BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

APPLICATION FOR CERTIFICATION FOR THE EASTSHORE ENERGY CENTER IN HAYWARD BY TIERRA ENERGY	DOCKET NO. 06-AFC-6 (AFC Accepted 11/8/06)

EASTSHORE ENERGY LLC'S REBUTTAL BRIEF SUPPORTING OVERRIDE OF LORS NONCOMPLIANCE

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EASTSHORE ENERGY CENTER'S REBUTTAL BRIEF SUPPORTING OVERRIDE OF LORS NONCOMPLIANCE

I. INTRODUCTION

The record in this proceeding shows that the Eastshore Energy Center Project significantly advances critical elements of California energy policy and statewide procurement strategy, contributing in particular to addressing the escalating problem of peak demand and the need to integrate renewable energy sources into California's supply portfolio. Against that commanding profile Opponents attempt to cast doubt about aviation safety based not on evidence but fear -- fear rooted not in any concrete experience or even realistic analysis of risk, but rooted instead in the abstract proposition that aircraft safety issues are relatively more significant ones than, say, traffic safety issues. Eastshore accepts that proposition and the responsibility it entails, and Eastshore has demonstrated that it has no claim to the Commission's decision-making here; both concrete, empirical testing and in-depth risk analysis prove that any aviation safety risk is virtually nonexistent with this Project. But to the extent Opponents' concerns give rise to LORS inconsistencies, the Commission won't find a more compelling candidate for an override decision than the Eastshore Energy Center, for all the practical and policy reasons set forth below and in Eastshore's previous briefing.

II. ARGUMENT

A. The Record Contains No Substantial Evidence To Demonstrate A Significant Risk To Aviation Safety; Eastshore's Evidence Is Not Refuted

1. Opponents' "Support" For A Safety Risk Amounts To No More Than Speculation

As before, Eastshore incorporates here the discussion and citations to the record set forth in both its Opening and Reply Briefs On Contested Subject Areas. To summarize, the only evidence – as opposed to speculation and argument – for a risk to aviation safety consists of

Staff's flawed modeling and a wholly inapposite power plant fly-over offered by Alameda County. Otherwise, Opponents' criticisms of Eastshore's evidence simply fall short.

2. The Barrick Fly-Over Test Flight Program Withstands Scientific Scrutiny

Opponents criticize the Fly-Over Test on the basis that it was not "comprehensive," that it only tested one set of conditions at one plant on a particular day.[1] Both Alameda County and Hayward protest that a number of differences potentially exist between Barrick and the proposed Eastshore Project, without demonstrating how such differences matter. The point of the test, in fact, was to evaluate thermal plume effects from a *particular* project design under a *particular* set of conditions – and not, as Opponents seem to advocate, to undertake a comprehensive assessment of all possible effects of all possible thermal emissions on aircraft stability. And the record is clear, moreover, that the Fly-Over Test was carefully designed by impeccably qualified professionals to test as closely as possible conditions that would produce the worst-possible thermal plume effects. Opponents make no effort to explain how the various differences between Barrick and the Eastshore plant negate the experts' conclusions that the Fly-Over tested the Project's impacts; what Hayward offers, for example, are mere distinctions signifying no difference, (Hayward Reply at 2: 16- 3: 8) and which therefore fail to support Opponents' contention that the Test was too limited.[2]

Neither do Opponents attempt to refute the experts' testimony that the Fly-Over was a true test of worst-case conditions; rather, both Alameda and Hayward offer a catalogue of *possible* variant conditions under which such a test could be undertaken. The closest thing to such an attempt comes from Staff's reply that the Fly-Over occurred during less-than-maximum

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[1] Group intervenors go so far as to complain that the pilot primarily flies over mountains.

[2] Ironically, Opponents reject the Fly-Over Test because of its specificity while rejecting FAA statistics as too general. Obviously, no concrete data of any kind will answer to arguments based solely on abstract fears about safety.

radiator operation. But this assertion merely compounds the mistake made by assuming such an influence of radiator activity on thermal plumes when the evidence demonstrates otherwise. (*See* Eastshore Opening Brief at 10-12; 12/18/2007 RT 247:23-25, 248: 1-23; 12/18/2007 RT 259:4; Ex. 200 at 4.10-43.) The Fly-Over Test was designed for cool, calm weather because Staff identified this condition as the worst possible for potential turbulence. (12/18/2007 RT 260:9-15; Ex. 200 at 4.10-44.) Moreover, Eastshore's expert, Greg Darvin, testified that the radiator fans will not increase stack plume velocity because the fans will have a separate effect on turbulence levels. (12/18/2007 RT 257: 9-11.) Furthermore, this separate effect could not be felt at all during the Fly-Over Test even at the lowest altitudes. (12/18/2007 RT, 72: 1-3 (Bellotto testimony).)

Finally, Alameda mischaracterizes David Butterfield's testimony as a disapproval of the Overflight Test. (Alameda Reply at. 7.) On the contrary, Mr. Butterfield "applauded" the attempt to test the impacts of thermal plumes, (12/18/2007 RT 254: 13) but stated that he did not have sufficient information to refute or support the test. (*Id.* at 255: 1-5.)

3. The FAA Has Not "Disapproved" the Project

Opponents offer two basic arguments about the application of Federal Aviation Administration (FAA) standards to the Eastshore Project. The first is simply that a statistical analysis of thermal plume impacts on aviation safety doesn't apply because it is not specific to the Eastshore Project. It hardly needs mentioning, however, that it is in the nature of statistical analysis that data come from (ideally) broad samplings and may not purport to analyze specific instances. The testimony is clear that a statistical analysis does not equate to an empirically derived conclusion that the Eastshore Project poses no aviation safety risk. But Opponents disingenuously seize on this to argue that FAA officials dispute the safety of the Eastshore plant,

because some data will not apply to the Eastshore Project. Once again, however, the FAA analysis not only does not do so, *it cannot do so because it is a statistical assessment.*

This is a far cry from the FAA "disapproval" of the Project that Opponents argue for. (*E.g.*, Hayward Reply at 3:15.) Indeed, Mr. Butterfield testified that the FAA is not even authorized to render opinions on thermal plumes. (12/18/07 RT, 113: 25-114: 1.) While Mr. Butterfield suggested caution regarding drawing conclusions from the FAA database search on power plant related accidents, Mr. Butterfield did not offer any criteria for how to segregate data from that search (e.g., involving older plants with visible plumes) that would not be applicable to the Eastshore Project. And Mr. Butterfield confirmed that under the FAA's analysis, any risk to aviation from the Project would be one in a billion, "an acceptable risk without further mitigation." (12/18/07 RT, 280: 2-8.) The FAA study is valuable *statistical* evidence that thermal plumes – visible or otherwise – do not affect aviation safety. Hence, it is entirely appropriate to cite to that study for the conclusion that "the risk associated with plumes is deemed acceptable without restriction, limitation or further mitigation." (Ex. 39 at ii.) In any event, the FAA's Part 77 Determination did take into account the Eastshore Project's thermal plume emissions. (Ex. 40 at 3; Ex. 17 at 6 (testimony of J. Scholl).) And finally, FAA information is to be reviewed in the context of both modeling and an empirical test, both of which confirm that thermal emissions from the Eastshore Project will not impact safety.

Opponents' second argument consists of the attempt to transform an FAA recommendation into a regulation. Hayward argues, for example, that the FAA recommendation to avoid overflights at altitudes lower than 1,000 feet would bar approval of the Eastshore Project if that recommendation were enacted as a regulation. (Hayward Reply at 3: 28 – 4: 5.) This is not a laws, ordinances, regulations or standards (LORS) issue, obviously, because the

recommendation is not a regulation and therefore has no bearing on the override analysis. Moreover, the recommendation is generic, and the evidence discussed above showing no risk to aviation safety renders it further irrelevant to the override question.

4. Staff's Criticisms Of Thermal Plume Modeling Only Rationalize Staff's Misuse Of Modeling Criteria

As detailed in the Opening and Reply Briefs, and summarized in Eastshore's Override Brief, Staff misapplied the Australian Government Civil Aviation Safety Authority's Advisory Circular (CASA AC) and selectively used its criteria to derive a result proper modeling protocols do not support. Staff's Reply concedes that it varied the modeling procedures, rationalizing its choice as the more conservative and safer one. As Mr. Darvin's and Mr. Corbin's testimony makes clear, however, this choice was not open.

First, Staff only employed the initial screening level criterion approved in the CASA AC, not the entire assessment methodology. (Ex. 20, Testimony of W. Corbin and G. Darvin at 10 (citing CASA AC at §§ 8.2, 8.3).) Moreover, Staff incorrectly used a standard for thermal plume velocities (4.3 m/s) as an absolute or peak value, whereas the CASA AC only approved use of the standard as an average value in initial screen assessments. (Ex. 20, Testimony of W. Corbin and G. Darvin at 1 *citing* CASA AC § 6.3 and Attachment A.) Likewise, Staff attempted to calculate the thermal plume's potential peak velocity by multiplying the average velocity by 2.0, even though the 2.0 multiplier "will not produce any information about the altitude at which the peak velocity occurs." (Ex. 200 at 4.10-20; Ex. 20, Testimony of W. Corbin and G. Darvin at 10.)

Second, Staff's analysis is unrealistic because it failed to account for the separation between the stacks at the Eastshore Project, the dead space between each of the Eastshore Project's radiator fans, and the likely presence of horizontal winds. (Ex. 20, Testimony of W.

Corbin and G. Darvin at 8.) Each of these errors could – in this case, did – result in an overestimation of vertical velocity and plume height. (Ex. 20, Testimony of W. Corbin and G. Darvin at 7-9.)

Third, Staff's modeling is flawed because it concluded that the impacts from the radiator fans will be greater than the impacts from the stack. (Ex. 200 at 4.10-43.) The Fly-Over Test results demonstrated that Staff's modeling overestimated the effects of the updrafts from the radiator fans. The only turbulence recorded during the Fly-Over Test was caused by the thermal plume from the stacks, not the radiator fans. (12/18/2007 RT 247: 23-25, 248: 1-23; 12/18/2007 RT 259: 4.) Opponents' and Staff's attempt to focus on the updrafts from the radiator fans, as opposed to the effect caused by the thermal plume from the stacks, is without technical merit.

While Staff's Reply Brief basically concedes[3] that it took an unconventional approach to modeling in order to achieve a "conservative" perspective on safety, Staff's argument then inadequately rationalizes this approach by asserting that modeling *in general* is imprecise and that caution is in order. (Staff Reply at 10.) While modeling is not the same as empirical verification, Eastshore submits that modeling need not be as imprecise as staff's inconsistent analytic approach has made Staff's in this instance. Furthermore, when modeling is verified against the empirical results of the Barrick Fly-Over Test and the statistical information provided by the FAA, modeling can be, and is here, an important tool for determining the impacts of thermal emissions on aircraft safety.

5. Because The Eastshore Facility Does Not Pose A Significant Risk to Aviation Safety, It Does Not Constitute An "Aviation Hazard"

Staff and Opponents seem to be arguing that irrespective of the weight of all of the modeling or scientific Fly-Over measurements demonstrating there is no significant risk to

[3] "Finally, staff does not contest the applicant's claim that the staff's method varied from the one identified in Exhibit 26 . . . ." (Staff Reply at 10.)

aviation, that the mere presence of the Eastshore Project at the proposed location constitutes an aviation hazard. However, no underlying basis for this assertion has been presented other than the possible aviation risk that has been asserted by the Opponents related to the overflight of the Eastshore Project's plumes. Since there is substantial evidence to support the finding that Eastshore Project plumes will not pose a significant risk to aviation safety, there is no other underlying basis to designate the facility as an aviation hazard.

B. The Project Is Consistent With All Other LORS

1. The Project Meets California NO_2 Standards

In his reply brief, Mr. Sarvey alleges that the Eastshore Project's NO_2 emissions will exceed the recently-approved California standard. (Reply Brief of Robert Sarvey at 1-3.) Mr. Sarvey first asserts that based on the modeling results provided in the Final Staff Assessment (FSA), the Eastshore Project's maximum modeled operational impact of 314.3 $\mu g/m^3$, in combination with the background concentration of 143 $\mu g/m^3$ will exceed the newly approved NO_2 standard and therefore violate the LORS. (Reply Brief of Robert Sarvey at 1.) He then goes on to state, based on the modeling results reported in the FSA, that the Project's NO_2 impacts represent a significant impact under CEQA. (Reply Brief of Robert Sarvey at 2-3.) Mr. Sarvey's contentions are incorrect for two reasons.

First, Mr. Sarvey mistakenly relies upon the modeling results included in the FSA (Ex. 200, Air Quality Table 16 at 4.1-23) to support his claim that the Eastshore Project's NO_2 emissions will violate LORS and create a significant impact under CEQA. (Reply Brief of Robert Sarvey at 1.) It appears that Mr. Sarvey does not realize that the Project's modeled NO_2 impacts, as reported in the FSA, are based on the level of modeling refinement required for Eastshore to demonstrate conformance with the existing standard (the current NO_2 standard of 470 $\mu g/m^3$ remains in effect until March 20, 2008). The process of air quality modeling is

conducted in increasing levels of refinement, as soon as an intermediate level of modeling refinement shows that a project's emissions will meet the limiting standard, the modeling process ceases because no further refinement is necessary. As stated by Staff in its reply brief and during the hearing, the modeling result is relative to the standard. (Staff's Reply Brief at 3; and 12/17/2007 RT 104:14-16.) In this case, Eastshore halted continued refinement of its NO_2 modeling analysis when an intermediate refinement of the analysis showed that the Project's modeled emissions would meet the existing NO_2 standard. Therefore, Mr. Sarvey's claims that the Eastshore Project would violate the new NO_2 standard based upon a simple review of the current modeling is incorrect. Further refinement to the modeling is possible and would show that the Eastshore Project will not exceed the new California NO_2 standard (the new standard becomes effective on March 20, 2008).

Mr. Sarvey is correct in his statement that 20 CCR § 1723.5(a) places the burden of proof on an applicant to show that the project will not have a significant impact. (Reply Brief of Robert Sarvey at 3.) However, Mr. Sarvey's reliance upon this regulation is misplaced due to precisely the fact that Eastshore has shown that the Project's NO_2 emissions will not create a significant impact pursuant to the standard that was in effect during the evidentiary hearings, which is the only standard applied to the Eastshore Project prior to closing the record.

Second, Bay Area Air Quality Management District (BAAQMD) rules or regulations do not require a modeling analysis for compliance with either the existing or new NO_2 standard because the Project's emissions are below the BAAQMD modeling requirements threshold. Furthermore, California Public Resources Code Section 25523(d)(2) provides that the Commission may find that a proposed facility complies with applicable air quality standards if the local air quality management district certifies that "complete emissions offsets for the

proposed facility have been identified and will be obtained by the applicant within the time required . . . ." The BAAQMD has provided this certification in its Final Determination of Compliance (FDOC). (Ex. 201.)

The Executive Summary of CARB's 2007 *Review of the California Ambient Air Quality Standard for Nitrogen Dioxide* (CARB Review) declares that once the new standard is adopted, "local air pollution control or air quality management districts are responsible for the adoption of rules and regulations to control emissions from stationary sources to assure their achievement and maintenance." (CARB Review at 8.) In addition, CARB's 2007 *Final Statement of Reasons for Rulemaking* (CARB Final Statement) offers the same qualification that the local air district must first adopt rules and regulations to control the emissions. (CARB Final Statement at 2.) Furthermore, and perhaps most important, BAAQMD Regulation 2-1-409, entitled "Regulations in Force Govern" asserts: "The decision as to whether an authority to construct shall be granted or denied shall be based on federal, state and District BACT, offset, TBACT, and project risk regulations or standards *in force on the date the application is declared by the APCO* [Air Pollution Control Officer] *to be complete*." (Emphasis added.) The previous NO_2 standard was the regulation in force when Eastshore's application was declared complete by the BAAQMD on October 16, 2006. Therefore, all of the above statements reveal that there is no regulation or rule in place that requires Eastshore to abide by the new standard; in fact, the BAAQMD rules explicitly declare that the regulations in force on the date the application is complete prevail.

No matter how Mr. Sarvey chooses to interpret the new California NO_2 standard, the Eastshore Project will not violate it. Even if the new standard applied to the Project, it would violate neither LORS nor CEQA due to the fact that the modeling analysis contained in the FSA is specific to the previous NO_2 standard.

2. To The Extent The Project Is Inconsistent With Other LORS Cited By Opponents, Or Creates Unmitigated Impacts, Eastshore Has Requested An Override

In its Override Brief, Eastshore explained its briefing of the LORS issues addressed by Staff, (Override Brief at 7, n.3.) that it addressed the remaining subject areas in its Opening and Reply Briefs, and that to the extent any of these issues were determined to create LORS inconsistencies or significant impacts under CEQA, the Commission override these along with the aviation-related LORS on the basis of the section 25525 analysis set forth in its Override Brief. (Override Brief at 18-19 and notes 6-8.) Alameda's assertion that Eastshore has waived its right to request an override in either category is therefore incorrect. (Alameda Reply at 31.)

C. The Project Is A Necessary Component Of PG&E's Policy-Grounded Energy Procurement Strategy

1. The Project Is Among PG&E's Specific Means Of Implementing Its Approved LTPP

As explained in detail in Eastshore's Override Brief, the Eastshore Project is firmly rooted in statewide energy policy. It goes without saying that California's energy needs, and in particular its need to address peak demand throughout the state, are urgent and immediate. These needs are thoroughly examined in the Energy Action Plan (EAPs) and Integrated Energy Policy Report (IEPRs) reviewed in Eastshore's Override Brief. What the Project's Opponents continue to overlook, however, is the integrated nature of the Project with Pacific Gas and Electric's (PG&E) own strategies for energy procurement.

Once again, PG&E's Long Term Procurement Plan (LTPP) was only approved by the California Public Utilities Commission (CPUC) after it ensured that the Project was consistent with the Commission-approved 2003 IEPR, was consistent with the loading order established and adopted by both the Commission and the CPUC in EAP II, and was consistent with the CPUC adopted targets for renewable portfolio standard, demand response and energy efficiency

set in earlier CPUC proceedings. And when the CPUC approved PG&E's 2004 LTPP, it recognized the advantages of a diversified utility resource portfolio for maintaining flexibility in the face of uncertainty in both supply and demand. PG&E's resulting 2006 Request for Offers (RFO) proposal was developed to provide this flexibility. The Eastshore Project is a result of that planning. The Project is not merely a design that happens to hit on some of the LTPP criteria; rather, through the RFO process, it is an instrument for PG&E's effort to realize that plan.

2. Opponents' Attempts To Minimize Project Benefits Disregard The Project's Important Place In Effectuating California Energy Policy

Hayward argues that a "general energy need" doesn't support an override. (Hayward Reply at 11.) As with Opponents' small-picture thinking generally, however, this mischaracterizes both local and statewide energy needs generally and the Eastshore Project specifically. Staff's Reply attempts to minimize the Project's benefits by limiting its discussion to transmission loss reductions in a manner disappointingly inconsistent with its previous analysis in the FSA. While the Project has considerable quantifiable benefits, it must not be considered in that light alone. Instead, it must be viewed in the context of each piece of the energy policy picture the Eastshore Project reflects. It is slated for a high-load center with inadequate local generation. It is a flexible, simple-cycle, fuel-efficient, low-emission plant capable of contributing substantially to meeting growing East Bay – specifically Hayward – peak demand. It is one of the anticipated new gas-fired generators on which California must rely in order to integrate intermittent renewables into the state's energy resources. Each one of these features has been identified by the CPUC, the Commission or both as essential features of the procurement planning currently in place.

Far from advancing its Project as a mere response to a "general energy need," Eastshore has responded to a specific RFO that is in turn a specific implementation of an LTPP whose approval is not just a reflection of California energy policy but rather is itself the concrete realization of that policy. It may well be that, in solely quantitative terms, a project like Eastshore's represents an incremental supply when considered against the background of overall statewide energy need.[4] But every planning document by every agency that purports to express California's procurement strategies makes abundantly clear that contemporary procurement is necessarily incremental, composed of diverse elements, and extremely time-sensitive. That can only mean that every incremental contribution, the Eastshore Project included, is essential.

3. Opponents' Attempts To Minimize Demand Disregard Reality

Alameda County argues, incredibly, that Hayward's energy demand is too low to justify approving the Eastshore Project. First, virtually all of the Project's generation will go to meet Hayward's demand. Second, Hayward's demand is not the same as that of the larger San Francisco Bay Region, which may well be relatively lower. Third, and most important, *Hayward imports nearly all of its electricity supply.* Local generation is therefore essential to providing local and system-wide reliability and flexibility, and the ability to deal with increasing peak demand. But it is also highly appropriate and fair to require that Hayward stop 'exporting' its energy-generation emissions and land use concerns to other communities whose land use and safety concerns, congestion and growth issues, are no less acute or important than Hayward's.

[4] This increment takes on an outsized importance, however, considering it could in certain circumstances supply virtually *all* of Hayward's demand and that it will contribute proportionately to Hayward's demand on the order of the Metcalf Energy Center's (MEC) contribution to San Jose's.

D. Need For The Project, Along With Its Role In Implementing Procurement Strategy, Strongly Outweigh Any Disadvantages

a. Staff Correctly Concluded That There Are No Alternatives

Staff's analysis concluded that no real alternatives to the proposed Project location and interconnection exist. This is not surprising considering the Project's high-demand, congested urban setting. Project Opponents primarily seize on the Project's interconnection location to criticize the alternatives analysis as though interconnection locations are essentially fungible. Opponents' arguments misconstrue the nature of the Project's design and development and completely ignore the reality of the studies, planning, and regulatory limitations imposed on the development of interconnection locations.

b. The Eastshore Substation Tie-In Is Integral To The Project

No one disputes that the Eastshore substation location was part of PG&E's RFO. It is thus critical to realize that the interconnection location is a cornerstone of the Project's design and seminal to its development. In effect, the Project's components were built around the Eastshore interconnection, they are integral to the Project, and these components are mutually interdependent. This is particularly true in an urban setting like Hayward, where interconnection options and flexibility are necessarily restricted. Contrary to Opponents' apparent assumption, new and different substations can't be mixed and matched in the evolution of a Project's design and it is entirely unrealistic to assume otherwise. It is by no means trivial that Staff accepts the Eastshore substation interconnection as an essential Project component, and evaluates alternatives in terms of whether they could achieve this interconnection.

c. Multiple Tie-in Alternatives Would Effectively Require Multiple System Impact Studies, Multiple Facilities Studies, And Chaos In The Regulatory Process

Hayward dismisses Eastshore's concerns about the timing and additional regulatory delays that would ensue should a new interconnection location be considered on the basis that these concerns go to the regulatory framework rather than to "physical or technical limitations" on the Project. (Hayward Reply at 13.) This argument overlooks the nature of the process. First, if responding to RFO's routinely entailed multiple studies of multiple interconnection sites, the effect would be to require not one project design but several. The unrealistic nature of such a requirement is self-evident.

Second, and even more important, applicants don't perform System Impact Studies; the California Independent System Operator (ISO) and the Investor Owned Utilities' (IOUs) perform them, following an application from the project's proponent. Each application then takes its place in the ISO queue. Each subsequent application must assume the system impacts of all that precede it, and multiplying applications multiplies the number of hypothetical impacts involved. Very little imagination is required to envision the resulting burden on the system, uncertainty and delay for projects and applicants, and general disruption to energy procurement of studying various interconnection locations for one project.

The sweeping oversimplification of the System Impact Study process implicit in Opponents' argument cannot be exaggerated. This process simply is not suited to contribute to a typical California Environmental Quality Act (CEQA) alternatives analysis because the initial determination of interconnection location, for all the above reasons, becomes for all intents and purposes the *only* interconnection location for the project it forms an integral part of. That has little to do with Staff's FSA analysis or the proponent's response to an RFO, and everything to do with the physical and regulatory limitations of energy procurement.

Third, timing is a dominant theme of the EAP II, and of each recent IEPR, as well as a critical element of PG&E's LTPP. Timing is also a critical element of the Commission's task of weighing the need for the Project. The Commission's MEC Decision pointedly determined that avoiding postponement of needed energy generation was an essential element weighing in favor of an override. (MEC Decision at 468-469.) Once again, Opponent's objection that delays and regulatory obstacles are not germane to the analysis of prudent and feasible alternatives ignores this critical point. Postponing needed energy procurement is not merely a regulatory issue but one with obvious physical and technical consequences. Most notably, as detailed in Eastshore's Opening and Override Briefs, new studies and a new AFC would threaten the Project's being built at all. Further, any threat to or delay of procurement undercuts PG&E's LTPP schedule, and the resulting questions of how to compensate for delays or alterations of that LTPP create problems exactly as technical and physical as those the LTPP addressed in the first place. In any case, no project, nor the analysis of its needs and benefits, can be divorced from the regulatory approval process that ultimately defines its physical and technical features.

d. The Additional Resources, Delay, And Uncertainty Of Analyzing Another Tie-In Location Are Not Justified By An Unsubstantiated Safety Concern

By urging additional interconnection studies as part of a "more prudent and feasible alternatives" analysis, Alameda and Hayward are asking the Commission to conclude that the attendant cost, delay and uncertainty are outweighed by a perceived benefit to aviation safety. The record simply fails to support this conclusion. If Opponents had presented any credible rebuttal of Eastshore's evidence regarding thermal plumes; if the attacks on that evidence established any credibility by even once acknowledging that aviation safety is not per se an improvable proposition; if promoting a fear of safety risks was not so convenient a means of furthering Hayward's sudden embrace of information technology over manufacturing; if the

Russell City Energy Center's (RCEC) recent approval were not so blatant a demonstration that Hayward's new land use policy was *designed* to create a LORS inconsistency; if any of these were otherwise, the Commission might have something other than subjective discomfort and competing land use goals to weigh against the Project's benefits. As it is, timing is critical, postponement is unacceptable, and to the extent an override is necessary at all, the Commission should provide one.

E. Project Opponents Mischaracterize Both Override Standards And Their Relation To CEQA Review

1. § 25525 Imposes No Presumption Against An Override

Hayward originally argued that section 25525 creates a rebuttable presumption against an override (Hayward Brief at 3) but now retreats to the assertion that the "CEC should approach its override analysis with a presumption against certification." As before, nothing in the law supports the imposition of such a presumption; the criteria for determining an override are quite clearly specified in the statute. Had the Legislature wished to create a presumption against an override determination, it could have specified this just as clearly.

The plain intent of Hayward's procedural argument is to create doubt about the extent of the Commission's authority to ensure that narrow, local concerns do not obstruct necessary energy procurement. Under the Warren-Alquist Act there can be no doubt whatever that it is the Commission's responsibility to do just that. With section 25525, the Legislature has simply provided the Commission with the necessary tools to carry out its duty.

2. AB 32 Imposes No Separate Procedural Criteria On § 25525 Decision-Making

In a similar attempt to obscure the Commission's clear authority and the plain language of section 25525, Alameda has constructed a lengthy argument to the effect that AB 32 imposes a new *procedural* requirement: the "standard of review" for overriding a LORS now must include

a determination that the override will advance the goals of AB 32. (Alameda Reply at 19, *et seq.*) Alameda asserts that this new "standard of review" must consider public convenience and necessity in terms of the extent to which the policies of the Warren-Alquist Act compete with those underlying AB 32.

First, just as with Hayward's invention of a presumption against overrides, nothing in either Act states or implies that to "public convenience and necessity" must be added a third criterion, "reduction of greenhouse gas emissions." Second, there is no generic relationship between local LORS generally and reducing greenhouse gases, and no inherent conflict between the latter and statutory override criteria that would suggest any need for a procedural adjustment to the application of those criteria.

Third, and most important, Alameda's suggestion can only be described as astonishingly blind and deaf to the work of the CPUC, the Commission and the IOU's in the recent years; Alameda's discussion nods reverently toward recent IEPRs, but gives no indication of comprehending how current energy policy defines modern plants such as Eastshore. Eastshore won't repeat here its earlier review of the EAPs, the IEPRs, and the decisions reviewing and approving PG&E's LTPPs and RFOs set forth in its Override Brief. In summary, however, it should be enough to say that it isn't possible to cross this landscape of analysis, fact-finding, and discussion without encountering at almost every step evidence of deep and far-reaching consideration of greenhouse gas (GHG) reductions and AB 32 requirements. It is no overstatement to say that AB 32 compliance is hard-wired into every recent expression of statewide and IOU-level energy policy and procurement strategy.

As Eastshore has repeatedly argued, the Project in every way expresses AB 32-compliance strategy. Its design reflects the best efficiency and emission-reduction technology

and operating protocols available. It is designed to contribute toward taking inefficient, high-emission generators offline. And above all, it is designed to address peak demand so as to ensure the viability of the renewable but highly intermittent energy generation AB 32 aims for.[5] Both the CPUC and the Commission have unequivocally concluded that efficient, flexible, gas-fired peak generation is indispensable to the viability of renewable energy. The Eastshore Project is not only consistent with AB 32; the Project effectively implements it. Viewed in that light, the Project would more than satisfy the AB 32 criteria Alameda urges. In fact, the Project demonstrates that all projects now necessarily grow out of AB 32 awareness and that projects are no longer possible that do not in some way further AB 32 objectives. California accelerated at a considerable clip past the "standard of review" requirement Alameda argues for some time ago.

3. The Record Will Not Support a Finding of a Significant Impact Requiring a CEQA Override

While an insignificant risk to aviation safety may theoretically conflict with local LORS, it cannot constitute a significant CEQA impact. Staff's Reply seems to suggest that Eastshore ignored this aspect of the CEQA analysis in presenting its override case, describing this as a "fatal flaw." (Staff Reply at 15.) This assertion assumes, however, that the need for a CEQA override exists, an incorrect assumption resting on the further error of assuming that the Project creates a significant environmental impact that the Commission must weigh against Project benefits.

It is true that for override purposes the Commission must balance benefits and disadvantages As explained in Eastshore's Override Brief, however, and overlooked by Staff, a significant difference exists between defining a LORS inconsistency and finding a significant

[5] In a stretch to discredit this aspect of the Project's benefits, Alameda argues that because the renewables that the Project will support are not yet available, the Project's potential contributions to renewable supply must be ignored. (Alameda Reply at 28-29.) Not only is this a classic chicken-egg nonsequitur, but in the context of Alameda's plea for environmental awareness, it is almost surreal.

environmental impact. A LORS inconsistency may depend entirely on the subjective perceptions according to which locals interpret their LORS – as is the case here. In this matter, local officials and entities seek to construe their land use regulations to bar a use that entails even a one in a billion chance of a risk to aviation safety. A significant impact under CEQA, however, is obviously not amenable to such a definition. As the lead agency for this certification, the Commission determines what constitutes a significant impact for CEQA purposes. In this instance, FAA officials defined the risk as "not nonexistent." (Ex. 204 at 2.) Such a risk hardly qualifies as an environmental impact much less a potentially significant one.

Eastshore does not take lightly Staff's argument that any potential question of aircraft safety dictates a certain amount of caution in this proceeding. The record developed here, however, especially after Staff completed the FSA that continues to shape its approach to this issue, overwhelmingly weighs in favor of finding no safety risk, and therefore no possible significant environmental impact. CEQA requires nothing further.

F. The Project Meets The Criteria Applied In Previous Override Decisions

1. The Paramount Question Is Whether And How Well A Project Advances Statewide Energy Policy

In each of the three previous override decisions discussed in Eastshore's Override Brief, the essential question posed was how effectively the proposed override would advance the goals of California's energy policy and procurement strategies. In reply, only Hayward argues that those decisions shed no light on the present matter, on the ground that the physical differences between the earlier projects and Eastshore remove that essential policy question from the Commission's consideration here. This argument typifies Opponent's strategy of adding up insignificant differences to no important effect.

In brief, Hayward contends that previous decisions (1) didn't require a CEQA override; (2) involved larger local demand; (3) involved little local generation; and (4) relied on infeasible alternatives. (Hayward Reply at 8.) First, as discussed above, while a LORS inconsistency may require an override in this matter, the Commission should determine, in its capacity as lead agency, that unless the policies underlying CEQA are to be perverted beyond recognition, a barely existing safety risk does not amount to a "significant impact." Once again, a LORS inconsistency is not the same as an environmentally significant impact. (MEC Decision at 463.)

Second, the *amount* of local demand is not what matters; what does matter is the significance of that demand to the community. Here, as Peter Mackin's unrefuted testimony makes clear, "on a percentage basis Eastshore is much bigger relative to the area it is serving than Metcalf [Energy Center] was." (1/14/2008 RT 29: 24-25, RT 30:1.) This significance is directly related to the third point, which is that Hayward imports nearly all of its electricity. On the basis of these two circumstances alone, the Project squarely meets the key criteria that informed the Commission's previous override decisions.

Fourth, Eastshore is not obligated to demonstrate that the alternatives examined are "infeasible or would create greater environmental impacts." Section 25525 requires that there not be *more prudent and feasible* alternatives.[6] In any case, as Staff's FSA demonstrated, there are *no* alternatives to the Project. Opponents' discussions of alternatives seem uniformly founded on the assumptions that alternatives are readily available and that the benefits of this or any project can be obtained merely by looking elsewhere – which translates, "anywhere but here." These form a dangerously distorted lens through which to view energy procurement. *All* urban settings present complex land use problems. Environmental concerns will arise in any

[6] Hayward has once again distorted the standard and/or confused the standard for a CEQA override with a LORS override.

such setting. No proposed alternative will cleanly satisfy the demands of diverse interests. Section 25525 is the Legislature's direct response to combination of difficulties.

Given Hayward's demand, its lack of local generation, the manifold benefits of the Project and their conformance with current policies and procurement strategies, the Commission's precedents militate strongly in favor of an override decision here. Against this backdrop, the differences in population, the fact that a previous override involved an expansion instead of a new plant, and the differences between objections to technology versus plant location (Hayward Reply at 8-10) simply amount to a list of distinctions without any individual or collective importance to the present decision.

2. Commission Decisions Necessarily Draw Override Issues In Broad Strokes

The essence of an override analysis is whether the demands of a broader perspective trump local – and sometimes myopic – concerns. The Commission's previous override decisions tend not to be highly specific, but the decisions are driven by the larger concerns of statewide policy. In each instance, however, local land use concerns gave way to the Commission's need to consider *California's* energy needs, and in each case it is clear that the Commission focused on the interplay between local generation and statewide procurement strategy. This is a perspective which the press of local concerns can easily obscure. In contrast, maintaining that perspective is the unique responsibility of the Commission.

III. CONCLUSION

Plainly, it is no coincidence that the Legislature invested this Commission with both the responsibility to look past the parochial concerns of local communities and the authority to override those concerns in the interest of much larger ones. In the balancing process the Commission undertakes here, it is not only the multiple benefits of the Eastshore Project that

count, but the demonstrated need for those benefits, to serve both local and statewide interests. Indeed, it is the unity of those interests that often gets lost in the local view of things. The override decision that is due this Project, however, represents the reality that the Commission doesn't have the luxury of forgetting that unity of interests.

DATED: March 13, 2008

DOWNEY BRAND LLP

By: _____
Steven P. Saxton

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 (AFC Accepted 11/8/06) **PROOF OF SERVICE** (Revised 1/18/08)

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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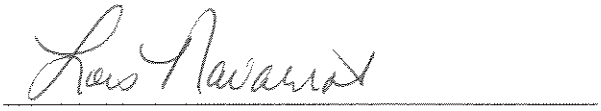
DECLARATION OF SERVICE

I, Lois Navarrot, declare that on March 13, 2008, I deposited copies of the attached **EASTSHORE ENERGY CENTER'S REBUTTAL BRIEF SUPPORTING OVERRIDE OF LORS NONCOMPLIANCE** in the United States mail at Sacramento, California with first-class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above.

OR

Transmission via electronic mail was consistent with the requirements of the California Code of Regulations, title 20, sections 1209, 1209.5 and 1210. All electronic copies were sent to all those identified on the Proof of Service list above.

I declare under penalty of perjury that the foregoing is true and correct.



Lois Navarrot