

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

In the Matter of the:)
)
Complaint Against and) Docket No.
Request for Investigation) 12-CAI-01
of CalCERTS, Inc.)
)
_____)

CALIFORNIA ENERGY COMMISSION
HEARING ROOM A
1516 NINTH STREET
SACRAMENTO, CALIFORNIA

TUESDAY, MAY 29, 2012
10:30 a.m.

Reported by:
John Cota
Contract No. 170-09-002

COMMITTEE MEMBERS PRESENT

Karen Douglas, Presiding Member

Andrew McAllister, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Kourtney Vaccaro, Hearing Officer

David Hungerford, Advisor to Commissioner McAllister

Galen Lemei, Advisor to Commissioner Douglas

Jennifer Nelson, Advisor to Commissioner Douglas

CEC STAFF PRESENT

No Staff Present

OFFICE OF THE PUBLIC ADVISER

Jennifer Jennings, Public Adviser

COMPLAINANTS

No Appearances Made

RESPONDENT

Jane E. Luckhardt, Attorney
Downey Brand, LLP

Shelby Gatlin, Attorney
Downey Brand, LLP

ALSO PRESENT

George Nesbitt (via WebEx)

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P R O C E E D I N G S

10:37 a.m.

1
2
3 PRESIDING MEMBER DOUGLAS: Welcome to this
4 Committee Meeting in the matter of the complaint against and
5 request for investigation of CalcERTS, Incorporated. I am
6 Commissioner Douglas; I am the Presiding Member of this
7 committee meeting. To my immediate left -- to my immediate
8 left is Kourtney Vaccaro. To her left -- our Hearing
9 Advisor. To her left, Commissioner McAllister and to his
10 left, David Hungerford.

11 I would like to ask the parties to introduce
12 themselves, please, beginning with CalcERTS.

13 MS. GATLIN: Hi, I'm Shelby Gatlin; I'm counsel
14 for CalcERTS.

15 PRESIDING MEMBER DOUGLAS: Thank you.

16 Is anyone here from the Complainants.

17 (No response.)

18 PRESIDING MEMBER DOUGLAS: Not present in the
19 room. On the phone?

20 (No response.)

21 PRESIDING MEMBER DOUGLAS: Okay. Jennifer
22 Jennings is here from the Public Adviser's Office.

23 And with that -- actually, let me ask if there are
24 any public agencies represented in person or on the phone?

25 (No response.)

1 PRESIDING MEMBER DOUGLAS: All right. With that
2 I'll turn this over to the Hearing Officer.

3 HEARING OFFICER VACCARO: Good morning everyone.
4 Thank you for the introductions.

5 Just to give a little background so that those of
6 you, particularly those of you on the phone understand
7 what's going on. As I look in the room in front of me the
8 court reporter is here, the Public Adviser Jennifer Jennings
9 is sitting in front of me, and of course we have Ms. Gatlin
10 from Downey Brand representing the Respondent, CalcERTS.

11 We don't seem to have an appearance yet by the
12 Complainants' attorney and it's quite possible that we
13 won't. There is nothing negative to be imputed by this at
14 all. As many of you should be aware, today's proceeding is
15 noticed. It is a publicly noticed proceeding to advise all
16 of you that the Committee will be meeting in closed session
17 to deliberate in this matter. That is what is intended
18 today.

19 However, if you looked at the noticed agenda we
20 also do have placeholders today that allow for public
21 comment and comment of the parties should they wish to make
22 a comment. I already understand from the Public Adviser
23 that she will be representing a member of the public in
24 introducing some documents today during the public comment
25 period, but that won't happen until a little bit later.

1 I think what we are going to do now is adjourn to
2 closed session; but I like to give everybody a sense of when
3 we are coming back so that you are not just sitting there on
4 the phone line. So I am going to turn to the Presiding
5 Member, Commissioner Douglas, and have her smile or frown at
6 me when I propose that we meet for, I think, 45 minutes,
7 maybe come back at 11:30. But if you think a half an hour
8 is sufficient --

9 PRESIDING MEMBER DOUGLAS: 11:30 would be good.

10 HEARING OFFICER VACCARO: Okay. Then what we'll
11 do is come back. We are going to go off the record in just
12 a few moments. We will come back on to the record at 11:30.
13 At that time if there is anything to report out we'll make
14 a report out. However, it is quite possible there is
15 nothing to report out today.

16 After that we will hear from the parties if there
17 is a comment they wish to make and from the members of the
18 public. Which means we do anticipate seeing you again,
19 Ms. Jennings, preferably in person, not over the telephone,
20 for your purposes today.

21 So with that, we will return at 11:30, thank you.

22 (Off the record at 10:41 a.m.)

23 (On the record at 11:45 a.m.)

24 HEARING OFFICER VACCARO: We are back. Those of
25 you who have been waiting, I think probably quite patiently,

1 we are back on the record now, 15 minutes later than
2 intended so thank you for your willingness to just sit by
3 and wait for us to return.

4 Before we adjourned to closed session I indicated
5 that the Committee may or may not have a report out. There
6 is no report out for today's closed session.

7 So I think what that means is we move to the next
8 item on the agenda, which would be comments from any party
9 or member of the public.

10 I see, Ms. Luckhardt, you are here sitting in the
11 audience. You are certainly welcome to sit up at the table
12 if there is a comment or anything that you wish to say
13 today. I don't mean to put you on the spot, you are not
14 required to, but you came, and if you want to be accounted
15 for as having anything to say at this point we are certainly
16 welcoming that. And I don't know if we have Mr. Haddock on
17 the line at all, he is not here in the room, and he would be
18 welcome at this time to make a comment. But we will first
19 start with Ms. Luckhardt because she is here before us on
20 behalf of CalcERTS.

21 MS. LUCKHARDT: Okay. And I actually wasn't
22 planning on being here today. But when I talked to Shelby
23 Gatlin, who was here earlier, she reported to me a
24 conversation she had with Mr. Hungerford that actually gave
25 me great concern. Mr. Hungerford, as it was reported to me,

1 made a comment about whether she was going to be paid for
2 her time here.

3 And that gives me concern that there might be bias
4 amongst the Committee. And I understand that in situations
5 like this it is the decision of the Commissioners and not
6 their advisors, but in many instances their advisors play a
7 very significant role in ensuring that the decisions, the
8 ultimate decisions are written in a form that reflects the
9 intent of the Commissioners. And so, unfortunately, I feel
10 like it is important to bring this to your attention and to
11 raise it as a concern.

12 HEARING OFFICER VACCARO: Well I think before the
13 Commissioners speak, if we could, I notice Ms. Gatlin is on
14 the telephone line. Ms. Gatlin, are you there?

15 MS. GATLIN: I am here.

16 HEARING OFFICER VACCARO: I think, perhaps so that
17 the Committee Members can be more informed and so that
18 Mr. Hungerford himself can address that I think it would
19 probably be most appropriate to hear directly from
20 Ms. Gatlin what it is that she believed she heard and then
21 we move forward from there. Thank you.

22 MS. GATLIN: Certainly, certainly. It was a
23 question of whether or not I would be able to bill my time
24 for the next 45 minutes when you were behind closed session.
25 It was presented in a joking manner but I believe it was a

1 sincere question. Can you hear me?

2 HEARING OFFICER VACCARO: Yes, thank you.

3 MS. GATLIN: Okay.

4 PRESIDING MEMBER DOUGLAS: I don't know if there
5 is anything Mr. Hungerford would like to say. I heard the
6 comment and also heard him say it in a joking manner.

7 I have also been, just at this moment, talking to
8 my advisor, not about the question of billing time but about
9 the question of whether when we are not intending to report
10 anything out and have one of these closed sessions it is
11 worth the time of attorneys to be there and whether there is
12 any better way that we can send a signal directly through
13 what we write in the order or otherwise that makes it more
14 clear that this session is for the purpose of --

15 You know, certainly you are entitled to come and
16 speak and the public is entitled to make public comment in
17 these sessions. But if there is a way of making it more
18 clear for people who are managing their time to know whether
19 it makes sense for them to come or not, we would be -- we
20 would like to do that so that you use your time efficiently
21 and we use ours.

22 So I do feel concerned about a perception that you
23 might be obligated to be here when, you know, really what we
24 plan to do is open the hearing, go into closed session,
25 leave the hearing, report that we have had a closed session

1 and let Ms. Vaccaro do her work. Go ahead.

2 HEARING OFFICER VACCARO: I think -- you know, I
3 think that is an excellent point that you raise. In this
4 case in particular I had conversation with Ms. Luckhardt and
5 I actually do -- in the last few closed sessions I have had
6 in different matters and I do personally let them know not
7 only that they don't need to attend, what they can expect,
8 and also that there is nothing negative imputed to an
9 attorney who doesn't show. And I think that is how we
10 opened today's proceedings as well, making that very clear.

11 I think there is something that perhaps maybe can
12 be put in orders in the future. But just focusing on
13 today's proceeding and future proceedings, I think there is
14 something to be said for reading nothing either way into an
15 attorney representing their client, even if the primary
16 focus is for the Committee to meet in closed session. It is
17 still an open proceeding at all times until we adjourn and
18 come back and we specifically carve out the opportunity for
19 further comment by a party or member of the public. And
20 indeed we are going to get some comments today, as I
21 understand it, from a member of the public who attended the
22 hearing but would like to use today's proceeding as an
23 opportunity to make further comment.

24 So I think I just wanted to clarify for our
25 purposes today that that is an understanding that CalCERTS'

1 attorneys had but that they made the professional decision
2 on behalf of their client to monitor what was happening
3 today so that they could be apprised of all comments that
4 were made and to be here in person if need be.

5 So I think if -- you invited Mr. Hungerford to say
6 something, I don't know if he was going to, and then we can
7 certainly circle back to you, Ms. Luckhardt.

8 ADVISOR HUNGERFORD: The thing I was thinking when
9 I made the comment was I was feeling sympathy for someone
10 who was having to spend their time in a non-productive
11 manner while we were, while we were in closed session and
12 didn't mean anything else by that. That she would be -- I
13 presumed she would be here until we came back instead of
14 switching places with someone else and that she would -- and
15 that she would basically have to find something to do during
16 that time to be productive. And it was the idea that it
17 would interfere with her productivity and sort of take a
18 chunk out of the day. And it was only in that vein that I
19 was thinking.

20 HEARING OFFICER VACCARO: Ms. Luckhardt?

21 MS. LUCKHARDT: I don't know if you want me to
22 respond. I think the -- we did make an effort and I did
23 call the Hearing Officer to determine how this was going to
24 go and so we would know. We didn't know when you would come
25 back until you announced it at the beginning of this hearing

1 so we needed to know when that was.

2 And I was actually not planning on being here this
3 afternoon. Kourtney was going -- not Kourtney -- Shelby was
4 going to -- Shelby Gatlin was going to follow up. But it
5 just -- the comment raised a concern to me that maybe there
6 was a perception that our client had too much representation
7 and that that might be held against our client.

8 And if there is a chance for a perception like
9 that to influence a decision I can't let it go. You guys
10 have to understand that, I cannot let that stuff go. I have
11 to bring it to your attention. Decisions go both for and
12 against me out of this Commission and so I can't leave one
13 stone unturned. And I apologize for that but unfortunately
14 that's the situation I'm in and it's the only way I can be
15 an advocate for my client in truly all instances. So I
16 thank you for your consideration.

17 HEARING OFFICER VACCARO: This is probably not
18 going to be the most articulate phrasing of what I am going
19 to say but -- I understand all of the words that you just
20 used but I am trying to understand, I guess, what the
21 practical effect is of your raising that. Because I think
22 you're either looking for assurances from the two Committee
23 Members that there is no bias, and that statement is not a
24 statement that is reflective of their perceptions, their
25 points of view or where they are coming from in this

1 proceeding. I am trying to get a sense.

2 You have raised that you were concerned that
3 Mr. Hungerford made a comment that to you might indicate
4 bias. He's explained himself. You may or may not be
5 satisfied with that explanation. But at the end of the day
6 what we have is hanging out there is an assertion of
7 potential bias without more.

8 Do you need to hear for the purposes of the record
9 so that we continue to move forward with working through
10 this matter before the Committee, assurances from the two
11 Commissioners as to what their perception is? Because they
12 are ultimately the decision-makers. And we need to either
13 move forward with this or is this you foreshadowing I am
14 going to raise up a red flag at some other point in time.
15 So I think we need to get this addressed and figure out what
16 your proposed course of action is.

17 MS. LUCKHARDT: You know, I learned about this and
18 then I walked over here. So I have had a whole of about 10,
19 15 minutes to even understand what the comment was. And the
20 one thing I wanted to ensure was that it wasn't an ongoing
21 -- that there was bias going forward. You know, bias is a
22 very difficult thing to predict. I don't know what the
23 appropriate action is. To be honest, I haven't thought
24 through it, let alone called my client to see what they
25 would think might or might not be the appropriate action.

1 Because I haven't had the time to address it in any way.

2 But I just felt like if it was a comment and it
3 was a concern that I needed to raise it at the soonest
4 possible moment and that happens to be right now. So I have
5 not thought through what the implications are or what
6 entirely would satisfy it. I was just -- when I heard the
7 comment it raised a concern and I felt like I needed to
8 express the concern.

9 HEARING OFFICER VACCARO: Okay, fair enough. And
10 again, you weren't here at the beginning of the proceedings
11 and I don't know if you listened in at all. But I do
12 believe that I was speaking for myself and certainly for the
13 Committee Members and I believe everyone who is advising
14 them, when the initial admonition to everyone is there is
15 nothing to be imputed to the parties or the attorneys by
16 whether they are here or not here. And I think that is a
17 true and accurate statement.

18 It certainly reflects my point of view in
19 reviewing this matter and making any recommendations to the
20 Committee Members. I think for the purposes of the record I
21 would invite the two Committee Members to either affirm or
22 disavow that statement but I think you will likely affirm
23 it, since I was speaking for both of you. But I am not
24 going to speak for you in this instance. I think it is, it
25 is important enough for the record to reflect the positions

1 of the decision makers.

2 PRESIDING MEMBER DOUGLAS: Thank you, Kourtney. I
3 strongly agree with your statement. We wanted to make a
4 very clear statement that we were not going to impute on the
5 parties or infer from the parties or anything about the
6 parties based on whether or not their lawyers were here or
7 the clients themselves came to this.

8 ASSOCIATE MEMBER McALLISTER: I would also
9 strongly agree with Kourtney's statement. This decision
10 will be made on the merits on the record and, you know,
11 nothing else. There is clearly -- the fact that, you know,
12 the complainant or the respondent's lawyers or themselves
13 are here or not here today is in no way influencing the
14 content of the closed session or the decision itself.

15 HEARING OFFICER VACCARO: And obviously you have
16 made it clear, Ms. Luckhardt. You probably feel the need to
17 discuss the matter with your client. I mean, please do so.

18 But for today's purposes in moving forward I think you do
19 have a good sense of what the Committee's expectations and
20 thoughts are when it does convene this type of proceeding
21 with the sole intent of going into closed session and the
22 expectations that it has only of itself to be here and not
23 the parties and the attorneys.

24 If there is anything else you want to follow up
25 with right now, you can, otherwise I think we are just going

1 to move on to public comment at this time. But thank you
2 for coming and bringing this to the Committee's attention.

3 I don't have any other individuals in the room in
4 terms of members of the public or parties or party
5 representatives but we do have the Public Adviser in the
6 room. I had indicated to everyone early on that she was
7 going to be making a public comment on behalf of someone.
8 And so I think at this time, Ms. Jennings, if you would come
9 to the podium. And after that we will check to see if there
10 is anyone on the telephone who might wish to make a comment.

11 MS. JENNINGS: Thank you, Hearing Officer Vaccaro
12 and Commissioners. I am here today on behalf of Mr. Tommy
13 Young. He appeared at the May 11th hearing and made oral
14 public comments. And he requested that today I submit to
15 you and to Dockets the written version of his oral comments
16 as well as some supporting documents and I am prepared to do
17 that today.

18 HEARING OFFICER VACCARO: So would it be rereading
19 what he read to us? Because if I recall correctly Mr. Young
20 came up and read directly from his paper. So is it -- if it
21 is that same paper that he read when we last had -- when we
22 last met and had an evidentiary hearing --

23 MS. JENNINGS: He had made notes on that paper so
24 he wanted to clean it up. He had gone -- deviated from his
25 written text. And so that's what this is, this is the

1 revised, written text.

2 HEARING OFFICER VACCARO: Okay.

3 MS. JENNINGS: It is not verbatim.

4 HEARING OFFICER VACCARO: And he asked you to read
5 it --

6 MS. JENNINGS: No, he just asked that I submit the
7 written version of it to the docket.

8 HEARING OFFICER VACCARO: Okay. Okay. So you are
9 not going to reread, I guess is what I'm saying.

10 MS. JENNINGS: No, I wasn't intending to unless
11 you want me to. No, he didn't ask that -- for that.

12 And we do have someone, Mr. Nesbitt on the phone
13 who would like to speak.

14 HEARING OFFICER VACCARO: Okay, thank you.

15 Mr. Nesbitt, if you would like to make a public
16 comment at this time you are welcome to do so. Again, I
17 think you know the rules. We like to hear the public
18 comments but we also like them brief so let's keep this to
19 three minutes, please.

20 MR. NESBITT: Actually, I guess I probably have
21 more questions than comments, more about the process. So I
22 guess you went to closed session but you would have some
23 sort of open discussion depending on what you were talking
24 about, say at the June 11th? Is that correct?

25 HEARING OFFICER VACCARO: Close but not exactly.

1 You know, under the Bagley-Keene Open Meetings Act there are
2 requirements. First of all, you know, you only go into
3 closed session if you are doing it in accordance with the
4 Bagley-Keene Act. And then the Bagley-Keene Act also has
5 requirements for when a committee or a commission or public
6 body must come out of closed session and report information
7 to the public.

8 So what I advised you is that there is no report
9 out today so there is no discussion of what took place in
10 the closed session. The public was advised that it would
11 happen. The public was advised of the scope and nature of
12 that discussion through the public notice and that's all
13 today that there is to be said with respect to the closed
14 session.

15 MR. NESBITT: Okay. So this is a normal
16 subcommittee meeting or it's a meeting of the subcommittee,
17 the efficiency?

18 HEARING OFFICER VACCARO: Well it is a meeting of
19 the committee, yes. There is a two-person committee
20 assigned to this matter and that committee met in closed
21 session today.

22 MR. NESBITT: Okay. And the consideration of
23 CalCERTS' sort of counter-complaint against Valley Duct
24 Testing, is the subcommittee going to take that up today or
25 as part of the June 11th?

1 HEARING OFFICER VACCARO: Well, that's a good --

2 MR. NESBITT: Or is that --

3 HEARING OFFICER VACCARO: That's a good question.

4 There are a couple of things going on here so let me just
5 make sure that everything is crystal clear. Two issues have
6 recently -- two notices have recently issued from the
7 Commission. One notice was to allow the public and parties
8 to be informed of today's closed session. That same notice
9 also advised that there would be a second closed session in
10 this matter. These are all available through the
11 Commission's website and that's something that you can look
12 at, the start time and the date.

13 As I sit here today I believe that it is June 11th
14 is when the second closed session will be held in this
15 matter but I don't have the notice in front of me. Yes, the
16 Public Adviser is affirming that I was correct, the second
17 closed session that has been noticed is June 11th.

18 There is a closed session that has also been
19 noticed relating to the complaint and request for
20 investigation pertaining to Valley Duct Testing. That is a
21 closed that would be held this coming Friday, June 1st.

22 All of these closed sessions have been noticed
23 according to the Bagley-Keene noticing requirements. All
24 details or all information that is pertinent is available in
25 the notices and they can be obtained from the Energy

1 Commission website.

2 At least as to CalCERTS, the Valley Duct notice is
3 not on our website because at this point there has been no
4 decision made as to the disposition of the pleading that has
5 been submitted to the Energy Commission.

6 MR. NESBITT: Okay. All right.

7 HEARING OFFICER VACCARO: Does that answer your
8 questions, Mr. Nesbitt?

9 MR. NESBITT: Yeah. I mean, I'm just partly
10 struggling to figure out what the process is, you know.
11 Okay. So most of this is going to be closed session and you
12 may or (WebEx faded) open discussion.

13 HEARING OFFICER VACCARO: You cut out a little bit
14 but I think what you were getting at is yes, the upcoming
15 events will be closed sessions. And as the Committee
16 indicated, at the close of the prehearing conference for the
17 CalCERTS matter, that a decision will issue on or before
18 June 2nd -- June 22nd, I apologize. Those are the things
19 you can look forward to. Another closed session in this
20 matter and the issuance of a decision from the Committee.

21 And I think if you have other questions about
22 process or things that relate to these matters, the Public
23 Adviser is available by email and telephone and my email
24 address and telephone number are also available. But I am
25 not sure that this forum is the place to continue further

1 discussing next steps or process.

2 MR. NESBITT: Okay, all right, thank you very
3 much.

4 HEARING OFFICER VACCARO: Thank you. Is there
5 anyone else who wishes to make a public comment?

6 (No response.)

7 HEARING OFFICER VACCARO: I am hearing none and I
8 see no members of the public in the room so I will turn this
9 over to Commissioner Douglas.

10 PRESIDING MEMBER DOUGLAS: All right. So I would
11 like to thank Ms. Luckhardt for being here. Obviously
12 Mr. Nesbitt for being on the phone and Jennifer for
13 providing us with the other public comment. We will look
14 forward to providing -- did you give a time line for when we
15 would come forward with a draft order?

16 HEARING OFFICER VACCARO: June 22nd. On or before
17 June 22nd.

18 PRESIDING MEMBER DOUGLAS: June 22nd. On or
19 before June 22nd, okay. So we will endeavor to make that
20 time line and I think that that shouldn't be too difficult.

21 So we will get to -- get a draft order out in the near
22 future and we will look forward to doing that.

23 So thank you and with that we're adjourned.

24 (The Committee Meeting adjourned at 12:05 p.m.)

25 --oOo--

CERTIFICATE OF REPORTER

I, JOHN COTA, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Committee Meeting; that it was thereafter transcribed.

I further certify that I am not of counsel or attorney for any of the parties to said meeting, or in any way interested in the outcome of said meeting.

IN WITNESS WHEREOF, I have hereunto set my hand this 4th day of June, 2012.

JOHN COTA

CERTIFICATE OF TRANSCRIBER

I certify that the foregoing is a correct transcript, to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

RAMONA COTA, CERT**478

June 4, 2012