the peak plumes that will be generated when this plant is operated at peak periods of time.*** But I just wanted the members to understand and realize that just because a traffic pattern altitude is stipulated**, aircraft pilots under these circumstances will be completely legal to operate an aircraft as low as 393 feet. And furthermore, if a pilot is looking on the ground trying to figure out where he should not be flying, especially considering there will be a second area [power plant], he may not be glued to that number. It is quite likely and possible that he might be flying lower than that, which would cause him to get into these plumes.**

(II R.T. 120-122, emphasis and italics added; *accord* declaration of Jay White, Exhibit 722, p. 2 ["when landing straight in on [Hayward] Runway 28 a pilot can descend in instrument conditions [as allowed by the FAA procedures] to 353 feet above ground. When circling for a landing a pilot can descend to 493 feet above the ground to circle in visual conditions."].)

Not only would the pilot be flying sufficiently low to "get into the[] plumes,"[2] but presently if a pilot misses the approach to Hayward's Runway 28, the FAA instructs the pilot to turn around which would place them right over the power plants. Mr. Butterfield also addressed this issue:

> Q. . . . Mr. Butterfield, if you're a pilot attempting to land at the Hayward Airport and for some reason you are unable to utilize the runway or to land[,] what takes place[?] . . .[W]hat are you generally instructed . . . [?]
>
> A. I think you're referring to if you're **flying an approach under instrument conditions without visual reference to the ground. The published missed approach procedure for all the approaches to Runway 28-Left at Hayward** call for the pilot to fly directly to the Oakland VORTAC, which is a navigation facility on Oakland Airport and enter a holding pattern over Oakland.
>
> That is . . .published primarily for lost communications procedures where the pilot cannot talk to air traffic control. And, as you can well imagine, air traffic control, the last thing they want is an aircraft holding overhead Oakland International Airport.
>
> ***So long as they have communication with the pilot they will issue instructions* to the pilot *to turn left to a heading of 160 and give them vectors back around either for another approach* or to go to their alternate airport. *And that heading would take them over the power plants. In that s*ituation *because they're in instrument conditions they would not be able to see the power plant and fly around it.***
>
> **That is in reference to the mitigations that were offered for Russell City. They wouldn't be able to do that.**

(II R.T. 194-195.)

As described by Mr. White, pilots also resort to an instrument approach when seeking to land in poor weather conditions by circling which requires "maneuvers at low altitude, at low airspeed and in marginal weather conditions" (Exhibit __, p. 2.) As Mr. White summarized it, placement of a power plant with thermal plumes "conflict[s] with a federal regulation in that it reduce[s] the safety margin for aircraft circling at the FAA approved circling altitude of 493 feet."

[2] The heat and velocity of the plumes vary with the altitude. At ____.

(II R.T. 202.) Based on this and that the project violates "state law in that it would create a hazard under California Public Utilities Code Section 21670 and Government Code [section] 50485.2," as summarized by Mr. White, "approval of the Eastshore Energy project is outside the authority of the Commission." (II R.T. 202.)

Here, Eastshore heavily relies on the FAA's "no risk" determination under 77 of the Federal Aviation Regulations applicable to its seventy foot high smokestacks and cooling towers. But, as a comparison of section 21658 of the Public Utilities Code and the FAA's subsequent Octobe 2007 letter and testimony undisputedly establishes, this provision does not apply to its 500 foot high thermal plumes, much of the time which are invisible to pilots. Although section 21658 of the Public Utilities Code likewise addresses the height of the physical structure, it also provides the following in relevant part:

> ***No public utility shall construct any*** pole . . .distribution or transmission tower, or **tower** line, or substation ***structure in the vicinity of the exterior boundary of an aircraft landing area of any airport open to public use,* in a location with respect to the airport and *at a height so as to constitute an obstruction to air navigation, as an obstruction is defined in*** accordance with Part 77 of the Federal Aviation Regulations, Federal Aviation Administration, or ***any corresponding rules or regulations of the Federal Aviation Administration*, unless the Federal Aviation Administration has determined that the pole, line, tower, or structure does not constitute a hazard to air navigation**.

Here, in addition to Exhibit 204 and the testimony of the FAA that this thermal power plant's 500 foot high thermal plumes will constitute a hazard to air navigation jeopardizing pilots abilities to safely land within Hayward's airspace limited to 600 feet above ground, also in support of this conclusion before the Commission is Federal Order 5190.6A setting forth the FAA's Airport Compliance Requirements for the Hayward Airport. (Exhibit 411.) Among other provisions vesting authority in the FAA, part 4-8, p. 16 entitled "restrictions on aeronautical use of airport" provides that "Flight Standards and Air Traffic," departments of this Mssrs. Butterfield

and Richards represent, must be "consulted to help determine the reasonableness of the airport owner's restrictions," which here would be imposed by this Commission's certification of a second thermal power plant within the Airport Influence Area for Hayward.

As also explained by Mr. Richards and set forth in Order 51090.6A, "[i]t may be appropriate to initiate an FAA airspace study to determine the efficiency and utility of the airport when considering the proposed restriction. In all cases the FAA will make the final determination of the reasonableness of the airport owner's restrictions which denied or restricted use of the airport." (Exhibit 411.) As Mr. Richards pointed out, to date no one has initiated a request for Air Traffic to "change the airport air traffic operation" or "alter the National Airspace System" for Hayward with respect to either Eastshore or Russell. (Exhibit 727.)

Consistent with the Public Utilities Code, under section 3 of Order 5190.6A entitled "Approach Protection and Compatible Land Use," p. 19 of Exhibit 411, Hayward as a recipient of federal funds is "obligated to prevent the growth or establishment of obstructions in the aerial approaches to the airport." In addition to "obstruction" as defined in FAR Part 77, the "brick and mortar" provision as abbreviated by Mr. Butterfield, Order 5190.6A also refers "obstruction" as "other appropriate citation applicable to the agreement as applied to the particular airport." (Exhibit 411, p. 19.)

On point, and specifically the citation in Order 5190.6A prohibiting this project, is the following provision of part 4-9:

> . . . **.Effective with the Airport and Airway Safety and Capacity Expansion Act of 987 (P. L. 100-223)** the standard approach assurance was changed to read: "It will take appropriate action to assure that such terminal airspace as **is required to *protect instrument and visual operations* to the airport (*including established minimum flight altitudes*) will be cleared and protected** by removal, lowering, relocating, marking, or lighting or otherwise mitigation of existing airport hazards **and by preventing the establishing or creation of future airport hazards**." ([Citation].)

(Exhibit 411, p. 19.) The Order defines an airport hazard as "any structure or object of natural growth. . . **or any use of land near such an airport**, **which obstructs the airspace required for the flight in landing or take off at such airport or is otherwise hazardous to such landing or taking off of aircraft."**

2. As A Matter Of Law, The Legislature Already Has Determined That Restrictions And Hazards Such As Here Impairing The Airport's Utility Is A Public Nuisance Threatening The Public's Health And Safety Mandating That There Shall Be No Interference With The Airport's Utility.

The Government Code sets forth the Airport Approaches Zoning Law enacted by the Legislature to "prevent the creation or establishment of airport hazards." (Gov. Code, S50485.3.) Like the State Aeronautics Act, the Government Code also defines "Airport hazard" as "any structure or tree **or use of land which obstructs the airspace required for the flight of aircraft in landing or taking off at an airport or is otherwise hazardous to such landing or taking off** of aircraft." "Airport hazard area" is defined as "any area of land . . . upon which an airport hazard **might be established if not prevented by this article**." Clearly, by Eastshore's own admissions, the location it chose for its fourteen seventy foot tall smokestacks emitting thermal plumes five hundred feet into the air falls within an "airport hazard area" and interferes with the traffic pattern needed for instrument landing as described above by Mssrs. White, Cathey and Butterfield which may be as low as 383 feet above ground.

Government Code section 50485.2 also makes legislative determinations limiting this Commission's authority to approve this application for this site. First, "an airport hazard endangers the live and property of users of the airport and occupants of land in its vicinity." Second, as undisputedly applicable here as conceded by the Commission in requiring restrictions of that yet to be defined airspace above the Russell City plant, reduction in the airspace needed for landing and taking off may "destroy or impair the utility of the airport and the public investment therein." (Gov. Code S 50485.2.) Specifically, the Legislature has determined the following:

> **It is hereby found [an airport hazard exists]. . . if of the obstruction type, in effect reduces the size of the area available for the landing, taking off and maneuvering of the aircraft, thus tending to destroy or impair the utility of the airport and the public investment** therein. Accordingly, it is hereby declared: (a) that the **creation or establishment of an airport hazard is a public nuisance and an injury to the community served by the airport in question;** and (b) that it is therefore necessary **in the interest of the public health, public safety, and general welfare that the creation or establishment of airport hazards be prevented by appropriate exercise of the police power or authority conferred . . . commencing with Section 21652 . . . . of the Public Utilities Code.**
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> It is further declared that **both the prevention of the creation or establishment of airport hazards and the elimination, removal, alteration, mitigation, or marking and lighting of existing airport hazards are public purposes for which a city or county may raise and expend public funds and acquire land or property interests therein**.

Based on section 50485.2, if this Commission approved this project, as a matter of law the City or County would be entitled to exercise its police power of eminent domain and remove it as a hazard to the community to protect the utility of its public airport.

As clearly explained by the FAA, Caltrans Aeronautics and Calpilots, pilots must fly below 1,000 feet within Hayward's airspace to not interfere with Oakland's turbojet traffic and will fly below 500 feet if they resort to instrument control due to a missed landing or must circle to land due to poor visibility commonly experienced along the shoreline of the San Francisco Bay due to common coastal fog. It is undisputed that those pilots missing the runway presently are directed by the FAA to fly right over the location which Eastshore proposes to build its fourteen seventy foot high smokestacks emitting its 500 foot high thermal plumes.

In accordance with state and federal law as set forth in its federal grant agreements, Hayward adopted its Airport Approach Zoning Laws pursuant to Government Code section 50485.3:

> **In order to prevent the creation or establishment of airport hazards, every city or county having an airport hazard area within its territorial limits may adopt, administer, and enforce, under the police power** and

> in the manner and upon the conditions hereinafter prescribed, **airport zoning regulations for such airport hazard area, which regulations may divide such area into zones, and, within such zones, specify the land uses permitted and regulate and restrict the height to which structures and trees may be erected or allowed to grow.**

(Emphasis added.)

Likewise, Public Utilities Code section 21670 further authorizes the creation of Airport Land Use Commissions to "provide for the orderly development of each public use airport . . . and the area surrounding these airports . . .and **to prevent the creation of new noise and safety problems" as well as to "protect public healthy, safety, and welfare** by ensuring the orderly expansion of airports and adoption of land use measures **that minimize the public's exposure to excessive noise and safety hazards within areas around public airports**." (Pub. Utilities Code, § 21670, subd. (a) (1) & (2), emphasis added.)

The local procedures guiding Airport Land Use Commissions must also be reviewed by the Division of Aeronautics to determine if the procedures will rely on "height, use, noise, safety, and density criteria that are compatible with airport operations, as established by this article, and referred to as the Airport Land Use Planning Handbook . . . and any applicable federal aviation published by the division, and any applicable federal aviation regulations, including, but not limited to, Part 77 (commencing with Section 77.1) of Title 14 of the Code of Federal Regulations." (Pub. Utilities Code, § 21670, subd. (a) (1) & (2).)

The mandate of the Legislature set forth in subdivision (b) of section 21674.7 of the Public Utilities Code to County Land Use Commissions is specific and likewise binds this Commission:

> (b) **It is the intent of the Legislature to discourage incompatible land uses near existing airports**. **Therefore, prior to granting permits for the renovation or remodeling of an existing building, structure, or facility, and before the construction of a new building, it is the intent of the Legislature that local agencies shall be guided by the height, use, noise, safety, and density criteria that are compatible with airport operations, as established by this article, and referred to as the Airport Land Use Planning**

> **Handbook, published by the division, and any applicable federal aviation regulations**, including, ***but not limited to***, Part 77 (commencing with Section 77.1) of Title 14 of the Code of Federal Regulations, **to the extent that the criteria has been incorporated into the plan prepared by a commission pursuant to Section 21675. This subdivision does not limit the jurisdiction of a commission as established by this article**.

Although subdivision (b) does not limit the authority of local agencies to overrule commission actions or recommendations, to do so requires a two thirds vote of the governing body *and only* if the body "makes specific findings that the proposed action is consistent with the purposes of the Aeronautics Act as set forth in 21670" cited above *to minimize the public's exposure to excessive noise and safety hazards within areas around public airports*. (Pub. Utilities Code, §§ 21676 & 21676.5 [local agency may "propose to overrule" *after* hearing by a two-thirds vote of its governing body followed by 30 day comment period by Commission]; 21677 [Marin's commission advisory and may be overruled by majority].)

Likewise, Government Code 50485.4 makes clear that only the most restrictive land uses may be allowed surrounding the public's airports such as Hayward's:

> In the event that a city or county has adopted, or hereafter adopts, a comprehensive zoning ordinance regulating . . . the height of buildings, any airport zoning regulations applicable to the same area or portion thereof may be incorporated in and made a part of such comprehensive zoning regulations, and be administered and enforced in connection therewith. *In the event of conflict between any airport zoning regulations adopted under this article* ***and any other regulations applicable to the same area whether the conflict be*** with respect to the height of structures or trees***, the use of land, or any other matter, and whether such other regulations were adopted by the city or county*** which adopted the airport zoning regulations or by some other city or county, ***the more stringent limitation or requirement shall govern and prevail.***

(Emphasis and italics added.)

Given the Legislature's mandate set forth in section 21690.5 of Public Utilities Code which is applicable to this Commission's decision providing jurisdiction, Group Interveners

submit that the Legislature already has mandated this Commission's decision to find that this project is not to the benefit of the public:

> The Legislature finds and declares as follows:
>
> (a) The proper operation of California's publicly owned or operated airports is essential to the welfare of the state and its people.
>
> (b) California's publicly owned or operated airports establish a vital transportation link between the state and the economic systems of the nation and the world, and enable the state to enjoy and provide the benefits of an international tourist and commercial center.
>
> (c) The economic validity and stability of California's publicly owned or operated airports is, consequently, a matter of statewide importance.
>
> (d) The policy of this state is to promote the development of commerce and tourism to the end of securing to the people of this state the benefits of these activities conducted in the state.
>
> (e) Therefore, since the proper operation of the state's publicly owned or operated airports is essential to the welfare of the state and its people, the Legislature recognizes and affirms such operation as a governmental function to be discharged in furtherance of the policy of securing the benefits of commerce and tourism for the state and its people.

Public Utility Code section 21690.6 states this applies to any airport owned or operated by a political subdivision, including a charter city. Although section 21690.5's mandate is set forth in article 4.5 authorizing concessions, this clear and unambiguous theme is repeated throughout the Public Utilities Code which applies to this Commission, including requirements applicable new construction of state buildings.

> ***Notwithstanding any other provision of law*****, if the proposed** ***site*** **of any state building** ***or other enclosure is within two miles*****,** measured by air line, ***of that point on an airport runway*****, or runway proposed by an airport master plan, which is nearest the site, the state agency** or office **which proposes to construct** the building or other enclosure **shall,** before acquiring title to property for the new state building or other enclosure site or for

> an addition to a present site, **notify the Department of Transportation**, in writing, of the proposed acquisition. **The department shall investigate the proposed site and,** within 30 working days after receipt of the notice, **shall submit to the state agency or office which proposes to construct the building or other enclosure a written report** of the investigation and its recommendations concerning acquisition of the site. ***If the report of the department does not favor acquisition of the site, no state funds shall be expended for the acquisition*** **of** the new state building or other **enclosure site**, **or the expansion of the present site, or for the construction** of the state building or other enclosure, provided that the provisions of this section shall not affect title to real property once it is acquired.

(Pub. Utilities Code, §21655, emphasis and italics added.)

Here, on November 1, 2007, Exhibit 203, the Department of Transportation made such a recommendation to this agency reaffirming its earlier recommendation against such a location and agreeing with CEC staff that this facility as well as Russell as stated in its November 1 as well as attached July 18, 2007 letter should be "the ***relocation*** of the plant at a sufficient distance that would not negatively impair a pilot's ability to control or maneuver his/her aircraft." The basis was the same as with Russell's, the "potential hazards to navigable airspace created by the construction of this facility revolve primarily around *the proximity of the power plant relative to Runway 10R/28L*" at Hayward Airport which traffic pattern altitude "is 650' above Mean Sea Level (MSL). (Exhibit 203.)

B. The FAA's And State Aeronautics Evidence Undisputedly Establishes That The "No Risk" Determination Is Limited To Physical Structures And SRA's "No Safety Risk" Conclusion Is Based On Data Where Power Plants Are Visable And Located Far From Airports.

The EEC argues that the "single assumption underl[ying] all of the concerns expressed by Staff and local agencies regarding consistency" is based on an "unfounded assumption" that EEC's thermal plumes from its fourteen stacks "could create a hazard to aircraft." (EEC Override, pp. 1-2.) The EEC argues first that no one will be flying over the project area, relying on the testimony of Michael Graves who erroneously assumed flyovers are over 1,000 feet, directly in

violation of federal aviation standards and contradicted by both the City's and Staff's Traffic Tracts.[3] (EEC Override, p. 2; compare II R.T. __ Butterfield ["east of shoreline one must be below 1,000 feet"], II R.T. 120 Cathey [throughout Graves' declaration it's inferred that majority of aircraft flying in the vicinity will be at 1,000 MSL or greater] & City Opening, pp. __.)

Further, EEC contends that "a panel of [FAA] safety experts concluded that 'the risk associated with plumes is deemed acceptable without restriction, limitation or further mitigation.'" (EEC Override, p. 2.) But, as David Butterfield, an Aviation Safety Inspector for Operations for the FAA explained, "the realities of that analysis . . . is strictly a database search of FAA/NTSB/NASA databases on accident and incidents over a 30 year period of time" from 1975 to 2004, a time during which the height of the smokestack of most power plants prohibited locating it near an airport. (II R.T. 114.)

> In the 30 years of analysis from 1975 to 2004, that's throughout the entire country, all sorts of power plants. **The majority of older technology power plants had taller stacks, therefore could not be built close to airports**. And they also emitted a visible plume which pilots would avoid much as they would avoid convective weather.
>
> So for the analysis to say there were no accidents or incidents associated with plumes is not . . . a big leap of faith because most pilots are not going to fly through one if they can see it. And the other thing is, because the older technology stacks were taller and away from airports pilots transiting from point A to point B were typically above 1,000 feet when they would fly in the vicinity of these power plants.
>
> **So now we have a situation with Eastshore that is close to an airport that emits a plume that is largely invisible and the FAA does not have statistical data specific to that type of operation.**
>
> The safety risk analysis does say that the risk of catastrophic damage to an aircraft over flight of a plume is acceptably low. But you need to understand the greater context of that data that was mined from these databases.

(II R.T. 114-115.)

[3] As Mr. Cathey explained, the Hayward Air Traffic pattern altitude is "exceptionally low," if not "probably the lowest traffic pattern altitude in the state . . . to deconflict with

> facilities may cause air disturbances via exhaust plumes. Two hazards were identified by members of the safety risk analysis team. The first hazard recognized turbulence that may be associated with plumes that could result in possible airframe damage and/or negative effects on aircraft stability in flight. The second hazard discussed was the possible adverse effects of high levels of water vapor, engine/aircraft contaminants, icing, and restricted visibilities produced by these plumes. These hazards, taken individually or cumulatively, could possibly result in the loss of the aircraft or fatal injury to the crew, as well as substantial damage to ground facilities. The SME team considered these situations to be most critical for general aviation (GA) aircraft flying at low altitudes during the takeoff and/or landing phase when an aircraft is in close proximity to an airport.

Further, as Mr. Cathey testified, presently pending is the proposal to amend FAA Order 7400.2 which considers a plume generating facility as a hazard to air navigation on expected flight paths past less than 1,000 feet above the top of the object. (Also see Exhibit 39.) This is indeed the case with Eastshore with respect to its location relative to Hayward Airport." (II R.T. 117.) Therefore, as Mr. Cathey aptly put it, this proposal does not satisfy the criteria developed by the FAA

> the bottom line is, that's the recommendation and it is intended to be adopted for the use of future airspace determinations, **specifically for power plants in close proximity to airports that have traffic pattern altitudes less than 1,000 feet. And all those criteria match exactly the situation that we're discussing right** now.,

(II R.T. 118.)[4]

[4] Specifically, the report forewarned against creating just the unsafe circumstances already prohibited by state and federal law in protecting airspace necessary for general aviators to land and take off:

> The underlying presumption is that high efflux temperature or velocity from industrial facilities may cause air disturbances via exhaust plumes. Two hazards were identified by members of the safety risk analysis team. The first hazard recognized turbulence that may be associated with plumes that could result in possible airframe damage and/or negative effects on aircraft stability in flight. The second hazard discussed was the possible adverse effects of high levels of water vapor, engine/aircraft contaminants, icing, and restricted visibilities produced by these plumes. These hazards, taken individually or cumulatively, could possibly result in the loss of the aircraft or fatal injury to the crew, as well as substantial damage to ground facilities. The SME team considered these situations to be most critical for general aviation (GA) aircraft flying at low altitudes during the takeoff and/or landing phase when an aircraft is in close proximity to an airport.

C. Eastshore's "Flyover" "Test" Does Not Satisfy The Necessary Elements To Constitute Reliable Evidence And Therefore Must Be Struck.

On November 28, 2007, the day after the prehearing conference before the Evidentiary Committee, the same day that the applicant claimed to have its evidence available and in the process of being printed, without any prior notice or invitation to any party, CEC staff, or to any of the numerous disclosed aviation experts, including Mr. Cathey of California's Division of Aeronautics or any disclosed FAA witness to observe, confirm and verify any results, EEC's expert visited the Barrick facility in Nevada to conduct a "flyover" test employing former Italian Airforce Pilot Claudio Bellotti, who formerly often flew over the Alps and now the Sierras from Lake Tahoe where he now lives.

At no time on November 27, 2007, was it disclosed that such a test would be conducted which given the equipment and number of personnel needed, must have been known and planned at that time. None of the disclosed witnesses offered by both CEC staff and Group Interveners, which includes the statewide organization of pilots, were invited to attend. Neither was CEC staff invited to attend to observe this "flyover" or verify the equipment, methodology or data which was purportedly monitoring the turbulence measured. Not until December 7, ten days prior to the commencement of the evidentiary hearings, was this news disclosed that a "test" was performed soon after the pre-hearing conference, and the modeling analysis provided by the CEC Staff was all "wrong." (Override Brf, p. 2.)

Given EEC's failure to disclose this "test" upon which it bases much of its argument for this Commission to ignore its State and Federal mandates prohibiting obstructions and restrictions of navigable airspace accessing the California's airports on the basis it is "safe" to fly through thermal plumes, and its failure to disclose its intent to conduct it and invite the numerous aviation experts to observe, applying evidentiary standards adopted to protect against such unverified claims, minimally statutorily this is "weak" evidence. (Evid. Code §412 ["if evidence offered

when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distress."].) Not only should this evidence be viewed with distrust as directed by section 412 of the Evidence Code, but Group Interveners move that it be struck.

D. The Fact That The CEC Received Numerous Reports And Complaints From Pilots Flying Over Blythe, An Airport With Far Less Flights Than Hayward, Clearly Establishes Serious Safety Risks Exist By Siting Power Plants Near Busy Airports.

In 2006 Hayward Airport had 130,000 "takeoffs and landings at the airport." (II R.T. 270.) In 2007 there was an additional increase of take off and landings of "about 17,000." According to Hayward City's estimates, operations by the end of 2007 are expected to be at about 147,000. (II R.T. 270.) Under the Airport Master Plan estimate a growth of over 3,000 operations, "presently now the growth that we were projecting. There was a growth of 16,000 rather than 3,350." (II R.T. 272.) As CEC Staff testified, some years ago the CEC began receiving complaints from pilots accessing the Blyth Airport attributed to the siting and construction the Blyth Power Plant approximately one mile from the runway. The situation in Blyth is startlingly different than that in Hayward given its isolated location and far smaller number of operations. (See attached photos from CEC's PSA of which Group Interveners request administrative notice.)

While Hayward's operations averaged 1,225 monthly, Blyth's operations averaged to approximately 25 monthly. Yet, with so few operations, prior to the NOTAM which was posted restricting Blyth's airspace, the CEC still received complaints which lead to Gary Cathey's investigation a few years ago to fly over the Sutter Power Plant with a CEC staff supervisor. Group Interveners submit that this evidence gathered over the years since the construction of Blyth constitutes far more reliable evidence that hot thermal plumes hundreds of feet high create airport hazards than the paid for experts of the applicant whose opinions are based on the erroneous

assumption that the traffic pattern altitude for Hayward is 1,000 feet or isolated unobserved tests by helicopter mountain pilots. (See Exhibit 20, testimony of Graves, part 1.)

Mr. Cathey best summarized his purpose when the CEC had contacted him to investigate these complaints accompanied by CEC staff supervisor Eileen Allen:

> . . . when I conducted an overflight of the Sutter power plant in December of 2003 **the purpose of that overflight was not to conduct a scientific test*, it was rather to validate the claims that were provided to the Division of Aeronautics as a result of the Blythe power plant being constructed* approximately one mile away from the Blythe Airport, which is about the same distance that this power plant has been proposed to be constructed at.** *I was curious if the claims that I was receiving were true or not so I took a member of the Energy Commission up on a flight and conducted several overflights of the power plant*. And I can't speak as to whether, what the similarities and dissimilarities are of the two facilities, the existing one I flew over and this proposed one, I'll let the Energy Commission staff address any questions you have on that.
>
> But **I can absolutely testify that at approximately 1,000 feet I was feeling what I would define as light turbulence** using the definitions that were previously provided **and I terminated the elevation that I was flying at the point of 600 feet. I thought that jeopardized controllability and maneuverability of the aircraft.** I have been flying aircraft . . .for over 22 years and I was anticipating getting into that turbulence. Whereas a pilot flying, especially an itinerant pilot flying to or from the airport, may not be anticipating that type of turbulence. **And I think there is a good potential for a pilot to over-control the aircraft in the event that he experiences what I would deem to be asymmetrical lift. And I did experience asymmetrical lift at one of my overflights. One wing got more lift as a result of flying over the exhaust plume than the other one did, which caused the aircraft to roll.** ***I was anticipating it,*** *I was able to quickly correct it,* ***but a pilot who is not anticipating that could overreact, especially in such a very busy environment as operating at the Hayward Airport.***

(II R.T. 122-123.)

E. As A Matter Of Law, Like The ALU, This Commission Must Satisfy Public Utilities Code 21676 Which Prohibits Creation Of Airport Hazards.

California's State Policy concerning prevention of public airport safety hazards is set forth in the Public Utilities Code. Section 21670 provides sets forth the Legislature's specific findings: hereby finds and declares that:

> (1) It is in the public interest to provide for the orderly development of each public use airport in this state and the area surrounding these airports so as to promote the overall goals and objectives of the California airport noise standards adopted pursuant to Section 21669 **and to prevent the creation of new noise and safety problems**.
>
> (2) It is the purpose of this article to protect public health, safety, and welfare by ensuring the orderly expansion of airports and the adoption of land use measures that minimize the public's exposure to excessive noise and safety hazards within areas around public airports to the extent that these areas are not already devoted to incompatible uses.

(Emphasis added).

Here, in analyzing whether exercise of an override is appropriate, this Commission must also satisfy 21675.1, which mandates that any override of the Airport Land Use Commission decision may only be overruled by a two-thirds vote of the overriding agency only if this Commission finds it also satisfies the purpose of the Land Use Commission as set forth in 21670. (Pub. Utilities Code §21575.1, subd. (d) [local agency may overrule "by a two-thirds vote of its governing body, if it makes specific findings that the proposed action . . . or permit is consistent with the purposes of this article, as stated in Section 21670"].)

Group Interveners submit that as a matter of law, applying section 21670, the certification sought by EEC admittedly "creates new noise and safety problems" in the airport surroundings and such required findings to overrule the Airport Land Commission cannot be made under applicable state and federal requirements also prohibiting this construction at this location.

F. There Is No "Indisputable Energy Shortage" Requiring The Construction Of Fossil Fuel Peaking Plants In 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.

1. The Hayward San Leandro Area Is A Moderate Coastal Climate With A Comparative Low Load Need Which The 2007 IEPR Establishes Has The Least Need For A Peeking Plant.

EEC attempts to fit the square peg of the Hayward – San Leandro area into the round hole of San Jose by comparing it to the diametrically different circumstances and times before the CEC in Metcalf. (EEC Override Brf, p. 12.) First, the application for Metcalf was decided in 2001, at the height of the drama when California's energy was being sold out of state to be resold to consumers at dramatically higher prices while the power facilities in-state were being closed for "plant maintenance."

The additional important difference is that the San Jose load need was 2,000 megawatt, while the San Leandro Hayward's load just around 100 megawatts, a far smaller proportion. (III R.T. 29.)[5] Here, EEC proposes to build a peaker plant with the capacity of 115 megawatts purportedly for an area which loads needs are around 100 megawatt, without taking into consideration the important energy efficiency improvements which can readily be gained by aggressively adopting this Commission's efficiency recommendations set forth in its 2007 IEPR.

In this regard, Group Interveners object to EEC's attempt to build a straw house to tear down concerning Professor Lewis's testimony on energy alternatives upon which he relies on this Commission's own 2007 report.[6] As he testified and his CV reflects, he has spent decades working on smart growth to conserve resources to protect the environment, before it was

[5] Specifically, EEC's expert Mackin testified that "Metcalf is larger project and San Jose was about 2,000 megawatts of load where 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 than Metcalf was." (III R.T. 29-30.)

[6] In this regard, EEC relies on and quotes extensively from earlier integrated energy reports while largely attempting to downplay the 2007 IEPR.

discovered it was "smart." Specifically offered was the CEC's own policy adopted December 2007 that "price-responsive demand response is expected to reduce peak demand" but has not been as aggressively pursued to achieve the needed goals. (2007 IEPR, p. 108.)

Likewise, as the 2007 IEPR recognized, the population inland is grower faster than the coastal areas. (2007 IEPR, p. 3.) Likewise, the 2007 IEPR observes that coastal areas with moderate climates are not in need of peeking power compared to the hotter drier climates and that this Commission needs to coordinate with local agencies to encourage land use decisions which will encourage conservation and reduction of transportation. (2007 IEPR, p. 207.) Applying the evidence and the 2007 Integrated Energy Report of which Group Interveners have sought administrative notice, this peaking plant in this moderate climate is not needed. Moreover, given its location threatens the viability of the County's Redevelopment housing plans, which based on the proximity to existing infrastructure and public transportation constitutes smart growth.

As this Commission quoted in its executive summary, "We can't solve problems by using the same kind of thinking we used when we created them." As established by these evidentiary hearings, EEC and its greenhouse gas emissions are part of the problem which needs to be eliminated and does not fit in the City, County or this Commission's land use plans.

2. The Socio-Economic Regional Impacts On Oakland And Hayward's Airports And The Regional Community's Health And Safety Far Outweighs Any Disputed Local Systems Savings Which May Be Better Achieved By Not Disrupting Redevelopment's Growth Plans And Pursuing Efficiency Goals.

Here, the declarations of Jay White, Carol Ford and Bob Bauman together with the City's 1999 Economic Benefit Study undisputedly establish that the Hayward Airport is an important regional economic engine. Additionally the Port of Oakland has objected that it too "is concerned that Eastshore may result in impacts on OAK operations; and that it will contribute to the cumulative impacts on future air traffic conditions, i.e. traffic patterns in the surrounding airspace." (Exhibit 205.)

Not only are over 400 private planes stationed at Hayward's Airport[7] generating important property taxes, but the regional economic benefits generated by an airport which runways are not restricted by the presence of thermal plumes are enormous. (Exhibits 711 & 712.) In 1999, when the Airport's operations were smaller than to date, the total benefits were **over $90 million a year**, of which $53 million were enjoyed within the City of Hayward. Likewise, in 1999, almost ten years ago, the Airport generated 856 jobs, of which 505 jobs consisted of employment within Hayward. (Exhibit 410.) Clearly, as Public Works Director Bauman testified, since 1999 when this report was prepared the Airport has grown and no doubt too have the number of jobs and revenues.

Weighed against this understated $90 million of benefits enjoyed by the San Francisco Bay region, EEC asserts that the "savings to ratepayers of between $11.4 million and $16.3 million (present value) *over 20 years* of operation" constitute benefits justifying this Commission's decision to exercise its extraordinary override power. (EEC Override Brf, p. 19.) Mathematically, based on the understated 1999 economic benefits exceeding $90 million a year, this potentially results in roughly up to ***an annual net loss to the region of $89.5 million***, not including the identified and unmitigated detrimental public health impacts on Eden Garden and Ochoa Middle School and other nearby schools, including Chabot-Las Positas Junior College, Life Chiropractic College and ITT Technical Institute, on this environmental justice community which is the least able to afford such burdens.[8]

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[7] This does not include planes stationed there for the National Guard.

[8] That these public health impacts are unmitigated and a substantial burden is established by the fact that the health and toxic air contaminants generated by nearby highways 92 and 888 are not part of the CEC staff analysis. As Dr. Greenberg testified, if one included the existing emissions from these corridors, this project could not be built. Group Interveners assert this alone establishes that this project is not mitigated given these emissions were not measured or considered.

Additionally, the County's redevelopment area is planned for important housing is a mere 1,115 feet from this plant. Generally, this area has been under study and plans for reclaiming the shoreline and utilizing it, moving away from a disfavored heavy industrial use. Both city and county zoning have sought to have housing and research and technology live side by side, an example of smart growth given its proximity to existing infrastructure, transportation systems and proximity to the Bay's regional parks (not addressing that dramatic and detrimental impact of the 600 megawatt Russell plant). Given this proposal if approved would be directly in opposition to this Commission's own 2007 IERP, the only decision applying the this Commission's own policies is to deny this project which does not conform to important LORS.

G. EEC Waived Any Entitlement To Address Interveners' Contested Issues By Intentionally Not Briefing Them And Absent An Entitlement For Interveners To Rebut, Those Issues Raised By Interveners Are Left "Undisputed."

In their override brief, EEC "chose to brief only those issues related to aviation without addressing non-aviation–related issues in [its] brief, which only interveners (not Staff) raised." (EEC Override Brf, p. 7, fn. 3.) Instead, EEC unilaterally announces it will "brief these issues in its reply brief on disputed topics." (EEC Override Brf, p. 7, fn. 3.)

As reflected in Group Intervener's February 11, 2007 brief, Group Interveners set forth federal guidelines to calculate emissions for these proposed engines impacting public health which were not followed by CEC staff analysis. Group Interveners also calculated the mathematical differentials when applying the federal guidelines. Given EEC's failure to address these mathematical discrepancies impacting public health issues, Group Interveners contend that these

issues are undisputed by the applicant and as a matter of law, this project's impacts are not mitigated and this application must be rejected on this basis alone.

Dated: March 3, 2008

Respectfully Submitted,

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

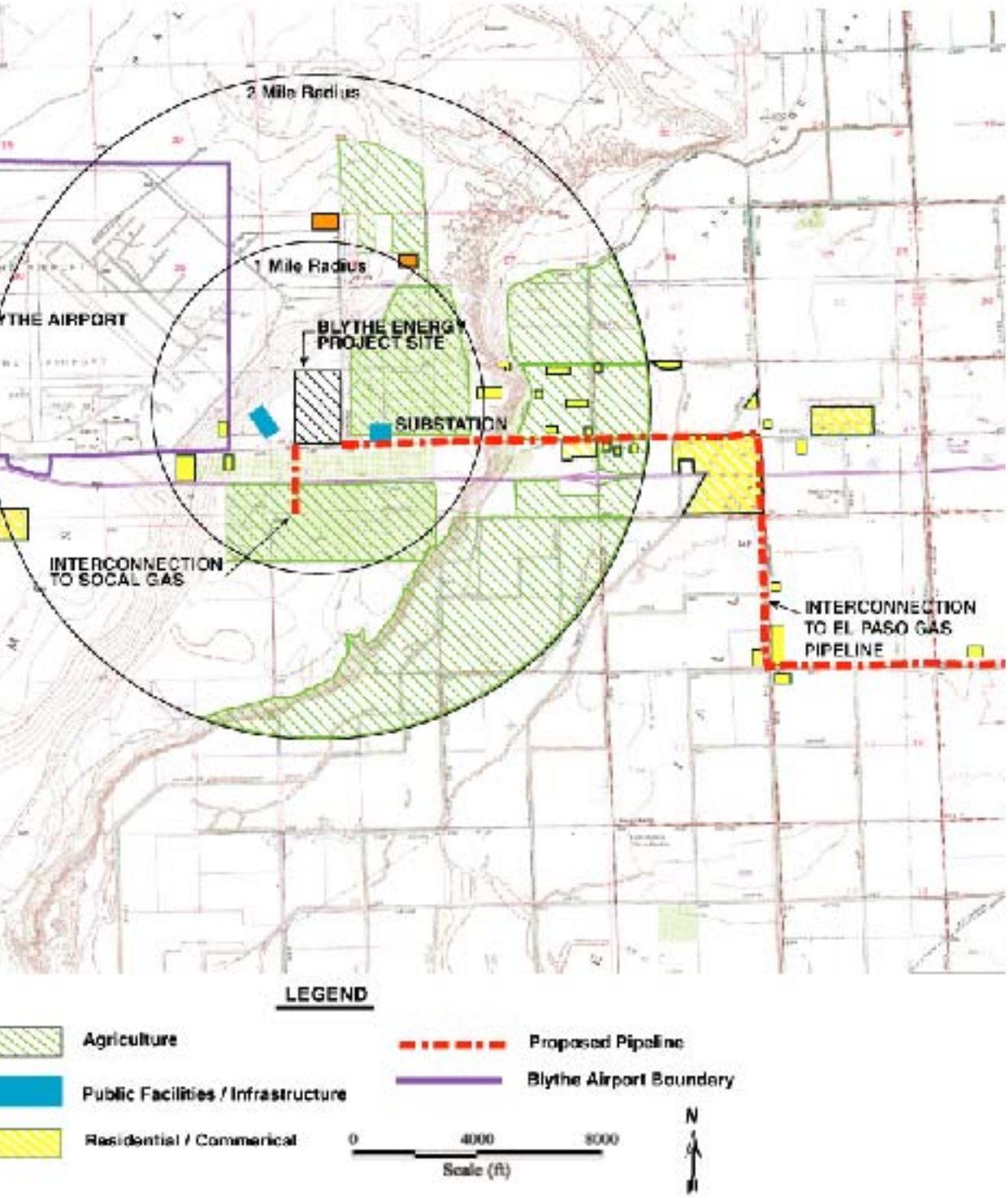
DECLARATION OF SERVICE

I, Jewell J. Hargleroad , declare that on March 3, 2008 I transmitted electronic copies of the attached Group Interveners REBUTTAL BRIEF ON CONTESTED ISSUES AND OPPOSITION TO APPLICANT'S OVERRIDE BRIEF 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 March 3, 2008 in Hayward, California.

_____

Jewell J. Hargleroad



ORNIA ENERGY COMMISSION, ENERGY FACILITIES SITING & ENVIRONMENTAL PROTECTION DIVISION, OCTOBER 2000
SOURCE: AFC 1.0-9

A The **existing view** to the northeast from Key Observation Point 7, located on eastbound Hobsonway, southwest of the plant site and immediately north of the residence located on the upper slope of the mesa. The existing structures at KOP 2 are visible in the lower right of the photograph. **B** The same view showing a **photosimulation** of the Blythe Energy Project.	**September 1, 2000**	**Blythe Energy Project** **Preliminary Staff Assessment** **VISUAL RESOURCES** **FIGURE 16** **KEY OBSERVATION POINT 7**

Sources: Base Photograph and Image Compositing - Michael Clayton & Associates; Project Components - BEP 1999a