

BUSINESS MEETING
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Business Meeting)
)
_____)

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

PARTIAL TRANSCRIPT - ITEMS 12 THROUGH 17

WEDNESDAY, APRIL 13, 2005

10:06 A.M.

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PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

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Arthur Rosenfeld

James D. Boyd

John Geesman

STAFF PRESENT

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William Chamberlain, Chief Counsel

Song Her, Secretariat

Roger Johnson

Gary Fay

Sue Kateley

Gordon Schremp

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Barbara Byron

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Guido Franco

Caryn Holmes

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Kevin Kennedy

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Jennifer Chamberlin
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Laura Genao
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ALSO PRESENT

Christopher J. Warner, Attorney
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Joseph Kloberdanz
San Diego Gas and Electric
Semptra Energy Utilities

Stuart Hemphill
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Woodruff Expert Services

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(via teleconference)

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P R O C E E D I N G S

12:46 p.m.

ACTING CHAIRPERSON PFANNENSTIEL: The meeting will be back in order. We have items 12 through 18 in front of us. Since 12 through 17 deal with the same subject, and since we're going to be hearing them commonly, although with some breakdown, I think, I thought I would read into the record the introduction to each of the six; get those on the record.

And then we'll hear from first the staff on a discussion of the six. Then I believe we should talk with the group of the ESPs. Then perhaps a group of the IOUs. And we'll see there where the discussion goes from that point.

Let me start with item number 12, Strategic Energy, LLC., Appeal. Consideration of an appeal by Strategic Energy LLC of the Executive Director's decision denying in part their application for confidentiality pursuant to the California Code of Regulation Title 20, section 2505(a)(3).

Item 13, Constellation NewEnergy, Inc., Appeal. Consideration of an appeal by Constellation NewEnergy, Inc. of the Executive

1 Director's decision denying in part their
2 application for confidentiality pursuant to the
3 California Code of Regulations Title 20, section
4 2505(a)(3).

5 Item 14, APS Energy Services, Inc.
6 Appeal. Consideration of an appeal by APS Energy
7 Services (APS) of the Executive Director's
8 decision denying in part their application for
9 confidentiality pursuant to California Code of
10 Regulations Title 20, Section 2505(a)(3).

11 Item 15, Southern California Edison
12 Company Appeal. Consideration of an appeal by
13 Southern California Edison Company of the
14 Executive Director's decision denying in part
15 their application for confidentiality pursuant to
16 the California Code of Regulations Title 20,
17 section 2505(a)(3).

18 Item 16, San Diego Gas and Electric
19 Company Appeal. Consideration of an appeal by San
20 Diego Gas and Electric Company of the Executive
21 Director's decision denying in part their
22 application for confidentiality pursuant to
23 California Code of Regulations Title 20, Section
24 2505(a)(3).

25 Item 17, Pacific Gas and Electric

1 Company Appeal. Consideration of an appeal by
2 Pacific Gas and Electric Company of the Executive
3 Director's decision denying in part their
4 application for confidentiality pursuant to the
5 California Code of Regulations Title 20, section
6 2505(a)(3).

7 With that, Ms. Holmes.

8 MS. HOLMES: Thank you very much. Good
9 afternoon. The item before you today is six
10 appeals of decisions by the Executive Director to
11 deny confidential designation for certain
12 electricity demand forecast data sought by the
13 Commission in order to prepare the 2005 IEPR.

14 Appellants are three investor-owned
15 utilities, SDG&E, PG&E and SCE, and three ESPs,
16 APS, Constellation and Strategic.

17 They submitted data in early February
18 with requests for confidential designation. The
19 Executive Director granted confidential
20 designation for some of the data, but denied
21 confidential designation for other portions of the
22 data. And the parties have appealed the denials.

23 The question that the Commission must
24 answer today from each of the appeals is whether
25 the appellants have made a reasonable claim that

1 confidentiality is authorized under the Public
2 Records Act.

3 This is not a high threshold, but
4 neither is it a meaningless one. It's important
5 to note that it's not sufficient simply for the
6 applicant to make any claim that confidentiality
7 is justified. Rather, the applicant must
8 demonstrate that their claim is reasonable in
9 light of the facts before the Commission.

10 For example, to the extent that the
11 claims are based on a statement that annual peak
12 demand can be used to back-calculate into an
13 hourly net short, the question that you would be
14 facing is whether or not it's reasonable to claim
15 that such a calculation can be made based on the
16 facts in front of you.

17 As you make your decision you should
18 keep in mind that the Executive Director has
19 already granted confidential designation for
20 virtually all of the supply side data for which
21 confidentiality was sought.

22 I have several recommendations in terms
23 of process. First, I recommend allowing the
24 moving parties, the appellants, to make their
25 presentation. I have encouraged both the ESPs and

1 the IOUs to consolidate and coordinate their
2 presentations, so hopefully you'll only have to
3 hear one discussion of each of the common issues.

4 To the extent that there are issues that
5 are unique to each entity, those will need to be
6 discussed separately.

7 Secondly, staff is available to answer
8 technical questions about its reactions on a
9 technical basis to the appellants' claim for
10 confidentiality, and I encourage you to take
11 advantage of that opportunity.

12 I also recommend that you allow staff
13 and the appellants to ask questions of each other
14 at the conclusion of their presentations in order
15 to develop a full record for your resolution of
16 these issues.

17 And with that, I think we can begin.

18 ACTING CHAIRPERSON PFANNENSTIEL: Thank
19 you, Ms. Holmes. I think that your
20 recommendations on process seem reasonable to me.
21 Let me ask my fellow Commissioners if there's any
22 problem with that.

23 Then why don't we ask whoever would
24 represent the ESP's to come forward and make a
25 discussion of your case.

1 MR. KLATT: Good afternoon, Madam Chair
2 and Commissioners. My name is Gregory Klatt and I
3 am speaking today on behalf of APS Energy Services
4 and Strategic Energy. Gregg Wheatland, who is
5 seated to my right, will be speaking on behalf of
6 Constellation NewEnergy.

7 We have coordinated beforehand to try to
8 minimize the amount of overlap between the
9 presentations.

10 Before I start I wanted to note that all
11 three companies are electric service providers, or
12 ESPs. And that they are in vigorous competition
13 with each other, and also compete against the
14 bundled rate and special rates offered by the
15 utilities. All under a competitive marketplace
16 where they do not have the same type of cost
17 recovery guarantees that are enjoyed by the
18 utilities. So they're in a somewhat different
19 situation than the IOUs.

20 The basic issue before you today is
21 whether my clients have made a reasonable showing
22 that public disclosure of the information at issue
23 in the appeals would cause them some competitive
24 harm.

25 The information at issue includes

1 information concerning the total loads and total
2 peak loads of each company for the period of 2003
3 through 2016. And in the case of Strategic,
4 detailed information about the company's forecast
5 methodology and uncertainty analysis.

6 Strategic and APS, and this is also true
7 for Constellation, have made efforts to keep this
8 information confidential. They believe it is
9 extremely sensitive commercially; and, in fact,
10 constitutes trade secrets.

11 In anticipation of what we have been
12 told today is likely to be extensive questioning
13 from the dais on the competitive harm issue, Mr.
14 Wheatland and I have arranged for knowledgeable
15 personnel from the companies to be here today to
16 speak to that issue and answer any questions you
17 may have.

18 Before we get to that discussion,
19 however, I'd like to make a few preliminary -- I
20 would like to address a few preliminary matters.

21 First, in their appeals, my clients
22 requested that the three years of confidentiality
23 granted by the Executive Director be extended to
24 ten years. Upon further consideration my clients
25 have determined or concluded that a five-year

1 rolling period would afford adequate protection
2 for the forecast load data. And they amend their
3 request accordingly.

4 I understand that Constellation
5 NewEnergy will do likewise, although I'm not here
6 to speak on behalf of Constellation.

7 And that Mr. Wheatland will explain the
8 importance of having a rolling, as opposed to a
9 static, confidentiality period for the load
10 forecast information.

11 I'd like to distinguish, however, the
12 forecast methodology and uncertainty analysis that
13 was provided by Strategic Energy, unlike the load
14 forecast information -- and this is particularly
15 true for the forecast methodology data, or
16 information, basically the description of how they
17 do forecasting.

18 That information does not really have a
19 shelf life. There's unlikely to be significant
20 change between now and three years from now, or
21 five years from now, as to the methodology that
22 Strategic uses to conduct its forecast.

23 And so we are requesting that that
24 particular piece of information be granted
25 confidentiality on a permanent basis.

1 The same is also true with respect to
2 the uncertainty analysis. Conceivably, as time
3 goes by, the commercial value of the uncertainty
4 analysis could decline. However, we are now at a
5 static marketplace. There have not been any
6 changes as of yet to the market structure. So,
7 the same considerations that go into the
8 uncertainty analysis today might very well be the
9 same five years from now.

10 So, also with respect to the uncertainty
11 analysis we're requesting that the grant of
12 confidentiality be permanent, or at the very
13 least, for ten years.

14 The second point I'd like to address is
15 the competitive harm standard. In denying
16 confidentiality for information about my clients'
17 total loads and total peak loads, the Executive
18 Director held that the information, quote, "is not
19 sufficiently detailed to provide others with a
20 competitive business advantage."

21 Similarly, with respect to the forecast
22 methodology and uncertainty analysis provided by
23 Strategic, the Executive Director found that this
24 information is not commercially sensitive, and
25 disclosure would not confer a competitive

1 advantage on a competitor.

2 I submit that the Executive Director has
3 used the wrong standard. As reflected in the
4 Commission's regulations the Public Records Act
5 and relevant judicial decisions, the issue is not
6 whether the information would bestow a competitive
7 advantage on a competitor or other market
8 participant, but whether the information has
9 commercial value to the reporting company and its
10 disclosure would result in a loss of competitive
11 advantage or other harm to the reporting company.

12 It's a subtle difference, but important.

13 Third, and actually, Ms. Holmes made
14 this point to some extent, my clients were not
15 required to prove their case for confidentiality
16 beyond a reasonable doubt, by a preponderance of
17 the evidence, or even by substantial evidence,
18 which is the standard that's common for regulatory
19 proceedings. Rather the Commission's regulations
20 provided that the Executive Director shall grant
21 confidentiality if an applicant has made, quote,
22 "a reasonable claim that the Public Records Act or
23 other provision of law authorizes the Commission
24 to keep the record confidential."

25 I submit that while it is reasonable to

1 ask a company that is seeking confidentiality to
2 explain in general terms why the information at
3 issue has commercial value to the reporting
4 company, it would be unreasonable to require an
5 applicant to get into the heads of its competitors
6 or much less, explain in its application exactly
7 how those competitors could use the information to
8 their advantage.

9 And in that respect with respect to that
10 area, when Ms. Chamberlin and Ms. Tierney speak,
11 depending upon how detailed the questions are that
12 are presented to them, we may request that we go
13 into closed session. And, in fact, it may be
14 appropriate to have only Constellation in the room
15 for that session, and only Strategic in the room
16 for their session. We may not get there, but
17 that's just something we wanted to raise as a
18 possibility.

19 I want to just make a point that this
20 information is extremely sensitive and they don't
21 want it to get into the hands of their
22 competitors.

23 Third, my clients -- excuse me. Fourth,
24 I wanted to point out that there are alternative
25 grounds for the Commission to grant

1 confidentiality to the information in question.

2 If the Commission is not convinced that
3 the information necessarily satisfies the
4 requirements to be characterized as a trade
5 secret, the Commission also has the authority to
6 grant confidentiality where the public interest in
7 nondisclosure outweighs the public interest served
8 by disclosure.

9 We believe it is not necessary to
10 disclose ESP-specific information in order for the
11 debate on key energy issues facing the state to be
12 open and informed. That interest can be satisfied
13 by ESP information that has been aggregated for
14 all ESPs on the statewide level.

15 On the other hand, public disclosure of
16 ESP-specific load information could prompt
17 reporting entities to adopt a minimalist approach
18 with respect to future data requests and data
19 submittals. And that would be in contrast to the
20 cooperative and open approach they've adopted so
21 far.

22 In short, the balance of public interest
23 provides additional ground for the Commission to
24 grant confidentiality to the ESP-specific
25 information at issue before you today.

1 Lastly, I wanted to speak to the issue
2 of consistency on a national level. It's been
3 suggested that somehow what we are doing here
4 today is different than what's being done in other
5 states. That there's more disclosure in other
6 states.

7 Now, our understanding is actually that
8 the opposite is true. With respect to ESPs
9 they're simply not required to disclose this type
10 of information in other jurisdictions. They do
11 make some reports to the DOE, to the Energy
12 Information Administration, but not to state
13 jurisdictions. And there certainly is no
14 jurisdiction in which the type of information that
15 we're discussing today would be made public, the
16 forecast information.

17 The only information that they report is
18 historical. And some of that is public already.
19 But there's no other jurisdiction where the ESPs
20 are reporting information about the future and
21 that information is being made public.

22 I'd like to end by making a proposal.
23 We think that the Commission's purposes can be
24 served while at the same time providing adequate
25 protection to ESPs by taking two steps:

1 First, with respect to the data that's
2 been submitted by ESPs, to deem that confidential,
3 but to make it public on an aggregated basis,
4 where all ESP information is aggregated. We
5 believe that that would serve the public purpose
6 of having an open informed debate, while at the
7 same time not disclosing sensitive information.

8 The second part of our proposal is that
9 the period of confidentiality be five years and on
10 a rolling basis. And, again, Mr. Wheatland will
11 talk more to that.

12 That concludes my prepared remarks.
13 Before turning the microphone over to Mr.
14 Wheatland, I would be happy to try to answer any
15 questions you may have. And also I wanted to
16 repeat the Ms. Chamberlin is here today from
17 Strategic to answer specific questions you may
18 have about the competitive harm issue.

19 ACTING CHAIRPERSON PFANNENSTIEL:

20 Commissioner Geesman.

21 COMMISSIONER GEESMAN: I want to get a
22 better handle on this historical information that
23 your clients disclose to the federal government.
24 Doesn't that negate the argument for a rolling
25 period of nondisclosure?

1 MR. KLATT: I don't believe so. If you
2 don't have a rolling period you're going to be in
3 a situation where, for example, the forecast
4 information about the year 2008 that's been
5 submitted to the Commission, that would be
6 disclosed in 2008, made public. So you'd have
7 2008 information available in the year 2008.

8 For the historical information there's a
9 lag between the period that's covered and the time
10 the information's reported, and an additional lag
11 between the time that information's reported and
12 the time it's made public by the EIA.

13 So, I believe it's about a year, a year
14 gap or so. And so what's being made public by the
15 federal government is always a year, two years in
16 the past. And it's only --

17 COMMISSIONER GEESMAN: And you're
18 suggesting that because we're merely a state
19 government that five years ought to be sufficient?

20 MR. KLATT: No, that's not the point I
21 was making at all. That's actual information;
22 it's already happened; it's reported; it's out
23 there; it's made public about a year or so after
24 the period in question.

25 COMMISSIONER GEESMAN: And --

1 MR. KLATT: The information here is
2 forecast information; it's not just --

3 COMMISSIONER GEESMAN: Forecast
4 information after the fact is more potentially
5 damaging to your clients than actual information?
6 How does that work?

7 MR. WHEATLAND: May I --

8 COMMISSIONER GEESMAN: No.

9 MR. KLATT: Forecast information would
10 be -- just give an example. You're talking about
11 actual information and why forecast information is
12 more sensitive than actual information.

13 The forecast covers several years in the
14 future. That information, say for example the
15 year 2008. The actual information for the year
16 2008 won't be public until 2009.

17 COMMISSIONER GEESMAN: And I believe
18 you're suggesting that we keep the forecast
19 information of 2008 confidential until 2013.

20 MR. KLATT: Yes.

21 COMMISSIONER GEESMAN: I don't think you
22 fully appreciate the magnitude of the task that we
23 have to perform in terms of adequately assessing
24 the state's energy situation, making policy
25 recommendations to ourselves, other regulatory

1 agencies, the Governor and the Legislature.

2 MR. KLATT: Um-hum.

3 COMMISSIONER GEESMAN: And the necessity
4 of having timely data in order to do that.

5 MR. KLATT: Certainly I do understand
6 that, and I think the difference is that the
7 information that you need for that process does
8 not need to be ESP-specific information. It can
9 be aggregated --

10 COMMISSIONER GEESMAN: Let's go to that.
11 I think on one level you make a good point about
12 aggregation. But I'm not certain statewide
13 aggregation is the appropriate level of
14 aggregation.

15 I'm fearful that we would develop a
16 Swiss cheese understanding of what our electrical
17 supply and demand situation is. And I'm not
18 certain that utility service territory is the
19 right level, or some subset of utility service
20 territory.

21 But I understand your point on
22 aggregation. I'm just not convinced that a
23 statewide aggregate quite gets us to where we need
24 to be.

25 MR. KLATT: And we've explored this a

1 little bit with staff, too, and I know exactly
2 where you're coming from.

3 COMMISSIONER GEESMAN: Okay.

4 MR. KLATT: It may be that service
5 territory level information is more helpful to the
6 process. The main concern we have about service
7 territory level information is that there are few
8 enough market participants at this point in terms
9 of number of ESPs, and in some classes, some
10 service territories there are only a small number
11 of customers in a particular customer class.

12 The concern is that if the information
13 is broken down to the service territory level that
14 you would effectively be facilitating -- you would
15 be effectively disclosing customer-specific
16 information, or ESP-specific information, even
17 though it's been aggregated for ESPs for the
18 service territory level.

19 If that consideration is taken into
20 account and measures are taken to insure that
21 breaking the information down to the service
22 territory level does not create those problems,
23 then there's two ways to get at that.

24 One is, for example, if there was only a
25 few customers in a certain subcategory of the

1 commercial class, you just aggregate that small
2 customer class with the rest of the commercial
3 class. And so you don't have that information for
4 a few customers hanging out there on the chart so
5 people can back-engineer it.

6 Similar situation where the ESP is --
7 there's only one or two ESPs that serve the
8 customers in a class in a service territory. You
9 may want to do some additional masking there. But
10 I certainly understand the issue you're getting
11 to. And I think there may be ways to work that
12 out. Although there may be different
13 considerations for different ESPs.

14 I'm certainly not familiar with all the
15 information that has been submitted. I've, you
16 know, barely even looked at or been allowed to
17 look at the information that was submitted by my
18 client, so I don't know what other people have
19 submitted. But that's the main concern that we're
20 getting at.

21 Back to the question about duration. I
22 think more important than it being five years or
23 ten years is the idea of there being a rolling
24 period. If you don't -- and I believe Mr.
25 Wheatland can speak more to this, but really

1 having the confidentiality period being rolling is
2 extremely important, otherwise you're going to
3 have the situation where every year the
4 competitors are going to see a snapshot for the
5 whole period that's covered by the report.

6 So 2003 to 2016, the next year it'll be
7 2004 to 2017, or I guess there's a two-year gap
8 between the report. But you start putting those
9 snapshots next to each other and you get a pretty
10 clear picture of what the ESP supply/demand
11 situation is. And that's the concern that we
12 have.

13 COMMISSIONER GEESMAN: The ESP business,
14 is that static?

15 MR. KLATT: It is now. Hopefully --

16 COMMISSIONER GEESMAN: Doesn't change.

17 MR. KLATT: -- that will change soon,
18 but we don't know. I mean there are -- basically
19 load will go from ESP to ESP. But I don't think
20 you can anticipate a huge difference in the loads
21 of each individual ESP over the next couple years
22 unless, of course, direct access is reopened.

23 And there's also the problem where
24 they're not only competing against each other, but
25 they are competing against the utilities' bundled

1 rates and their special rates. And that also
2 could affect, you know, what their situation is
3 going forward.

4 But you made an important point,
5 Commissioner Geesman, because the market is static
6 now, the fact that a few years may go by before
7 the information is disclosed doesn't necessarily
8 give you the protection that you would want.
9 That's why you want to have the rolling period.

10 COMMISSIONER GEESMAN: You suggested
11 that you have another witness for competitive
12 advantage questions?

13 MR. KLATT: Yes. Thank you. Jennifer
14 Chamberlin from Strategic Energy.

15 ACTING CHAIRPERSON PFANNENSTIEL: But
16 before we move on, Commissioner Rosenfeld, did you
17 have a question?

18 COMMISSIONER ROSENFELD: Yeah. I'm
19 sorry to be confused about the five-year rolling,
20 but let's take your example. It's now 2008 and
21 the 2007 data have just been published by EIA and
22 presumably has no confidentiality at value
23 anymore.

24 You're suggesting that your forecast for
25 the years 2008 out to 2013 be kept confidential?

1 I'm not fighting about this, I just don't
2 understand.

3 MR. KLATT: Right. Yes, that
4 information, that's the idea of the rolling
5 period, you're right. The information after that
6 time would continue to be confidential until the
7 rolling period catches up with it.

8 COMMISSIONER ROSENFELD: Well, in fact,
9 until the calendar catches up.

10 MR. KLATT: Yes.

11 COMMISSIONER ROSENFELD: And do you
12 submit forecasts for more than five years ahead?
13 You're supposed to submit --

14 MR. KLATT: From 2003 to 2016. And the
15 fact may be that not all the years are covered,
16 depending upon what the actual data submittal is.
17 But the notion is they basically forecast out as
18 far as they could without it becoming so
19 speculative that there's really no use or value to
20 the staff.

21 COMMISSIONER ROSENFELD: Right. I guess
22 the point I'm confused about is I would have
23 thought you would have said that you just want
24 future estimates kept confidential. And, of
25 course, they drop off when the calendar catches up

1 with them.

2 MR. KLATT: Right, that's the basic
3 idea. And I may be, you know, like I said, we
4 kind of divvied this up a little bit, the
5 responsibilities in terms of the presentations.
6 And I do think that Mr. Wheatland is actually more
7 prepared to speak to kind of the nuts and bolts of
8 how the rolling period would average.

9 And I would --

10 COMMISSIONER ROSENFELD: Okay.

11 MR. KLATT: Not to duck the question,
12 but I think really to get a better answer I should
13 defer to Mr. Wheatland.

14 COMMISSIONER GEESMAN: But if I
15 understand correctly the Executive Director
16 provided three years of confidentiality.

17 MR. KLATT: Right, meaning --

18 COMMISSIONER GEESMAN: You had
19 originally suggested ten; today you've changed
20 that to five.

21 MR. KLATT: For the rolling.

22 COMMISSIONER GEESMAN: FERC observes one
23 based on historical information. So, Commissioner
24 Rosenfeld, your question really related more to
25 the forecasts between now and 2008. And I believe

1 that what his answer implied was that he would
2 suggest forecast demand for each year between now
3 and 2010 be kept confidential until 2010. Then in
4 2011 you would be able to see the 2006 forecast.
5 Despite the fact that FERC would have -- EIA would
6 have published the actual consumption on a one-
7 year lag basis.

8 COMMISSIONER ROSENFELD: Yeah, that's
9 why I'm confused. It seems like confidentiality
10 is of something which is almost valueless.

11 ACTING CHAIRPERSON PFANNENSTIEL: Well,
12 perhaps now we should go --

13 COMMISSIONER ROSENFELD: We should let
14 Mr. Wheatland -- yes. Sorry.

15 ACTING CHAIRPERSON PFANNENSTIEL:
16 Enlighten us, please.

17 MR. WHEATLAND: Well, first of all, let
18 me say I'm Gregg Wheatland, Constellation
19 NewEnergy. And I agree with the comments Mr.
20 Klatt has made, to say in the interests of time we
21 have made an effort to coordinate our
22 presentation.

23 I have just a few additional comments.
24 I'm going to juggle the order here to talk a
25 little bit about this one issue that's come up

1 right now.

2 The important thing to realize is the
3 Executive Director's determination looks at the
4 information that's on form 1.1 which shows total
5 retail sales in gigawatt hours by customer class
6 for each IOU service area.

7 And the Executive Director believes that
8 the retail sales totals for each service area
9 should be disclosed now. There's no three-year
10 confidentiality protection to those numbers. So,
11 for an ESP like Constellation the Executive
12 Director's recommendation is that the total retail
13 sales for that ESP for each of the utilities'
14 services areas be disclosed now without any
15 protection.

16 Second of all, we report on that form
17 and break it out by the data for each customer
18 class. And the Executive Director has determined
19 that with respect to the customer class that
20 information can be held confidential until March
21 9th of 2008.

22 So on March 9th of 2008 the entire
23 forecast would be released, including both the
24 totals for each service area and the breakdown by
25 customer class.

1 Now, a forecast has two important
2 elements to it. One, it builds on the historical
3 data. But the more important and perhaps even
4 more sensitive aspect of that forecast is the
5 business plans of that entity.

6 And we believe very strongly that there
7 is important confidentiality interests to be
8 protected in the business plans of the utility.
9 And we would prefer not to give competitors of
10 Constellation, or persons who Constellation must
11 purchase energy from the advantage of seeing what
12 we purchased historically last year, as well as
13 our business plan for this year and next year.

14 So the rolling confidentiality is a way
15 of protecting the long-term business plans of the
16 utility, of the ESP and shielding it from that
17 level of discovery.

18 COMMISSIONER GEESMAN: So, if I
19 understand correctly, you're suggesting that the
20 forecast that Constellation made for the year 2000
21 would be characterized as a trade secret which
22 should be kept confidential until 2005, because it
23 represents a competitive advantage that you have
24 over your competitors?

25 MR. WHEATLAND: That's right. And it's

1 not only with respect to the competitors. You
2 also have to realize that Constellation is out
3 purchasing energy. And when you make an energy
4 purchase there are two important components to
5 that purchase. One is price and volume. For it
6 to disclose -- and many of these purchases may be
7 for a short term or it may be for a long term.
8 But the last thing Constellation wants to do is to
9 provide to all of the wholesalers, the suppliers
10 from whom they're purchasing, a detailed breakdown
11 on what their long-term business plan is and
12 energy purchase needs are.

13 This would be extremely damaging in
14 their ability to negotiate a fair sale, especially
15 where the supply side information is all kept
16 confidential.

17 So here you have the seller, whose
18 information is confidential. You have the buyer
19 with all of their information, under the Executive
20 Director's recommendation, laid out on the table.

21 And Mona Tierney, who is with
22 Constellation, is here today and can speak in more
23 detail to these concerns if you'd like to hear us
24 discuss them.

25 COMMISSIONER GEESMAN: Well, but I want

1 to come back to a couple of things you said. I
2 didn't understand how the confidentiality of the
3 supply side information exacerbated your
4 sensitivity to disclosure of the demand side.

5 MR. WHEATLAND: Well, it's basically an
6 unlevel playing field if the supplier knows
7 exactly what the energy needs are of the buyer,
8 but the buyer doesn't have information with
9 respect to the supplies. Then the parties are in
10 obviously an unequal bargaining position.

11 COMMISSIONER GEESMAN: So would that
12 then motivate Constellation to want to disclose
13 its supply side?

14 MR. WHEATLAND: No, I think what we
15 would like to do is, in the interests of not
16 having disclosure in this area, because it's too
17 difficult to balance these issues.

18 One of the other points that I wanted to
19 make which is related to this issue is that as an
20 Administrative Law Judge for many years at the PUC
21 I fashioned protective orders. And it was one of
22 the issues that I anguished over the most.

23 Because on the one hand there certainly
24 is an interest in the public understanding these
25 numbers. But there's also a real significant harm

1 that can result if the disclosure is unnecessarily
2 burdened and tramples on a trade secret.

3 In this case you have to keep in mind
4 that the ESPs are not saying that the Energy
5 Commission cannot use this information in its
6 analysis. That isn't the issue.

7 Also the issue is not aggregation,
8 because the ESPs are comfortable with having this
9 information aggregated on a statewide basis. And
10 incidentally, that aggregation on a statewide
11 basis would still be much less than any of the
12 other columns that you probably have on the table.

13 So the issue is not aggregation. The
14 issue is not disclosure. But the issue is
15 breaking the information down so specifically, not
16 only breaking it down by year, but by utility
17 service area, then by customer class, such to a
18 level that competitors might actually be able to
19 ascertain the customers that are on the system for
20 the ESP at any given year, and the customers that
21 may be leaving the next year. This is our
22 concern.

23 COMMISSIONER GEESMAN: Well, as one of
24 the most distinguished alumni of our legal office,
25 I know that you recognize you're not at the Public

1 Utilities Commission now, and I am less concerned
2 with what your client would like or what it would
3 prefer, than trying to relate back to the
4 requirements of the Public Records Act and our
5 statute.

6 And I wonder if you would walk us
7 through why you consider any of the information
8 that you've just described as a trade secret that
9 confers a competitive advantage over competitors
10 to your client, such that disclosure of that trade
11 secret would deprive you of a competitive
12 advantage.

13 MR. WHEATLAND: Right, I'd be happy to
14 do that. We also have here witnesses that can do
15 it in much greater detail, and that's --

16 COMMISSIONER GEESMAN: Okay, well --

17 MR. WHEATLAND: -- why we wanted to
18 bring the people that do it on a hands-on basis.
19 But let me just walk you through from a larger
20 perspective.

21 As an ESP we have a number of customers
22 with contracts of differing terms. And while one
23 of the most important things is when that contract
24 term ends that we're able to sign that customer up
25 again. That information is not available to

1 anyone other than the ESP and the customer.

2 But if someone can look at a spreadsheet
3 for a given year and see the shifts in loads, they
4 can ascertain from that information which
5 customers are going on and off the system.

6 And we're concerned that that type of
7 information that's for these very small ESPs,
8 broken down by service area and customer class,
9 may actually reveal our contracts and our
10 customers, and provide a competitive advantage to
11 others to go out and to market to those customers.

12 COMMISSIONER GEESMAN: Now, does
13 Constellation fit that definition in any utility
14 service territory in California?

15 MR. WHEATLAND: We believe it does, yes.

16 COMMISSIONER GEESMAN: So that you feel
17 disclosure of this information would allow a
18 competitor to identify one of your client's
19 customers?

20 MR. WHEATLAND: That's correct.

21 ACTING CHAIRPERSON PFANNENSTIEL: Mr.
22 Jaske, why don't you -- you have a single question
23 now, but generally we'll get into --

24 DR. JASKE: Merely a point of
25 clarification.

1 ACTING CHAIRPERSON PFANNENSTIEL: Okay,
2 thank you.

3 DR. JASKE: -- help you to better
4 understand the sensitivity they're bringing
5 forward between forecasts and history.

6 There are five ESPs that have submitted
7 demand forecasts pursuant to the forms and
8 instructions. Among those five there are two
9 different styles of forecast, I'll use sort of
10 loosely.

11 One is sort of forecasters are well
12 familiar with is a prediction of the number of
13 customers in a future year and the sort of loads
14 and energy associated with that prediction of
15 customers. So it's a sort of permanently viable
16 going-forward business sort of view of the future.
17 There's at least one of those among these five.

18 As well, there's a different style among
19 these five, which is to, in effect, not make a
20 forecast at all, but they have reported to us the
21 load they continue to have under contract in a
22 future year.

23 And as businesses that have contracts of
24 various durations, in effect that becomes a stair-
25 step down, so that by 2008 or '09 there are no

1 more customers. And so the forecast is zero.

2 So, in that style of so-called forecast,
3 which sort of says they're going out of business,
4 if you sort of literally interpret what they're
5 telling us, the increments of load that are
6 decreasing from one year to the next are precisely
7 the amount of either load that they're not going
8 to sign up, or load that they have to go out and
9 get supply contracts for.

10 And so it's actually the very peculiar
11 nature of that kind of forecast, the second kind,
12 that makes them, I think, more sensitive to the
13 issue of the release of it. And why, in response
14 to Commissioner Rosenfeld's question and
15 Commissioner Geesman's question, why would they be
16 more concerned about the forecast than actual
17 history. It's because the particular forecast
18 style that they have used exposes the set of
19 loads, the amount of loads that they have under
20 contract and the term of those loads.

21 So, it is, in effect, more commercially
22 sensitive because it was prepared in that style,
23 than if it was a sort of going-forward estimate
24 that we're more accustomed to from a utility.

25 COMMISSIONER GEESMAN: You suggested

1 four of the five submitted that style forecast?

2 DR. JASKE: Both styles are represented
3 within those five.

4 COMMISSIONER ROSENFELD: Mike, do I
5 understand you that one of the styles, the
6 decreasing ones, if there's no contract for say
7 2009, that it won't appear on the forecast?

8 DR. JASKE: That's correct, there's at
9 least one or more of these five ESPs that has zero
10 loads let's say starting 2009 or 2008, and from
11 that point forward.

12 COMMISSIONER ROSENFELD: Now, that's a
13 very good clarification. Thank you.

14 MR. KLATT: Yeah, Mr. Jaske actually did
15 a much better job of explaining that than I ever
16 could even hope to do.

17 But it takes us to one of the points I
18 was trying to make is that if you're going to have
19 information disclosed, or aggregated information
20 on a service territory level, at a minimum you'd
21 want to break it down into just two blocks,
22 residential and nonresidential. If you get to any
23 more level of detail it's likely that you're going
24 to have the type of complications that especially
25 Constellation is concerned about.

1 And it would just make it more complex
2 with not necessarily having any additional value.

3 COMMISSIONER GEESMAN: So, identity of
4 customer you would consider a trade secret?

5 MR. WHEATLAND: Yes.

6 COMMISSIONER GEESMAN: And I believe
7 that one of you suggested forecast methodology
8 would also be a trade secret?

9 MR. KLATT: Yes, actually Strategic
10 submitted in forms 4 and 6, in form 4 a fairly
11 detailed description of their forecast
12 methodology, including formula and assumptions.
13 And that information is extremely sensitive for
14 Strategic, as is the information about their
15 uncertainty analysis.

16 And the distinction I was going to make
17 between the two is that, you know, we think the
18 uncertainty analysis could very well have the same
19 sensitivity five years from now, ten years from
20 now as it has today because of the static market.
21 That may change possibly.

22 But with respect to the forecast
23 methodology, that is less likely to evolve over
24 time. Or if it does evolve it will be very small
25 incremental changes. It doesn't have a shelf

1 life; it has a half life of, you know, 50, 100
2 years. That's an exaggeration, but it's an
3 ongoing use. And it seems to fall squarely within
4 the definition of trade secrets, as that term is
5 defined in the statements and in the cases.

6 ACTING CHAIRPERSON PFANNENSTIEL: My
7 question about that, though, is why, if that's
8 true for Strategic, that's a trade secret for
9 Strategic, it is not true for the other ESPs?

10 MR. KLATT: They haven't yet submitted
11 that information. Strategic was actually --

12 ACTING CHAIRPERSON PFANNENSTIEL: I see.

13 MR. KLATT: I mean I don't want to
14 suggest that the other ESPs didn't fully comply,
15 because they're going to give you basically the
16 same information in their April 1st filings. But
17 Strategic did it a little bit early.

18 ACTING CHAIRPERSON PFANNENSTIEL: It's
19 just what's already been filed as opposed to what
20 there has not.

21 MR. KLATT: They've already filed it,
22 right. And so they're kind of having this
23 discussion a bit before the rest.

24 And also another point I wanted to make
25 is that, you know, it's true that there's going to

1 be some similarities between the forecast
2 methodologies that the ESPs and the utilities use.
3 There's going to be similarities in the
4 uncertainty analysis.

5 The fact that there are similarities
6 does not, in and of itself, make it not a trade
7 secret. And that's very clear in the statements
8 and in the cases.

9 Just because this isn't something that's
10 unique to that company doesn't mean that just
11 because it's not unique to the company it's not a
12 trade secret. They have kind of a pool of
13 knowledge that they're using, and if someone else
14 knows exactly what they're doing in terms of
15 forecast methodology or uncertainty analysis, that
16 gives them an insight into their competitor's
17 business. That causes the reporting company to
18 lose a competitive advantage.

19 And it would be particularly unfair for
20 Strategic since to date they're the only ones who
21 have submitted this information. Actually, I
22 can't speak for the utilities, because I'm not
23 sure, but with respect to ESPs that's the case.

24 ACTING CHAIRPERSON PFANNENSTIEL: Is
25 there a sense that we should have the technical

1 people from the ESPs available for questioning
2 now, or should we perhaps hear the utilities and
3 then, since the issues of confidentiality are
4 similar -- Ms. Holmes, in your suggestion how were
5 you thinking about doing this process?

6 MS. HOLMES: I think it depends on
7 whether or not the Commission decides to move into
8 a closed session or not. I think if there's not
9 going to be a closed session at this point, you
10 can move on and address the utility concerns.
11 Although I don't believe there was much of a
12 discussion of form 1.3 from the ESPs yet.

13 MR. WHEATLAND: All right.

14 ACTING CHAIRPERSON PFANNENSTIEL: Mr.
15 Wheatland.

16 MR. WHEATLAND: If I might just add, we
17 can present this information to you at one level
18 without going into closed session. So if you'd
19 like to hear from our technical experts, we can
20 present it at one level without a closed session.

21 I think it depends on whether you're
22 convinced that there are some important trade
23 secret aspects to the information. If you're not,
24 then we'd like you to hear from them.

25 ACTING CHAIRPERSON PFANNENSTIEL: Yes,

1 that's fine. We then will, I guess, hear from
2 your experts without going into closed session.

3 MR. WHEATLAND: Okay.

4 MR. KLATT: Just the thought was if it
5 gets to the point where the level of questioning
6 is detailed enough, then we may want to consider
7 breaking there and going into closed session.

8 ACTING CHAIRPERSON PFANNENSTIEL: I
9 understand.

10 MS. TIERNEY: Good afternoon,
11 Commissioners. My name is Mona Tierney; I'm with
12 Constellation NewEnergy. And I just, first of
13 all, want to support the comments that were made
14 by both counsel.

15 The concern about the sensitivity that
16 was asked relative to being able to deduct
17 specific customer loads and number of customers,
18 we believe is a commercially sensitive piece of
19 information that could be deduced from the
20 forecast information.

21 COMMISSIONER GEESMAN: Well, now, let me
22 interrupt you, Mona, because I thought we were
23 talking about identity of customers, not number of
24 customers. Is number of customers a trade secret,
25 as well?

1 MS. TIERNEY: Well, to the extent that I
2 guess I'll take a step up higher than that. The
3 issue about number of customers and then
4 associated load, especially if it's identified by
5 utility service territory, could lead to the
6 identification of specific customers. That's our
7 concern.

8 COMMISSIONER GEESMAN: Is it your belief
9 it's that identification which is the trade
10 secret? Or is it the number of customers, or the
11 aggregated load? Or all?

12 MS. TIERNEY: Well, actually all,
13 Commissioner Geesman. And the reason is by ESP
14 our respective positions in the marketplace has
15 not been publicly disclosed. So our relative
16 megawatt numbers or our gigawatt hour numbers have
17 not been publicly disclosed. They have all -- I
18 know you already said that this is not the Public
19 Utilities Commission, but any information that's
20 been provided to the Public Utilities Commission
21 to date relative to direct access service
22 requests, which is the vehicle by which we enlist
23 customers into the direct access market, has only
24 been reflected, the load associated with those
25 direct access service requests has only been

1 reflected publicly by the Public Utilities
2 Commission in aggregate across the state on a
3 historic basis only.

4 So, our relative position in that total
5 direct access load has never been identified by
6 energy service provider, nor has our megawatt
7 number been identified.

8 And we consider our position in the
9 marketplace to be a sensitive piece of
10 information. From one aspect, just having that
11 revealed to our competitors, but also because we
12 are a purchaser in the marketplace, having what
13 our load requirements are by year within a utility
14 service territory, we believe, is commercially
15 sensitive information in our abilities to go out
16 and secure energy supplies or for the upcoming
17 resource adequacy requirements.

18 COMMISSIONER GEESMAN: I wasn't clear.
19 Did you say that the PUC had published that
20 information on a statewide basis?

21 MS. TIERNEY: They publish on a monthly
22 direct access service request form, which reflects
23 the number of direct access service requests that
24 have been submitted and processed by utility
25 service territory. But then they report

1 separately the historic, the previous month's
2 direct access load activity in aggregate across
3 the state.

4 COMMISSIONER GEESMAN: And when they
5 make that aggregation do they identify how much of
6 that load is served by Constellation?

7 MS. TIERNEY: No, they do not.

8 COMMISSIONER GEESMAN: So there's no
9 place in any public document that associates
10 Constellation with a certain number of megawatts?

11 MS. TIERNEY: That's correct.

12 COMMISSIONER GEESMAN: And that
13 information is of some competitive benefit to you,
14 such that if we told one of your competitors what
15 it was, that competitor could deprive you of that
16 competitive advantage?

17 MS. TIERNEY: I'm not sure that a
18 competitor could deprive me of that competitive
19 advantage, but my position in the marketplace, we
20 feel, is sensitive information --

21 COMMISSIONER GEESMAN: I understand
22 that.

23 MS. TIERNEY: The concern is mainly from
24 a purchase perspective, in sending a signal to the
25 wholesale market about what our relative position

1 in the marketplace is.

2 COMMISSIONER GEESMAN: Yeah, I
3 understand that part. I'm just trying to
4 reconcile your concern with the statute that we
5 have to apply. And the statute speaks to a trade
6 secret giving its user an opportunity to obtain a
7 business advantage over competitors who do not
8 know it or use it.

9 MS. TIERNEY: Well, Commissioner
10 Geesman, because this information is not currently
11 public, I don't know how my competitors might use
12 my overall megawatt level or my gigawatt hour
13 level.

14 If my level appears to be lower than
15 another ESP's level in the state, can they use
16 that as a marketing tool against customers that
17 I'm currently serving? That's a potential use of
18 that information.

19 If that relative position in the
20 marketplace somehow confers a preference to the
21 ESP that has a larger market share, I think that
22 can be used as a marketing tool against me.

23 ACTING EXECUTIVE DIRECTOR MATTHEWS:
24 Commissioner Geesman, just to clarify. The
25 historic information is by number of customers,

1 revenue sales and average price. So we have the
2 details on the number of customers.

3 MR. KLATT: Let me clarify. It's price
4 charged to the customer, not the ESP's cost.

5 ACTING EXECUTIVE DIRECTOR MATTHEWS:

6 Yes.

7 MS. TIERNEY: Is that the Energy
8 Information Agency --

9 COMMISSIONER ROSENFELD: Scott, did you
10 say number of customers and price, but not sales
11 in kilowatt hours?

12 ACTING EXECUTIVE DIRECTOR MATTHEWS:

13 There's sales and megawatt hours.

14 COMMISSIONER ROSENFELD: Thank you.

15 MS. TIERNEY: That information is the
16 historical EIA information --

17 ACTING EXECUTIVE DIRECTOR MATTHEWS: By
18 state.

19 MS. TIERNEY: By state.

20 ACTING EXECUTIVE DIRECTOR MATTHEWS: For
21 all the service providers.

22 COMMISSIONER GEESMAN: With a one-year
23 lag.

24 DR. JASKE: It's actually a two-year
25 lag, 2003 data came out in early 2005. And I

1 think that's the pattern that EIA has fallen into.
2 It's been somewhat erratic over the years.

3 COMMISSIONER GEESMAN: And was it
4 Constellation that had the claim on forecast
5 methodology, or was that simply Strategic?

6 MR. WHEATLAND: That was Strategic.

7 COMMISSIONER GEESMAN: Okay. Are there
8 any other trade secrets at risk here?

9 MS. TIERNEY: Well, again, going back to
10 the -- I think the point has already been made,
11 but relative to the forecast information, the
12 ability to deduce the customer relationship, the
13 load and the customer, and being able to determine
14 certain customers if it's broken down by utility-
15 specific service territory.

16 The other concern is that it sends -- it
17 can also send a signal about our average contract
18 terms, for example, to our competitors, as well as
19 to the IOUs.

20 COMMISSIONER GEESMAN: How's that?

21 MS. TIERNEY: Based on the forecast
22 information.

23 COMMISSIONER GEESMAN: The forecast --

24 MR. WHEATLAND: Mona, explain how the
25 IOUs can use that information, what information

1 they already have regarding Constellation, and how
2 that additional information would help.

3 MS. TIERNEY: In signing up customers
4 for direct access through this direct access
5 service request, the DASR, the utilities receive
6 those requests. So they know the customer,
7 basically; and they have an idea of the load. But
8 they don't have an idea about the contract term
9 under how long that customer has signed a contract
10 with an energy service provider.

11 So, again, the more granular this
12 information is relative to customer type and
13 utility service territory, also provides the
14 utility with information about contract term.

15 COMMISSIONER GEESMAN: I don't
16 understand how it provides that information.

17 MS. TIERNEY: If the forecast is based
18 on the type of forecast methodology that Mike
19 Jaske indicated earlier, which reflects the load
20 based on what's currently under contract.

21 If you have a diminishing amount of load
22 and number of customers over time, because your
23 contracts are of a specific duration, then if you
24 look at an ESP's load data and determine when
25 those, you know, you can look at the decline in

1 load and number of customers over that forecast
2 period. And, you know, at some point in time
3 there's not many customers and there's not much
4 load out there. That's the concern that we have,
5 that this would indicate a duration of contract
6 for energy service providers.

7 COMMISSIONER GEESMAN: Would it indicate
8 anything else about the contract?

9 MS. TIERNEY: Not any price --

10 COMMISSIONER GEESMAN: Not other terms
11 and conditions?

12 MS. TIERNEY: Not any price information.

13 COMMISSIONER GEESMAN: Okay. But, going
14 back to the identity of the customer, the utility
15 already knows that customer's identity; he simply
16 doesn't know the terms and conditions that you are
17 providing the customer.

18 MS. TIERNEY: That's right.

19 COMMISSIONER GEESMAN: If the utility
20 has a motive to compete for that customer's
21 business, can't the utility simply call the
22 customer and say, you know, I'm going to make you
23 an offer that's better than the deal you've got
24 from Constellation?

25 Is there really any trade secret or

1 competitive advantage being conveyed to the
2 utility if the utility knows who your customer is?

3 MS. TIERNEY: The point is well taken
4 that the utility already knows the customer's
5 identity. And if the utility wanted to market to
6 that customer, that opportunity exists outside of
7 this reporting requirement.

8 What we feel is sensitive is that this
9 reveals Constellation's contract term information
10 with its current customer base. That's what we're
11 concerned about. That is what we consider a trade
12 secret.

13 MR. WHEATLAND: And, Commissioner
14 Geesman, if I could just add, where a customer is
15 under contract with Constellation for a term of
16 years, it isn't going to do the utility much good
17 to go in the first year of that contract and try
18 to market their services, because they're barred
19 from doing so by the existing contract.

20 What the utility would like to do, or
21 the other competitor, would be to like to go to
22 that customer at the expiration of the contract
23 term. And that's the very sensitive information
24 that could be revealed by a type of forecast based
25 on actual contracts.

1 COMMISSIONER GEESMAN: I don't have any
2 other questions, Madam Chair.

3 ACTING CHAIRPERSON PFANNENSTIEL: Any
4 other Commissioners have further questions? Thank
5 you, Ms. Tierney.

6 MS. TIERNEY: Thank you.

7 ACTING CHAIRPERSON PFANNENSTIEL: Why
8 don't we hear from the IOUs, then.

9 MR. WHEATLAND: Could you --

10 ACTING CHAIRPERSON PFANNENSTIEL: Oh,
11 I'm sorry, I did not --

12 MR. WHEATLAND: -- one more witness.

13 MR. KLATT: I didn't know if Ms.
14 Chamberlin wanted to say a few words. And also
15 you may want to have, if you had any questions --

16 ACTING CHAIRPERSON PFANNENSTIEL: At the
17 mike, please.

18 MR. KLATT: Ms. Chamberlin did want to
19 say a few words. And also if you had any more
20 questions about the forecast methodology or
21 uncertainty analysis, she's the person it should
22 be directed towards.

23 ACTING CHAIRPERSON PFANNENSTIEL: Thank
24 you. Ms. Chamberlin.

25 MS. CHAMBERLIN: Thank you,

1 Commissioners. Thank you for the opportunity to
2 talk with you today. I want to agree with the
3 things said by counsel and Ms. Tierney about the
4 confidentiality terms and provisions leading to
5 the various forms 1 and form 2.

6 Additionally, Strategic is in a unique
7 position among the ESPs, at least those filing
8 appeals today, or that are being heard today, in
9 that we have filed our demand forecast
10 methodology, which is a document that discusses
11 the methodology by which we determine the amount
12 of power that we need to procure for our
13 customers, procure and schedule for them.

14 And the way that we get from the
15 historical usage information that's out there in
16 the marketplace from the utilities to the
17 forecasted use in the future, both that we procure
18 and schedule on.

19 We believe that this document contains
20 certain formulas and compilations of information,
21 including explanations for some of our process
22 inputs that go to the heart of how we, as a
23 competitive supplier, make our procurement
24 decisions, which is a huge part of our product for
25 our customers.

1 We're at a disadvantage if others can
2 gain insight into this process. Among other
3 potential harms, competitors could use this to
4 market against us if they understand how we do
5 this and how good we are at it, that that puts us
6 at a competitive disadvantage.

7 Strategic also filed form 6 and sought
8 confidential treatment for this, as well, with our
9 uncertainty analysis. It was very similar to the
10 information that's being provided by a lot of ESPs
11 and others in response to the April 1st data
12 request.

13 The uncertainty analysis is a
14 quantitative view of our view of the marketplace
15 we operate under and the risks and uncertainties
16 we see affecting our business now and in the
17 future. A significant part of our business is
18 energy experts, and that's part of what we market
19 ourselves as to our customers, is as energy
20 experts. It's being able to help our customers
21 understand the market and make wise procurement
22 decisions.

23 Allowing our competitors to gain access
24 to our views takes away our current advantage in
25 this area, one that helps us gain and retain

1 customers.

2 And I think there's a commercial
3 sensitivity there that I'm not sure was thought
4 about when this was being evaluated originally.

5 MR. KLATT: Price being one of the
6 things that customers look at, but not necessarily
7 the only thing they look at when they choose the
8 SPE. And, in fact, Strategic is kind of the
9 Cadillac of the ESPs in terms of the quality of
10 information that they provide the customers about
11 the market.

12 That is their competitive advantage.

13 COMMISSIONER GEESMAN: So I am trying to
14 get a better understanding of the uniqueness or
15 special status of this Cadillac engine that
16 provides your forecast methodology --

17 MS. CHAMBERLIN: The forecast
18 methodology isn't necessarily the Cadillac
19 methodology. The forecast of demand is something
20 that I think is unique and sensitive to each
21 supplier.

22 We have to take historical usage
23 information and figure out how to turn what
24 happened in the past into what our customers will
25 do in the future. And how best we can predict

1 that based on a number of inputs and intelligence
2 that we glean from talking to our customers.

3 And experience in the marketplace allows
4 us to take historical usage and forecast, both on
5 a longer term basis for longer term procurement
6 planning, you know, the supplies we buy for our
7 customers; as well as on, you know, a day-ahead or
8 couple day-ahead, the information we give to the
9 ISO.

10 So our ability to do that carefully and
11 to make wise decisions, essentially predicting
12 what's going to happen based on what's happened in
13 the past, is -- every entity does that, but the
14 inputs and the things they consider and the
15 methods by which they do that can evaluate how
16 well they make those predictions and how much the
17 power they procure for their customers will cost.
18 Which goes into kind of the price buildup.

19 COMMISSIONER GEESMAN: And if you knew
20 the way in which Constellation does that --

21 MS. CHAMBERLIN: I could --

22 COMMISSIONER GEESMAN: -- you could
23 derive a competitive advantage over them because
24 of that?

25 MS. CHAMBERLIN: I think so, because I

1 could take the way that I do it, and we think that
2 we're good at it. We know that there are others
3 in the marketplace that are good at it, as well.

4 But if I had somebody else's information
5 or they had mine, I could look at it, I could
6 compare it to mine. Say, wow, I didn't think of
7 that. Or, you know what, they're doing this
8 better than I am. And these are processes that
9 remain, I think, relatively static over time with
10 tweaks and small improvements.

11 But if I could see what others were
12 doing, I could say, wow, I could use that on top
13 of mine and make mine better. And then I'd have
14 all of my information plus the things that they
15 have done.

16 COMMISSIONER GEESMAN: And if I could
17 ask the staff, you presumably did not find there
18 to be a reasonable case having been made that this
19 forecast methodology constituted a trade secret,
20 is that right?

21 DR. JASKE: I am actually not able to
22 reconcile what little I know about the methodology
23 with the points that Ms. Chamberlin is making.
24 And so either I have looked at the wrong document
25 or have somehow not seen the full material that

1 she is describing for you.

2 MR. KLATT: Ms. Chamberlin was not
3 speaking to the forecast methodology. She was
4 speaking to the uncertainty analysis. Right?

5 COMMISSIONER GEESMAN: No, my questions
6 were on the --

7 MS. CHAMBERLIN: We were on the
8 forecast.

9 COMMISSIONER GEESMAN: -- forecast
10 methodology, but if we want to --

11 MS. CHAMBERLIN: Our forecast discussed,
12 you know, the different inputs and things we take
13 into consideration. And I don't know if other
14 ESPs and other market participants take the same
15 things into consideration in doing their forecast
16 that I do.

17 And, you know, --

18 ACTING CHAIRPERSON PFANNENSTIEL: But I
19 would like to get back to Mr. Jaske's answer. I
20 mean I'm just confused here. You did not see a
21 methodological -- you didn't see anything in the
22 methodology that you thought gave a strategic
23 advantage or a strategic difference?

24 DR. JASKE: The documents that I recall
25 seeing from the ESPs in the category of forecasts

1 and uncertainty are so minimal as to not, you
2 know, reveal anything. And some of them I don't
3 think submitted anything at all. I thought I
4 heard that confirmed earlier today, they weren't
5 going to submit them until April 1st.

6 So I'm frankly not able to speak to
7 what -- either to confirm or refute anything Ms.
8 Chamberlin is saying.

9 ACTING CHAIRPERSON PFANNENSTIEL: Ms.
10 Holmes.

11 MS. HOLMES: If it would be helpful to
12 the Commission I can give you a copy of what
13 Strategic did file with the Executive Director.
14 Or we could -- if that would be helpful to you.

15 ACTING CHAIRPERSON PFANNENSTIEL: It
16 would be helpful to me. Thank you.

17 Mr. Wheatland.

18 MR. WHEATLAND: Yeah, we've been talking
19 here about the competitive advantage with respect
20 to competitors, that is ESPs versus ESPs. But I
21 also urge the Commission to consider the trade
22 secret implications of the information and how it
23 can benefit the wholesalers.

24 I know they're not a competitor, but the
25 emphasis on competitor is unduly narrow. The

1 Executive Director in his letter cites the case of
2 Uribe v. Howie, talking about obtaining an
3 advantage over competitors. And while that's a
4 great case, that's an overly narrow reading of the
5 actual civil code section which is much broader.

6 And it is, indeed, the civil code
7 section that will -- the California Civil Code
8 section 3426.1 that defines trade secrets. And
9 that talks about deriving independent economic
10 value from not being generally known to the
11 public, or to other persons who could obtain value
12 from the disclosure or use.

13 So it's not just competitors that we're
14 concerned about, but other persons who could
15 obtain value from the disclosure or use. And we
16 believe having the load information out there in
17 any form, other than aggregated on a statewide
18 basis, could provide value to the persons whom the
19 ESPs must buy power from.

20 COMMISSIONER GEESMAN: Well, the
21 Strategic petition directs us to the Government
22 Code section 6254.7(d) as the pertinent definition
23 of trade secret.

24 MR. KLATT: That's actually just a
25 reference in the Government Code that contains a

1 definition of trade secrets. It's --

2 COMMISSIONER GEESMAN: So you'd like to
3 expand your remarks to include Mr. Wheatland's
4 definition, as well?

5 MR. KLATT: There are several places in
6 the California Code -- yeah, the short answer is
7 sure.

8 COMMISSIONER GEESMAN: Thanks.

9 (Laughter.)

10 COMMISSIONER GEESMAN: So would you like
11 to elaborate on that, Gregg, as to how disclosure
12 of this information would provide a competitive
13 advantage to the people from whom your clients
14 procure electricity?

15 MR. WHEATLAND: Yes. Well, in a
16 nutshell, when an ESP goes out and purchases
17 energy in the market, the factors that are going
18 to influence that purchase are both volume and
19 price. And there's a relationship between those
20 two.

21 Oftentimes when negotiations are
22 commenced the ESP is not disclosing to the
23 purchaser the precise volume of energy that they
24 may purchase, or the term of it, which they would
25 like to purchase the information.

1 If the supplier has in hand the forecast
2 of the load of the ESP broken down by service area
3 for the year 2005, -- and may we just state very
4 soon where there may be an obligation for the ESP
5 to purchase 90 percent of that number -- if the
6 supplier knows, going into the negotiations, how
7 much energy exactly the ESP must purchase, they
8 lose quite a bit of advantage in the bargaining
9 over the ultimate price and volume that they'll
10 obtain.

11 MR. KLATT: And, again, I want to
12 reiterate that --

13 COMMISSIONER GEESMAN: That same
14 principle, though, would apply in any market? Or
15 is that restricted to the electricity market that
16 ESPs confront?

17 MR. WHEATLAND: I can only speak today
18 with respect to the ESP market. Because you keep
19 in mind that ESPs are competing within a
20 competitive market. They're trying to obtain the
21 lowest possible price for their customers. And
22 it's that lower price that will help them to get
23 future customers.

24 So, in this respect they're unlike an
25 IOU. They are operating in a very competitive

1 market.

2 COMMISSIONER GEESMAN: Of course, we
3 were told earlier that ESPs secure their customer
4 relationships with a lot more than simply price.

5 MR. WHEATLAND: Yes. But price is
6 certainly an important component.

7 MS. CHAMBERLIN: I think it depends on
8 the ESP and the customer, what they're looking
9 for. Whether it's a strictly -- I believe that
10 there are customers in the marketplace that are
11 strictly price shoppers. And those that want
12 additional information or services. And it
13 depends on the sophistication of the customer and
14 their own interests.

15 MR. KLATT: I just want to reiterate the
16 point that the standard isn't necessarily that we
17 have to prove that the information, if disclosed,
18 would confer an advantage on a competitor or some
19 other market participant. The standard is whether
20 or not the information has commercial value to us.

21 And the value is in part derived from
22 the fact that it's not public.

23 Once that showing's been made, that's
24 the end of the inquiry. It's a trade secret.

25 COMMISSIONER GEESMAN: Yeah, but you

1 have to make a reasonable argument. And just
2 because I happen to use yellow legal pads in my
3 business and that's important to me because I like
4 the color yellow, it's not as if I will be
5 conferring a competitive advantage to my colleague
6 if he discovers that I don't use white legal pads.

7 There's got to be some rule of reason
8 here. And I think that's the test that we need to
9 apply.

10 MR. KLATT: Point well taken, and I
11 think in terms of just when you're looking at load
12 and supply information, just think in terms of any
13 business. That isn't necessarily a public company
14 where they have a lot of information out there in
15 their reports and stuff.

16 You know, how much they're buying, how
17 much they're selling, all that stuff is
18 commercially sensitive to that company. If
19 competitors know it, they're going to have a
20 better insight into how to compete with that
21 company for customers or business.

22 And, in fact, we have done quite a bit
23 of research into the case law. I'm sure staff
24 has, too. And the fact of the matter is most of
25 these cases that deal with trade secrets are

1 dealing with really weird types of information.

2 You don't find cases out there that talk
3 about sales volume. Why? Because it's a given.
4 How much you're selling out there is a secret to
5 that company.

6 COMMISSIONER GEESMAN: I have to tell
7 you, I mean I spent 19 years in a very competitive
8 business, and I felt that I had a pretty good
9 sense of what my competitors were charging and
10 what their volumes were. And I think that we're
11 kidding ourselves if we don't think that all of
12 you have a pretty good sense of what each other is
13 doing, and who your customers are, and what the
14 general outlines of the terms and conditions of
15 the contracts you offer.

16 MR. KLATT: But some are better than
17 others at making those guesses.

18 COMMISSIONER GEESMAN: And the ones that
19 are weaker generally don't last in the business.
20 You folks are all survivors.

21 MR. WHEATLAND: But if I could just add,
22 I think that we all have an idea of the general
23 outlines. The real issue here is the degree of
24 granularity of disclosure.

25 Overall in the state there are only

1 about 9000 direct access customers in the
2 commercial sector today out of 1 million
3 commercial direct access customers. Do we really
4 need to disaggregate the information any more than
5 that, to break it down to individual ESPs and
6 individual service areas?

7 Or can we live in terms of fair public
8 disclosure with a degree of aggregation of less
9 than -- which totals just 1 percent of the total
10 customers?

11 COMMISSIONER GEESMAN: You know, last
12 year when we decided to break the state into north
13 and south, all of a sudden a fairly tranquil
14 situation on the statewide basis turned into a
15 supply challenge in the southern part of the
16 state. So we have found value in some
17 disaggregation in the past.

18 The ISO has asked us to disaggregate or
19 demand forecast down to a much more granular level
20 in order to facilitate their use of our data for
21 transmission planning.

22 I don't know how much of a
23 disaggregation we'll actually be able to achieve
24 in this cycle. But there are needs for us to be
25 able to disaggregate the data.

1 It has to be consistent with the
2 legitimate business interests your clients have in
3 trade secrets, but we're trying to determine which
4 arguments are reasonable and which ones aren't.

5 MS. CHAMBERLIN: To add to that point,
6 we recognize that you have a need for this data
7 and the ability to look at it in a disaggregated
8 form in order to make the analyses you're needing
9 to do.

10 And there hasn't been a question about
11 whether or not we would provide that data to you.
12 And we've done so, at least from my company's
13 perspective, to the best of our ability. And are
14 glad to do so.

15 The question really becomes to what
16 extent does completely disaggregated data need to
17 be made public. And I think that --

18 COMMISSIONER GEESMAN: I think that's a
19 good point.

20 MS. CHAMBERLIN: -- there's a large
21 difference from our perspective.

22 COMMISSIONER GEESMAN: I think that's a
23 very good point.

24 ACTING CHAIRPERSON PFANNENSTIEL:
25 Further questions for the ESPs?

1 Thank you.

2 MS. CHAMBERLIN: Thank you.

3 MR. KLATT: Thank you.

4 ACTING CHAIRPERSON PFANNENSTIEL: Ms.
5 Holmes.

6 MS. HOLMES: Yes, Madam Chair.

7 ACTING CHAIRPERSON PFANNENSTIEL:

8 Procedurally, do we think that the discussion with
9 the IOUs will bring some more information back to
10 the questions that we're facing with the ESPs, and
11 therefore we should wait and deal with them all at
12 once? Or was your initial suggestion that we deal
13 with each of the groups separately?

14 MS. HOLMES: I believe that you have
15 completed all the issues that were raised by the
16 ESPs. So I suggest that at this point you move to
17 the IOUs, as a group. My understanding is that
18 they do plan to have a common discussion of the
19 common issues, so hopefully it will go --

20 ACTING CHAIRPERSON PFANNENSTIEL: I
21 understand. I was trying to determine, I think,
22 really whether we should act, decide on the
23 questions in front of us with the ESPs right now,
24 or wait until we have heard from the IOUs, being
25 that that might inform our other discussion, also.

1 MS. HOLMES: Two points. First of all,
2 I'd like to provide you with the opportunity to
3 ask staff questions about what their technical
4 understanding is of what the ESP presentation was,
5 so that you have the benefit of, if you will, an
6 independent perspective as to the reasonableness
7 of the statements of the ESPs.

8 And in addition, I do agree that there
9 may be additional information that may come out
10 from the IOU presentation.

11 But it's up to you as to whether you'd
12 like to hear the staff presentation, or ask staff
13 questions first. Or whether you'd like to move
14 directly to the IOUs, and then ask questions of
15 staff when you've completed with that. It doesn't
16 matter.

17 ACTING CHAIRPERSON PFANNENSTIEL:
18 Commissioner Geesman.

19 COMMISSIONER GEESMAN: I do have one
20 question for Dr. Jaske. In looking at the
21 Strategic filing it appears to be form 4 that they
22 are concerned with as it relates to their forecast
23 methodology and uncertainty methodology.

24 Have you got their form 4 filing in
25 front of you?

1 DR. JASKE: I believe I was handed it a
2 couple minutes ago.

3 COMMISSIONER GEESMAN: And without
4 disclosing any reportedly proprietary information,
5 it does not appear to be too many pages in your
6 hand.

7 DR. JASKE: No, sir. There are only two
8 pages.

9 COMMISSIONER GEESMAN: Can you tell me
10 if you see anything on there that could reasonably
11 be characterized as proprietary or a trade secret?

12 DR. JASKE: I don't consider anything
13 here a trade secret.

14 COMMISSIONER GEESMAN: I don't think I
15 have any other questions.

16 ACTING CHAIRPERSON PFANNENSTIEL: No
17 other questions for the staff on this?

18 All right, well, let's turn to the IOUs.
19 Let's hear, is there a single representative, or
20 do we have several?

21 COMMISSIONER ROSENFELD: Several.

22 MS. GENAO: My name is Laura Genao and
23 I'm representing Southern California Edison today,
24 and I'll be the representative for PG&E and SDG&E
25 with regard to the opening remarks.

1 They may want to add to these opening
2 remarks once I'm done. And we also have several
3 experts of our own on all three sides to answer
4 any questions you may have following this
5 presentation.

6 First, we'd like to thank the Commission
7 and the staff for the March 30th decision on the
8 supply side forms. We believe that that's an
9 appropriate balancing of the issues before the
10 Commission. And the IOUs currently have no plans
11 to appeal that decision, although SCE may ask the
12 Commission to reconsider the three-year
13 confidentiality limit they put on that, at a later
14 date, if market conditions seem to indicate that
15 the information is fairly static and won't change
16 very much.

17 But moving on to the scope of this
18 appeal, I have the advantage of having had the
19 ESPs go first and they've aired a lot of the
20 issues. And I'd like to echo a lot of what
21 they've said and point out to the Commission that
22 we are LSEs just like they are.

23 And the number of customers and our
24 position in the marketplace with regard to buying
25 generation is exactly the same as theirs. And the

1 information should be protected for us, as it is
2 for them, if it is protected at all.

3 COMMISSIONER GEESMAN: Okay, how about
4 the converse? If it's not protected for them.

5 MS. GENAO: The reasoning should be
6 consistent with whatever the Commission's decision
7 is.

8 COMMISSIONER GEESMAN: Thank you.

9 MS. GENAO: Right now -- I'm not sure
10 what the decision was on theirs, right now we have
11 no protection for our bundled customer peak annual
12 number. I don't know what theirs is. So if
13 they're not consistent right now, they should be
14 made consistent.

15 So I want to also emphasize that the
16 IOUs' appeal is limited to one issue. It is the
17 protection of the annual bundled customer peak at
18 ISO number, both historical and going forward.

19 We're asking for protection on three
20 different forms, but two of those columns are the
21 exact same number which is that number. The other
22 two columns are a number that if you subtract one
23 from the other you get annual bundled customer
24 peak. So I want that to be very clear.

25 This isn't an issue of us wanting to

1 withhold the information from the world. We are
2 committed to working with the CEC, with the PUC,
3 with the ISO, with nonmarket participants to make
4 sure that they have the information needed to make
5 appropriate decisions to set state policy.

6 What we do not want to do is to allow
7 market participants to disadvantage ratepayers by
8 being able to gain some kind of advantage from
9 knowing what our needs for bundled customer are on
10 an annual basis. It is a peak number, so clearly
11 it is what we are procuring to.

12 You used an example of notebooks before.
13 If the person selling you knows that you will only
14 use 20 in a year, they will charge you a lot for
15 those 20.

16 COMMISSIONER GEESMAN: Because I have
17 the inability to go to somebody else and buy 20
18 notebooks?

19 MS. GENAO: Say you do, and then he
20 knows you only have one left. The last one's
21 going to cost you a lot. So he knows the pool is
22 only 20.

23 COMMISSIONER GEESMAN: I don't know
24 where you buy notebooks from, but you know,
25 competitive markets work in --

1 MS. GENAO: We'll get to that later.
2 We've submitted an expert report that discusses
3 exactly how competitive markets work. And what
4 happens when demand information is given out when
5 supply information is protected. And that's in
6 the record and it's been attached to our appeal
7 and our application.

8 COMMISSIONER GEESMAN: Is this Professor
9 Platt's paper?

10 MS. GENAO: Professor Platt's study.
11 But just getting to that, as you know, annual IOU
12 peak demand is an essential component of the
13 residual net short, which is a very important
14 number.

15 The demand side is as critical to that
16 equation as the supply side is. And as you aware,
17 the supply side of that has been made confidential
18 by the Executive Director's decision of March
19 30th.

20 So we believe that the demand side
21 should be equally protected to have consistency
22 with the idea that that is an important equation.

23 COMMISSIONER GEESMAN: Well, but doesn't
24 the logic arguably work the other way, as well,
25 that since the Executive Director has chosen to

1 afford confidential treatment to the supply side
2 information, the demand side information is
3 consequently --

4 MS. GENAO: No.

5 COMMISSIONER GEESMAN: -- of very little
6 value?

7 MS. GENAO: Trade secret is a matter of
8 law. It is not a matter of fact. So, it doesn't
9 matter what you did with the supply side. If you
10 think that the information is essential to an
11 equation, the demand side should be protected as
12 equally as the supply side is.

13 COMMISSIONER GEESMAN: But is --

14 MS. GENAO: It is not a matter of fact.

15 COMMISSIONER GEESMAN: -- is the demand
16 side essential to an equation?

17 MS. GENAO: Yes.

18 COMMISSIONER GEESMAN: Without knowing
19 the supply side?

20 MS. GENAO: It doesn't matter. If you
21 deemed the equation important, both A and B should
22 be protected.

23 MR. WARNER: Commissioner Geesman, let
24 me try to address that. Chris Warner from PG&E.
25 And I recognize your question. I think your

1 question really is, okay if the supply information
2 is protected, then how could a seller use the peak
3 annual demand information in order to construct
4 the residual net short.

5 And I think the answer is that even
6 though the supply information is protected, there
7 are other sources for putting together that
8 equation. There's nameplate capacity for the
9 various units. There's QF data in a kind of
10 aggregate basis out there in the public domain.

11 So PG&E feels very strongly that even
12 with the good decision we've had in terms of
13 protecting the supply forms, the peak annual
14 information is still, if that is made available to
15 the public, it can be used with the other
16 available public information on the supply side to
17 construct what amounts to a net short number.

18 And therefore we believe it is not
19 sufficient to say that if you protect the supply
20 information you can go ahead and make the annual
21 peak demand number available.

22 COMMISSIONER GEESMAN: Do you carry a
23 credit card?

24 MR. WARNER: Absolutely.

25 COMMISSIONER GEESMAN: You know those

1 last four digits on your credit card number, you
2 know, I want to keep my credit card number
3 confidential, but every restaurant I go to, when
4 the bill comes back, they disclose those last four
5 numbers.

6 Are you suggesting that from that I
7 could derive the preceding 12 digits, as well?

8 MR. WARNER: If you had other public
9 sources where a range of those last, those
10 previous 12 digits would be available, then the
11 answer would be yes. I don't think the analogy
12 really works when you're talking about public
13 domain information.

14 In the case of a credit card, unless
15 you're going to go out there with a supercomputer
16 and generate every possible combination of the
17 first 12 digits --

18 COMMISSIONER GEESMAN: Those exist.
19 Those exist.

20 MR. WARNER: And, again, I think there
21 are people who do have credit cards with just that
22 type of approach. It doesn't make them disclosing
23 the first four digits any less damaging in terms
24 of that overall ability to put together all the
25 digits.

1 COMMISSIONER GEESMAN: But I think that
2 society has determined that it is reasonable to do
3 so, and if there are other benefits attached, then
4 consequently, I don't have a trade secret interest
5 in those four digits.

6 MS. GENAO: But they're not publishing
7 your number on the front page of the Sacramento
8 paper.

9 COMMISSIONER GEESMAN: We don't often
10 get that kind of coverage for our information.

11 (Laughter.)

12 MS. GENAO: Or in a public report, if
13 that's the -- you know, the number of everybody in
14 this room in a 100-page report that you could pick
15 up at your local CEC.

16 COMMISSIONER GEESMAN: Although opinions
17 would differ, I would suggest to you my credit
18 card stubs have just as much accessibility to
19 thieves as your electricity demand data would.
20 The ratios are probably the same.

21 MS. GENAO: I guess one other --

22 ACTING CHAIRPERSON PFANNENSTIEL: Before
23 you continue, I just want to get to -- I'm a
24 little -- let me follow up on something Mr. Warner
25 just said.

1 Your comment was that the demand data,
2 the bundled peak demand data, would be -- I'm
3 sorry, the supply data would be derivable
4 elsewhere? Is that what you were pointing out?

5 MR. WARNER: Yes, or a kind of a
6 construct of it in terms of a range there for the
7 components of it. Even though the supply, the
8 specific supply data that we provided you is
9 protected under the Executive Director's
10 subsequent decision. There is --

11 ACTING CHAIRPERSON PFANNENSTIEL: But
12 it's otherwise derivable?

13 MR. WARNER: It's otherwise derivable in
14 certain forms. If you use, for example, nameplate
15 capacity; if you know that for specific units. If
16 you have some of the aggregate QF data by utility
17 available, then someone who is an overall supplier
18 in our ongoing procurement efforts can basically
19 say, okay, good, now I've got the annual peak
20 demand. That's the key remaining number that I
21 can't really come up with an estimate from public
22 sources.

23 So, here's PG&E's annual peak demand
24 number. I'm going to go back-calculate using
25 publicly available data at what I guesstimate to

1 be QF, hydro, nuclear, nameplate capacity, other
2 things, and that capacity subtracted from the
3 annual peak demand gives us an idea of what the
4 residual net short is.

5 ACTING CHAIRPERSON PFANNENSTIEL: Let me
6 just ask Dr. Jaske, do you find that supply number
7 is otherwise derivable?

8 DR. JASKE: I think the point Mr. Warner
9 is making about an estimate of supply at the time
10 of summer peak from otherwise available sources is
11 probably correct.

12 What I also think is that one can do an
13 approximation of their peak forecast from
14 otherwise available data.

15 And I guess getting to the point that
16 was made by Edison's representative earlier in her
17 remarks is whether -- the question is whether the
18 gap between supply and demand at one point in the
19 summer, you know, that single hour peak demand, is
20 sufficient to actually turn into an hourly
21 residual net short that I would agree is probably
22 a confidential piece of information, and that does
23 indicate the nature of their needs.

24 And moreover, more specific is the kinds
25 of resources that they need. I have not been

1 convinced in all the discussions I've had with the
2 utilities that knowing that supply demand gap for
3 the single peak hour, presumably a weekday
4 afternoon in the summer, allows generators, which
5 is the community they're concerned about, to know
6 what magnitude of resources they're going to
7 acquire, when they're going to acquire them, the
8 kind of resources they're going to acquire.

9 There are many ways in which the IOUs
10 can meet that peak demand with their own hydro
11 resources particularly PG&E and Edison, lesser
12 extent San Diego; with demand response, it's
13 growing and as a matter of state policy they're
14 being pushed.

15 So I don't think there is a really tight
16 connection between that one descriptor of need and
17 the concern of market, and the competitive process
18 gaming that is the core of their argument.

19 MS. GENAO: Do you want to address that,
20 Chris?

21 MR. WARNER: I wanted to respond,
22 because I think Dr. Jaske has put it very very
23 well. This is not a balancing test, at least for
24 PG&E, between private interest and public
25 interest, frankly. This is a balancing test

1 between competing public interests.

2 The public interest on behalf of our
3 customers that PG&E is pursuing right now in the
4 real world is after three years of coming up with
5 a long-term procurement program we are out with
6 requests for procurement, both intermediate term
7 and long term and for renewables.

8 We're out in the marketplace there. And
9 these are really culminating for our three-year
10 effort of coming out of the energy crisis and
11 making sure we never get back into the position we
12 got in in the energy crisis in terms of market
13 manipulation.

14 And there is a judgment call here, a
15 balancing test that you have to apply as between
16 whether making this information on annual peak
17 demand available to the public would harm PG&E's
18 procurement process as we're going forward.

19 Versus I think the overall public interest of
20 making data available generally to the public.

21 It's, of course, available to you for
22 your planning purpose. It's available within the
23 procurement review group at the CPUC. Where we
24 and our major customer groups, TURN, ORA, the
25 three utilities and the CPUC have agreed this type

1 of data is sensitive enough that it should be
2 protected.

3 But it is a balancing test; and I think
4 we would agree with staff that that's a balance
5 you have to strike.

6 We happen to believe if there's a risk,
7 as we see it, that that information would be
8 usable by the suppliers to manipulate or to gain
9 our ongoing procurement proceedings, you should
10 err on the side of protecting our customers from
11 the negative consequences of that. And that's
12 where we would recommend that you side.

13 MS. GENAO: And we also want to -- I
14 don't know if it was in our papers, but we are
15 comfortable with the level of aggregation of north
16 and south, PG&E being in the north, Southern
17 California Edison being in the south. And
18 aggregating at that level if you wish to put out
19 some information about what the peak demand is.

20 We, all three of the IOUs, are comfortable
21 with that level of aggregation.

22 And then also I just wanted to point out
23 one thing. In the March 30th decision on the
24 supply side forms, that decision covers peak
25 demand information. So whatever decision you make

1 has to conform to what you're doing with respect
2 to confidentiality.

3 COMMISSIONER GEESMAN: I'm not --

4 MS. GENAO: Because I think the CEC --

5 COMMISSIONER GEESMAN: I'm not certain I
6 follow you.

7 MS. GENAO: The forms that we -- the
8 supply forms had a certain number of lines that
9 were related to peak demand forecast.

10 COMMISSIONER GEESMAN: Yeah.

11 MS. GENAO: We filed applications for
12 confidentiality to protect that information.

13 COMMISSIONER GEESMAN: Right.

14 MS. GENAO: On March 1st. On March 30th
15 we got a letter that said, yes, it's protected for
16 three years forward.

17 COMMISSIONER GEESMAN: And that's what
18 the Executive Director told you?

19 MS. GENAO: Yes.

20 COMMISSIONER GEESMAN: So, and you had
21 indicated previously you will not be appealing
22 that decision.

23 MS. GENAO: As long as that decision
24 stays that way, yeah.

25 COMMISSIONER GEESMAN: Well, he's made

1 it. I --

2 MS. GENAO: So, yeah, we won't be
3 appealing that decision. But you have an
4 inconsistency right now.

5 COMMISSIONER GEESMAN: So does that moot
6 our ability to rule today? Or does that
7 predetermine what the outcome should be?

8 I'm asking you, counsel.

9 MS. GENAO: If given the option, yes. I
10 think it does moot your ability to rule on the
11 previous ones.

12 COMMISSIONER GEESMAN: The Executive
13 Director's decision on March 30th compels that we
14 grant your appeal?

15 MS. GENAO: There's an inconsistency is
16 all I'm pointing out. You have covered peak
17 demand forecast data that is contained in the
18 supply side forms. You have not covered bundled
19 peak annual data that is contained in the demand
20 forms.

21 DR. JASKE: Let me clarify a distinction
22 between the demand forms and the supply forms
23 that Ms. Genao is mentioning. The demand forms
24 ask for annual energy, annual peak. Utilities did
25 not ask for annual energy protection, unlike the

1 ESPs. That's a distinction I wanted you to become
2 aware of if you aren't already.

3 The annual peak is what is in contest
4 today. The Executive Director's March 1st letters
5 or thereabouts grant confidentiality for the 8760
6 hourly load forecast level. As I mentioned before
7 I believe that is a level of disaggregation that
8 can lead to competitive disadvantage of the IOUs
9 and their customers.

10 What was on the supply forms, however,
11 is monthly peak for each year, 2006 through 2016.
12 So what was protected in the top row of that form
13 is the monthly peaks. So that is the next step,
14 of course, beyond annual peak is the monthly peak.

15 So the inconsistency that Ms. Genao is
16 raising is, you know, you've decided to protect
17 something on the supply side, you should be
18 consistent on the demand side. Well, there's a
19 step beyond on the supply side is that is what is
20 protected. And there actually isn't a designation
21 on the supply forms, themselves, as to which one
22 of those months is the annual peak, probably June,
23 July, August, September, you know, one of those.
24 But there is nothing on the form that says, you
25 know, what's the annual value.

1 So everything on the supply forms
2 themselves is in terms of monthly values.

3 MR. WARNER: And, again, I think Dr.
4 Jaske is absolutely right. We're trying to
5 balance the legitimate concerns that we utilities
6 have regarding impacts on our procurement process,
7 and your concerns that you not over-protect data
8 that should be part of a transparent disclosure to
9 the public.

10 And there's a judgment call in there,
11 and between monthly peaks in terms of supply
12 forms, and the annual peak demand. We happen to
13 think that if you're going to protect the monthly
14 data in terms of the peak, the same logic applies
15 to our appeal here today.

16 Does that mean you're legally precluded
17 from deciding otherwise, I don't think we, for
18 PG&E, want to argue the legal issues here today.
19 I think it's more of an opportunity to talk about
20 how we're trying to balance the public interest
21 and our legitimate concerns on both sides.

22 So I think it's an important data point,
23 that the monthly peaks are protected. And we're
24 here today trying to ask for consistent treatment
25 in terms of the annual peak demand.

1 COMMISSIONER GEESMAN: I appreciate what
2 you're saying in terms of this balancing question
3 and the policy issues at the heart of that. But I
4 think that from a forum standpoint you've got your
5 best opportunity on those questions, at least
6 initially, with the Executive Director when he
7 makes a ruling on your original request for
8 confidentiality.

9 When his decision gets appealed to us I
10 think we're constrained by attempting to apply the
11 law. And I do think the questions in front of us
12 today are principally legal questions.

13 And to the extent that you're content
14 with the March 30th discussion or ruling by the
15 Executive Director and not appealing that, I'm not
16 certain that that question or the advisability of
17 the Executive Director's judgment there ever comes
18 in front of us unless and until some other party
19 raises a Public Records Act request.

20 But today I think what we're trying to
21 do is determine whether the information that
22 you're seeking confidentiality for in these forms
23 constitutes a trade secret.

24 MR. WARNER: And let me -- Commissioner,
25 I think you're right because -- and I don't think

1 we disagree on the legal standard. The legal
2 standard, I believe, has within it the balancing
3 test. I think the Public Records Act precedents
4 provide for an overlay of a balancing test.

5 But getting back to Judge Wheatland's
6 presentation, I think he got it dead right in
7 talking about what the breadth of legal definition
8 of a trade secret is. And it doesn't involve
9 merely harm based on value gained by your
10 competitors.

11 The utilities aren't in the same
12 position as the ESPs in precisely that way in
13 terms of harm to competitors. But we are in the
14 same position in terms of avoiding economic value
15 being transferred from us and from our customers
16 to the suppliers who, themselves, are not under
17 any obligation sitting here today to provide
18 transparent information that would level the
19 playing field. I think Judge Wheatland also made
20 that point very well.

21 So PG&E very strongly agrees that this
22 information is trade secret because it is of
23 economic value to the suppliers, to us and our
24 customers. We believe that our customers
25 recognize that. The support we've had at the CPUC

1 from TURN and ORA; the support we've had actually
2 within this Commission for the procurement review
3 group process that we pursue at the CPUC. Which,
4 by the way, is a closed process in terms of
5 protecting proprietary and confidential
6 information.

7 But the reason that that works at the
8 CPUC, and we believe should work here, is because
9 parties get the information, they just not are
10 permitted to provide it, disclose it to those who
11 could take advantage of it in a way that would
12 extract value from our customers.

13 So, --

14 COMMISSIONER GEESMAN: Well, I'd remind
15 you that this Commission, at the Commissioner
16 level, expressed very strong concerns to the PUC a
17 couple of years ago about what this Commission
18 felt was the excessive confidentiality embedded in
19 their process. And in particular, the nonpublic
20 nature of the PRGs.

21 Our staff has continued to participate
22 in the PRGs, but you should not mistake that as an
23 endorsement or embrace by this Commission of that
24 Commission's approach to confidentiality.

25 And they operate under a different

1 statute and different regulatory scheme.

2 MR. WARNER: And we understand that and
3 we believe reasonable people can differ as to
4 where you strike the balance.

5 We also understand that this Commission
6 is working in a coordinated fashion with the CPUC
7 on behalf of procurement planning --

8 COMMISSIONER GEESMAN: We most certainly
9 are.

10 MR. WARNER: -- for the state. We also
11 understand that this Commission and the CPUC, many
12 of us in the utility area, as well as other
13 parties, including the State Attorney General, are
14 pursuing refund claims at the federal government
15 that are based on exactly the types of market
16 manipulation that we want to try to avoid the next
17 time. And we're all together on that.

18 So, I know that we all agree that the
19 statutory underpinning for this Commission is
20 different than the Public Utilities Commission.
21 But I think we all would agree that we have a
22 mutual interest in striking the balance in a way
23 that assures that the ongoing procurement that we
24 utilities are going through right now to try to
25 put things back in a good place and avoid the next

1 energy crisis, that those procurements can go
2 forward without the threat that economic value
3 will be extracted again from our customers through
4 market manipulation.

5 COMMISSIONER GEESMAN: And we're all in
6 favor of that. I think I speak for my colleagues,
7 we're all in favor of the war on terror, at least
8 we're against terrorism. I suspect we're still
9 against the spread of international communism.

10 But the fact in front of us today are
11 whether these forms contain trade secrets, such
12 that they should be afforded confidentiality. And
13 I'm waiting to hear a better articulation than
14 simply the fact that somebody may be able to drive
15 a harder bargain with you from their disclosure.
16 I'm waiting to hear a clearer rationale on what
17 exactly is it in this information that meets that
18 test of trade secret.

19 MR. WARNER: Again, I do believe that
20 Dr. Jaske pointed out the judgment call you have
21 to make in that regard. And that is if our
22 residual net short is conceded to be of value to
23 suppliers to know --

24 COMMISSIONER GEESMAN: You're ahead of
25 us. That is not in front of us today.

1 MR. WARNER: Okay. Let me try it again.
2 If you assume, and I won't assume for you, you
3 make that judgment that the residual net short is
4 of little value to suppliers, okay, we would
5 disagree with that.

6 But let's assume, for the sake of
7 argument, the residual net short number, as PG&E
8 goes through its active procurement right now, is
9 of value to suppliers in a way that could extract
10 what you call a harder bargain, what I think some
11 of our customers would call millions of dollars of
12 higher procurement costs, let's assume that for
13 the sake of argument.

14 Then I think the judgment call is if you
15 take the annual peak demand number and you take
16 publicly available information that could allow
17 kind of a look at the numbers for our resources,
18 nameplate capacity, QF aggregate costs, demand,
19 could that allow the suppliers, as part of our
20 procurement proceedings, which are going on right
21 now, to come up with that net short number.

22 PG&E believes very strongly that it
23 could. And that that is our priority.

24 By the way, we are under an obligation,
25 speaking of different statutory standards, we're

1 not sitting here as merely a pass-through
2 mechanism for these costs. We are under an
3 obligation under the Public Utilities Code to
4 procure prudently and reasonably on behalf of our
5 customers. If we don't do that we are subject to
6 penalties, disallowances, reasonableness reviews
7 and all of that.

8 So we have to do everything we can to
9 procure at minimum cost and at the highest
10 possible reliability for our customers.

11 COMMISSIONER GEESMAN: And, of course,
12 you recognize that the argument is that you are
13 more likely to do that if more of these facts are
14 transparent to the public, the regulators, the
15 Legislature and others.

16 MR. WARNER: But, Commissioner, the day
17 that the suppliers provide us those same
18 transparent facts, maybe we can sit down and say
19 that would be a procurement process that would be
20 different. We put our cards on the table, the
21 suppliers put their cards on the table. We see
22 all their costs, all their supplies.

23 But that's not the case here. What
24 we're talking about is the utilities showing all
25 their cards on the table and the suppliers not

1 having any reciprocal obligation to do the same.

2 COMMISSIONER GEESMAN: During the
3 regulated era, pre 1997 or whatever -- 1998 I
4 guess is when started with the experiment --
5 during the regulated era when you were required to
6 put all your cards on the table, did you find
7 yourselves disadvantaged in your out-of-state
8 purchases?

9 MR. WARNER: I'm trying to understand
10 what you mean by being required to put all our
11 cards on the table. We were subject --

12 COMMISSIONER GEESMAN: Well, when this
13 agency and others --

14 MR. WARNER: -- to four --

15 COMMISSIONER GEESMAN: -- conducted this
16 sort of process in a more transparent fashion than
17 is being recommended by your company today.

18 MR. WARNER: Well, I think there's some
19 key differences between the regulated era, and I
20 call this the regulated era, as well. We had an
21 interim period of some different -- a different
22 structure.

23 But, during the regulated era, of course
24 we had a lot more utility-owned resources that
25 were a strong buffer against the manipulation at

1 the margin, A. B, we had a very active and strong
2 amount of seasonal exchanges of power. And we had
3 also longer long-term contracts, exchange
4 contracts, with various entities.

5 And all of that combined to basically
6 provide the type of resource mix that was not
7 susceptible to the type of manipulation, at least
8 to the same degree, that we might have today.

9 Here, today, we're really looking at
10 recreating the regulated era, but in a way in
11 which there's a much larger component of long-term
12 procurement from third-party resources.

13 So I do believe, respectfully, that the
14 sensitivity today is not merely because we've had
15 an energy crisis in between, but the sensitivity
16 is because the market structure right now is
17 different. We have not recreated the type of
18 capacity markets that we're all trying to create.
19 And if we don't create a good capacity market this
20 time around in terms of this procurement process,
21 then we really are susceptible to some of the same
22 things that occurred during the energy crisis.

23 COMMISSIONER GEESMAN: I don't think I
24 have any more questions, Madam Chair.

25 ACTING CHAIRPERSON PFANNENSTIEL: Yes.

1 MR. KLOBERDANZ: Madam Chair,
2 Commissioners, I'm Joe Kloberdanz, representing
3 San Diego Gas and Electric today. And when we
4 spoke of aggregation a few moments ago and between
5 north and the south, I just want to remind you we
6 would be in the south.

7 (Laughter.)

8 MR. KLOBERDANZ: I just wanted to assure
9 you that I agree with, and we have developed in
10 concert, the positions that have been described to
11 you today by my two colleagues to my left.

12 I'm not an attorney, and that's why you
13 have not seen me jump in on the legal discussion
14 that has just occurred. I would be fired for
15 practicing law in front of you.

16 But, I would point out that my
17 observation as a nonattorney is that there is some
18 room for interpretation here as to what the law
19 requires and what it allows. And that discretion
20 is with you now because of this appeal.

21 And the people who will ultimately pay
22 if this doesn't go right are my customers and your
23 citizens. You know that, I won't harp on it. But
24 I want to be sure and get that out. This is real
25 for those people.

1 I just wanted to urge you to, in this
2 matter which I believe involves some discretion on
3 your part, to not exercise that discretion in such
4 a way to put our customers at risk unnecessarily
5 for higher costs.

6 Thank you.

7 COMMISSIONER GEESMAN: Joe, I take it
8 you discount any prospect that your customers are
9 likely to be exposed to higher costs with an
10 opaque procurement process not subject to full
11 public scrutiny.

12 MR. KLOBERDANZ: I believe the public
13 scrutiny, as we move into something between the
14 old regulatory regime and the more recent market
15 structure we have, whatever that is going to be
16 called eventually, and history will name it, we
17 won't.

18 I believe that right now the best I can
19 see is that that oversight is again in the hands
20 of regulatory agencies.

21 COMMISSIONER GEESMAN: Who are best
22 protected when nobody else can see what we're
23 doing. And when we're not accountable to the
24 Legislature or the Governor in terms of our
25 performance, because we can't really share the

1 information with the Legislature or the Governor.

2 I mean I agree it's a balance, but it's
3 a balance that works both ways. And I'm not
4 certain that there's any empirical evidence,
5 Professor Plott's study notwithstanding, that
6 would suggest the opaque system produces better
7 results for your customers than the transparent
8 system does.

9 MR. KLOBERDANZ: I can't sit here today
10 and prove to you that proposition or disprove it,
11 as I'm not sure which way you stated it. I am
12 convinced that having certain information in the
13 hands of those who we need to buy from at certain
14 times has a high probability of being bad for my
15 customers.

16 I am not persuaded, but I will
17 acknowledge I cannot disprove the converse.

18 MS. GENAO: Commissioner Geesman, I
19 think Mr. Hemphill can probably talk to that point
20 a little, as well, if you would like additional
21 information.

22 COMMISSIONER GEESMAN: Sure.

23 MR. HEMPHILL: Good afternoon. My name
24 is Stu Hemphill, I work at Southern California
25 Edison. You did bring up an interesting point and

1 one that I've looked at quite a bit. In fact, I
2 worked with Dr. Plott and Tim Cason from Purdue
3 University on their experiments on economics
4 related to this very topic.

5 The situation can best be analogized as
6 a poker game. And that would be a poker game
7 where one player has all of the cards exposed and
8 the other players do not. And the question is
9 does the player with the cards exposed have a
10 disadvantage to those who do not have to show
11 their cards.

12 And the answer is obviously yes, because
13 each of the persons who is holding the cards is
14 able to see, but not have to show their own. So
15 they're no worse off than they were when those
16 cards were exposed.

17 And so actually it's the countervailing
18 argument that you need to be thinking about, which
19 is how our customers are advantaged by sharing
20 information of one party without sharing the
21 information of all parties. I think that's the
22 argument that needs to be addressed.

23 COMMISSIONER GEESMAN: Well, I'm glad
24 you raised the poker metaphor, Stu, because I
25 think it's unfortunate that your company, and at

1 least the California wing of your industry, seem
2 to have embraced that metaphor for your
3 procurement.

4 Most of the rest of the manufacturing
5 businesses in the world, the larger ones, anyway,
6 have tried to move more toward an open auction
7 form of procurement, convinced that the
8 competitive bidding process, particularly when
9 conducted in a transparent environment, produces a
10 lower price.

11 And I'm not an economist. I am
12 something of an empiricist, so I do like to see
13 the evidence. But I acknowledge with Joe, at this
14 point this is just an argument or clash of values.
15 There's not much evidence on one side of the
16 equation or the other.

17 MR. HEMPHILL: I would, just to point
18 out, you do have an experiment done, conducted by
19 two prominent econometricians in the U.S., and you
20 have nothing on the other side.

21 COMMISSIONER GEESMAN: I reviewed that
22 paper very carefully, and I would have to say that
23 I believe that if your company actually thought
24 that accurately replicated what the electricity
25 trading environment is really like, you'd probably

1 out-source your procurement to undergrads at
2 Purdue and at CalTech.

3 MR. HEMPHILL: No, I think -- I mean the
4 issue that you saw there was that people who had
5 the information were able to bid higher. It had
6 nothing to do with the buying side, it had
7 everything to do with information being provided
8 to the selling side.

9 And I'd be happy to make Dr. Plott
10 available, or Dr. Cason. We basically gave them
11 the information; they ran with it. We believe
12 it's sound information. And we can make them
13 available if you'd like to speak with them more
14 specifically.

15 COMMISSIONER GEESMAN: I think they
16 probably made their best arguments in their paper,
17 itself. And I will say, I didn't find it to be a
18 credible replication of the electricity trading
19 process. And I would think that most of the
20 professionals in your procurement department would
21 be insulted by the comparison.

22 MR. HEMPHILL: Oh, actually, I don't
23 think so, because they were also involved. I mean
24 we took --

25 COMMISSIONER GEESMAN: Well, then

1 perhaps you're overpaying them.

2 MR. HEMPHILL: No, I don't believe so.
3 I mean the truth is we spent a lot of time setting
4 up the markets. We did make sure that there was
5 an accurate representation of the numbers of
6 buyers, the numbers of sellers in the market, the
7 relative sizes of the markets.

8 Is it a perfect? No, it's not perfect.
9 But it was not an uninformed experiment. And so
10 it is the only evidence you have in front of you
11 that specifically addresses this topic.

12 You've mentioned manufacturers.
13 Manufacturing in whatever open transparent -- I
14 don't know exactly which one you're thinking
15 about, but that one clearly does not represent the
16 electricity markets in California. So that, in
17 itself, is an analogy that doesn't work.

18 COMMISSIONER GEESMAN: Thank you.

19 ACTING CHAIRPERSON PFANNENSTIEL: Mr.
20 Warner.

21 MR. WARNER: Just one last comment.
22 We've talked a lot about what the utilities'
23 concerns are, customers concerns. But I also
24 think that we utilities have tried to address,
25 through the north/south disaggregation proposal,

1 what we believe to be the interests of the
2 Commission in terms of public transparency, in
3 terms of its work.

4 And so we believe that that is a way to
5 achieve both public interest goals here. And
6 would hope that -- and certainly from the utility
7 standpoint, would be willing to move toward that
8 as part of any action by the Commission on our
9 appeals.

10 COMMISSIONER GEESMAN: So if we can't
11 disaggregate SDG&E from Southern California Edison
12 Company in our process, how are we to evaluate the
13 need hypothetically for a transmission project in
14 the San Diego service territory; or, for that
15 matter, in the Edison territory, if we're looking
16 at everything on an aggregated basis?

17 Knowing full well that the other
18 participants in our process are quite likely to
19 contest any determination of need that we might
20 make on the basis of readily available
21 alternatives to San Diego on the one hand, or
22 perhaps Edison on the other?

23 MR. WARNER: And, Commissioner, we agree
24 completely. And there's a process that we've used
25 for years at the CPUC in which market participants

1 basically are either under a nondisclosure
2 agreement when they participate in a proceeding at
3 the CPUC, and nonmarket participants, like the
4 customer groups, are not under necessarily the
5 same restrictions, the Commission has available to
6 it all the information in these various
7 proceedings and it makes the decision.

8 To the extent that there's competitively
9 sensitive information that is subject to seal.
10 But all the parties are participating, including
11 those contesting the applicant, have all the
12 information available to them. They just can't go
13 out and use it in a way that would allow them to
14 manipulate the process.

15 COMMISSIONER GEESMAN: So when the
16 Legislature calls me up and wants to know what's
17 really going on here, I'm left in a position to
18 say, well, Senator, I can tell you but I'd have to
19 shoot you?

20 MR. WARNER: Well, the Legislature is a
21 co-equal branch of government, obviously. And the
22 Legislature views its obligations to protect trade
23 secrets from its perspective.

24 But, as far as I can tell in the history
25 of every Legislature in this country, to the

1 extent that the courts have determined that trade
2 secrets are protected, those trade secret laws
3 also apply to legislators. And to the extent that
4 legislative committees, oversight committees, seek
5 to review trade secrets, they sign nondisclosure
6 agreements, they make pledges. Even though they
7 do not like to and they don't want to. But they,
8 indeed, get their oversight function done by
9 respecting the value of trade secrets.

10 COMMISSIONER GEESMAN: We don't have a
11 very good history in this state with opaque
12 procurement. Or economists.

13 ACTING CHAIRPERSON PFANNENSTIEL: Dr.
14 Jaske, did you have another comment?

15 DR. JASKE: Yes, I just have a couple
16 factoids you might call them. And then one
17 concept that hasn't yet been raised.

18 Obviously the key issue here is focusing
19 on annual peak. I just want to remind you that
20 historic annual peaks are frequently available,
21 even those defined down to the service area level.
22 Just a couple three weeks ago the Electricity
23 Committee conducted a workshop on the short-run
24 supply/demand balance, and San Diego put forward
25 historic peak data, and even the weather

1 adjustments to take the individual years back to
2 normal.

3 And so one can take that kind of
4 historic data and generate your own peak forecast
5 with the energy forecasts that are already
6 available that are not going to be the same as
7 what the utilities put forward, but, you know,
8 they're not going to be too far off.

9 MS. GENAO: Mike, can I just ask you a
10 clarifying question?

11 DR. JASKE: Sure.

12 MS. GENAO: Are you referring to the
13 bundled customer peak when you refer to that
14 number?

15 DR. JASKE: In that particular instance
16 I believe that was a San Diego service area peak,
17 so it was bundled plus ESPs.

18 And there are peak forecasts that are
19 used in the transmission planning process that are
20 lying out there in public all over the place
21 through the documents the PTOs put forward to the
22 ISO, to the documents the ISO prepares. Again,
23 those look to be something more like the service
24 area or traditional planning areas, as opposed to
25 bundled. So, that's the distinction.

1 Secondly, none of the munis have asked
2 for confidentiality for anything connected to
3 their demand forecast. Even though they are also
4 buying from or selling to these markets.

5 And lastly, no one today has raised the
6 concept of the distinction between protecting the
7 near-term versus not protecting the long-term.
8 So, for example, you know, the first three or four
9 years are years where these issues of existing
10 generators exercising market power are clearly
11 more germane than the period beyond that where the
12 markets are contestable by new entrants. And in
13 fact, we want quite explicitly to be encouraging,
14 you know, the generator community to make
15 investments and bring forward new projects that
16 can help the supply/demand balance.

17 I just wanted to make sure you were
18 aware of those additional factors for your
19 consideration.

20 ACTING CHAIRPERSON PFANNENSTIEL: Thank
21 you for raising those. Yes.

22 MS. GENAO: I just wanted to point out
23 that we believe that the bundled customer peak
24 distinction is an important one, and that that
25 number, as far as I know, neither the historic nor

1 the forecast is made public.

2 MR. KLOBERDANZ: I would agree.

3 ACTING CHAIRPERSON PFANNENSTIEL:

4 Understood. Are there other questions here? I
5 have a couple people who have asked to speak on
6 this subject, which I'll take in a minute. But I
7 want to see if anybody has questions of Dr. Jaske
8 or of the IOUs? Anybody here on the panel?

9 Thank you.

10 MR. WARNER: Thank you.

11 ACTING CHAIRPERSON PFANNENSTIEL: Why
12 don't we ask Steven Kelly, then, who had asked to
13 speak on the subject.

14 MR. KELLY: Thank you, Commissioners.
15 Steven Kelly with the Independent Energy Producers
16 Association.

17 First, I'd like to address you just to
18 kind of following up to what was just spoken, and
19 deal with a little theory in practice here. And
20 then talk a little bit about the reasonable
21 standard that was addressed and raised in front of
22 you earlier.

23 I've heard now both from the ESPs and
24 the IOUs what I view as a red herring. That the
25 need to keep data confidential is in order to

1 preclude wholesalers from gaming the marketplace.
2 And I think, as was addressed earlier, the best
3 way to keep wholesalers from gaming the
4 marketplace is buying long-term contracts, which
5 is exactly where the state is going today.

6 And I think what the utilities have
7 found is the praxis part of things, is that when
8 they actually went out with an open competitor
9 procurement for renewables they were inundated
10 with suppliers. All of them putting on the table
11 their bids.

12 The utilities were in the unique
13 position at that point of looking at a multitude
14 of bids from many many generators what they would
15 offer that product for at that particular time for
16 that duration.

17 So they actually have a means to acquire
18 the data that they think they need, and they can
19 do it through open competitive procurement
20 processes. And it's proven over the last year
21 that that works.

22 And the other thing I'll just remind you
23 is that the other prevention that we're having, or
24 we're in the process of developing, is the
25 resource adequacy requirement. Which is going to

1 have the utilities buying up to 115 percent of
2 their peak need on a capacity basis. And probably
3 have the energy to follow.

4 So we're really not talking, as we look
5 forward in the future, of an environment in which
6 the utilities ought to be on the edge facing one
7 sole supplier threatening them across a
8 negotiating table. What we're really looking at
9 is an environment where there's going to be
10 multiple suppliers if the information is out there
11 ahead of time so that they can plan their
12 projects.

13 And if the utility doesn't actually need
14 to buy from that last supplier, it probably need
15 not do that if the price is too high, because it
16 will be adequately resourced.

17 Now, I'd like to talk, move to a little
18 bit about the reasonableness standard, and I'm
19 really focusing my comments on planning data and
20 procurement. And my comments are in light of the
21 fact, as mentioned previously, that the PUC has
22 now essentially deferred to this Commission for
23 the data development in the planning process. And
24 in light of the fact that the PUC has adopted, and
25 I think this Commission has endorsed repeatedly,

1 the concept of an open, transparent, competitive
2 process as a means, and probably a very good
3 means, to move forward for procurement.

4 But ironically we're in a unique
5 situation here, and when you can calculate and
6 consider your reasonableness standard, I want you
7 to think of this, which is a slightly different
8 bent than what I've heard today.

9 The unique situation is particularly in
10 the long-term procurement decision that was voted
11 out by the PUC, is that the utilities are supposed
12 to buy resources, future resources, under a least-
13 cost, best-fit methodology. And so far that
14 methodology is totally opaque to anyone but the
15 utilities. Nobody really knows what that means.

16 But it means that whatever they buy it has to
17 fit into what that need is.

18 The other thing that that decision said
19 was that the utilities are going to be in a hybrid
20 market, not only as a buyer, which we've heard of
21 today, but as a seller to themselves.

22 And when you take the two components of
23 a requirement for least-cost/best-fit with the
24 reality that the utility will be the only one
25 under their scenario to know exactly what that

1 means and how to fit that, and they're the seller,
2 or potential seller, in a competitive market, or
3 through bilateral negotiations, you're creating
4 what I think is a very negative situation for
5 consumers.

6 The lack of transparency, the lack of
7 openness, the lack of competition gives the IOUs a
8 tremendous advantage as a seller in that
9 marketplace.

10 The closed, nontransparent,
11 noncompetitive process creates an unlevel playing
12 field which will, I believe, ultimately harm
13 consumers and their ability -- because they lose
14 their ability to compare proposals. And they'll
15 only be seeing one possibly, and that will be the
16 utility proposal. Because they're the only ones
17 who are going to know exactly what the need is and
18 when. They will be able to plan ahead of time;
19 nobody else will be able to do that.

20 Now, I recognize, and I've said this in
21 front of the Commission in the past, that some
22 data is commercially sensitive and proprietary.
23 And I don't think we've got a very good fix on
24 that. And followup to what Mike Jaske said
25 earlier, I think it does make a lot of sense to

1 realize that there is some short-term period where
2 there is commercially sensitive information, from
3 the IOUs, as a buyer, that does not need to be
4 publicly available.

5 I don't believe that's 15 years out; I
6 don't believe it's ten years out; I don't even
7 believe it's five years out. Because if you've
8 read their filings on the renewable resource
9 procurement plans, they basically have given some
10 projections that were redacted, and then indicated
11 that they were all contingent on things.

12 Nobody knows what's going to happen in
13 five years. I think we're down into a period --
14 and in one of your workshops I indicated it's
15 probably somewhere between 90 days to a year, and
16 maybe up to three. And I think the Executive
17 Director apparently picked three. In the short
18 term that may seem reasonable.

19 What I urge the Commission to do,
20 because you're playing such an important role as
21 we go forward in procurement, is to be
22 conservative on this and adopt a policy that says
23 essentially that barring some very clear rationale
24 for keeping something proprietary and
25 confidential, it ought to be made publicly

1 available.

2 I also believe that we ought to have a
3 workshop where we talk about these subject matter
4 headings, not necessarily the discrete data behind
5 them. And have a more robust discussion about
6 whether some of this data is actually proprietary.
7 Because I happen to believe a lot of it is
8 probably publicly available someplace else, or it
9 can be mined.

10 But it's important that as you think
11 about this when you go forward is to think about
12 this role of the utilities, not only as the buyer,
13 but as the seller in this market. And what the
14 impact of that is going to be on consumers choice
15 and opportunities down the road.

16 Because when you do that I think when
17 you apply your reasonableness test you're going to
18 see that a reasonable decision would say more
19 openness rather than less. More transparency
20 rather than less. Which will foster more
21 competition rather than less, and realize better
22 value for consumers.

23 So, I thank you. If you have any
24 questions, I'd be happy to answer any.

25 ACTING CHAIRPERSON PFANNENSTIEL:

1 Questions for Mr. Kelly? Thank you, Steve.

2 MR. KELLY: Thanks.

3 ACTING CHAIRPERSON PFANNENSTIEL: We'd
4 like now to hear from TURN, Kevin Woodruff.

5 MR. WOODRUFF: Thank you, Commissioner.
6 I'm Kevin Woodruff; I work extensively with TURN
7 on resource adequacy issues. And I wanted to just
8 talk today about some of these confidentiality
9 issues that this Commission is facing in the IEPR
10 process.

11 I think the compete conflicting public
12 policy imperatives have been very well framed
13 already, so I'm not going to spend a lot of time
14 discussing them. I think, Commissioner Geesman,
15 you've been very forceful on greater openness.
16 And I think it's entirely correct that an IEPR
17 process with no numbers in it of any sort, or
18 extremely generalized level of detail is not going
19 to satisfy the Legislature or the media or the
20 public. It is not going to gain a lot of
21 confidence.

22 By the same token, I also have a lot of
23 sympathy for the positions of both the IOUs and
24 the ESPs that revealing peak, and in the ESPs'
25 case, energy data, as well, has some potential to

1 do them some serious competitive harm. Both with
2 their competitors and potentially with their
3 counterparties, the generators and their
4 intermediaries.

5 A lot of it depends on what other data
6 is revealed during this process, and is available
7 from public sources. It's hard to look at these
8 numbers in isolation. But I have no doubt that
9 there is some incremental -- there's a good chance
10 of some incremental detriment to their position
11 could occur from revealing it.

12 TURN and myself and the other TURN
13 consultant that looks at these issues have
14 discussed this. And we came up also with the
15 notion that for this IEPR process, I think it
16 makes a lot of sense to get moving with some sort
17 of an aggregate of load by various regions, as has
18 been discussed by some of the parties. The idea
19 we had was by IOU service territory.

20 And I know it's more than the ESPs
21 wanted, and possible more than the IOUs want to
22 give up, but that's IOU service territory
23 revelation matches very well with the Public
24 Utilities Commission's responsibilities. It
25 provides some protection for individual customers

1 on individual load-serving entities' data.

2 You may lessen your chance of a legal
3 challenge that could delay this process. And as
4 I've told this Commission before, the state needs
5 to get moving forward with really assessing what
6 its mid- to long-term needs are. We've been
7 diverted by 2005, for better or worse, for the
8 last several months.

9 I think you might be able to move
10 forward with the process on this front. But also,
11 that kind of aggregation would also give Mr.
12 Kelly's clients some sense of whether they should
13 be looking in the San Diego load pocket, or
14 southern California or northern California. And
15 provide some notification to the market about
16 where long-term resources are likely to be most
17 needed.

18 I think that's the general distillation
19 of my comments about what could be done in this
20 IEPR cycle. More generally, the Commission, in
21 the future, needs to have a more, what I call a
22 more generalized process where all LSEs know what
23 they need to give up coming into this process,
24 what's going to be public and what isn't.

25 Right now the process is ad hoc. And in

1 an ad hoc process you create an incentive system
2 where if I'm an LSE of any sort, and I don't want
3 to be disadvantaged, I'm going to stamp as much
4 confidential as I possibly can, and hope that my
5 competitors are willing to give up more off the
6 bat. That's the incentive structure you create
7 with an ad hoc process.

8 It needs to be a much more generalized
9 process. And it's conceivable, once we go through
10 a cycle or maybe a couple cycles, that parties
11 will get more comfortable giving up more
12 information. You hear a lot of resistance here
13 from parties that have been greatly traumatized
14 over the last few years.

15 And I think there's some hope in the
16 future we can have a more open process than we're
17 likely to have this time around. I'd suggest
18 before this next cycle that there be some serious
19 discussion about how to come up with a generalized
20 process so that all LSEs know what they're giving
21 up to the public.

22 You might create an intermediate class
23 of data that's available to various intervenors
24 under a protective order that allows parties to do
25 a fairly detailed analysis of load resource

1 balances and the types of resources that are
2 needed.

3 But I think this Commission will need to
4 do that before you engage in the next IEPR cycle.
5 Thank you.

6 ACTING CHAIRPERSON PFANNENSTIEL: Thank
7 you, Mr. Woodruff. Any further comments? Ms.
8 Holmes, any further comments from staff?

9 MS. HOLMES: No.

10 ACTING CHAIRPERSON PFANNENSTIEL: Thank
11 you. Comments from the Commissioners before we
12 decide these matters?

13 COMMISSIONER BOYD: Comment, please.

14 ACTING CHAIRPERSON PFANNENSTIEL:
15 Commissioner Boyd.

16 COMMISSIONER BOYD: First, I want to
17 thank Commissioner Geesman for doing a lot of the
18 heavy lifting today. He and I and Commissioner
19 Rosenfeld are signatories to that letter that was
20 referenced some time ago about openness. And he
21 and I share a lot of Committees together, and I
22 know his strong feelings on this subject. And he
23 knows mine.

24 And I knew he would far more eloquently
25 today deal with the lawyers on this issue. And as

1 the economist sitting up here, I don't want to
2 even engage in that discussion. I'm one who
3 crawled out from the rubble of the sky falling
4 during the electricity crisis. And let that be
5 history.

6 A lot of what's been said by folks here
7 today has been agreed to, or certainly agreed to
8 by those of us sitting up here, I'm sure, when it
9 comes to -- certainly when it comes to protecting
10 the California public, or the California public's
11 welfare in the electricity arena. And that
12 therefore, by reference, includes California
13 customers.

14 So, we are struggling with this. I
15 don't want to even analogize this to a game, any
16 kind of gambling game, but I thought of Russian
17 roulette a few times while sitting up here, but
18 certainly didn't want to make that reference.

19 I reacted to the statement about, you
20 know, we're becoming a regulated market again. I
21 appreciated Mr. Kelly's reference to the hybrid
22 market because I think that's what we are. And
23 that's what we will be for a long time as we still
24 work to figure our way out of this. And/or we
25 will always be. We will create a new type of

1 system, and it will be the California whatever.

2 Right now it's hybrid market.

3 Therefore, I still find myself falling
4 heavily on the side of transparency and risk
5 taking. I do want to hear from my fellow
6 Commissioners, but I just want it known that I
7 don't feel a lot different about the subject than
8 I did when I signed that letter in the first place
9 sometime ago to the PUC about the need for
10 transparency. And therefore, fall down very
11 heavily on the side of where the staff is trying
12 to go; where the Executive Director was trying to
13 go.

14 I do think the suggestions of continued
15 dialogue about aerial displays of data, but it
16 north/south or by IOU service area, what-have-you,
17 deserve discussion. And I think the parties need
18 to continue to have that dialogue as we still work
19 on correcting the experiment, or building and
20 designing the hybrid market.

21 With that I'll pass the microphone.

22 COMMISSIONER ROSENFELD: I'm certainly
23 not a lawyer or an economist. And the idea of
24 continuing dialogue seems a way to go.

25 I guess I'm going to ask Commissioner

1 Geesman, I did hear some suggestions for
2 mitigation of this disagreement that didn't seem
3 very serious to me.

4 The third-party providers talked about
5 five years instead of three. And aggregation by
6 area. And the IOUs talked about just aggregation
7 by north and south. Certainly in the north it
8 sort of seems like it's PG&E territory to me,
9 anyway. So that seems like a fine distinction.

10 Do we want to grab any of these small
11 offers?

12 COMMISSIONER GEESMAN: I don't think
13 right now. And let me, if I can, say I think
14 Kevin Woodruff hit a lot of the right notes on
15 this.

16 And one of the things that's difficult
17 is the fact that this is a case of first
18 impression. We are doing this now for the first
19 time. You know, we've previously conducted a
20 similar function in a more classically regulated
21 market environment. We've gone for some ten years
22 without having done it.

23 Because of the press of time and our
24 important role in the PUC procurement process, we
25 are taking these -- I'm not certain that I can

1 come up with a better word than Kevin's ad hoc --
2 but we are taking these up without benefit of
3 having adopted regulations in this area.

4 Frankly, we don't know enough to have
5 prescribed regulations. And I think that for this
6 cycle dealing with these matters on a case-by-case
7 basis really is the best approach.

8 I think the Executive Director has
9 faithfully, or I should say our prior Executive
10 Director, because that's the decision that's in
11 front of us today, decisions that Bob Therkelsen
12 made in February, I think he faithfully applied
13 both our regs and the Public Records Act, as well
14 as the Warren Alquist Act.

15 I believe this came up for at least
16 brief discussion when Scott stepped in. And our
17 direction to Scott was to look at that earlier
18 letter that has been referenced several times
19 before. And, you know, Commissioner Pfannenstiel
20 wasn't with us at the time, so it's the three of
21 us that signed on to that earlier letter to the
22 Public Utilities Commission, as the best
23 expression of our policy beliefs, or where we
24 would strike that balance between transparency and
25 opaqueness.

1 I frankly have not heard arguments today
2 by either the ESPs or the IOUs that would suggest
3 a reasonable case can be made that the specific
4 information in front of us is, in fact, a trade
5 secret. Or that that balance should be struck
6 against disclosure.

7 Having said that, I do think it would be
8 productive if the staff, and probably more
9 important the various parties that participate in
10 our process, see fit to enter into a dialogue as
11 to what information is best kept confidential that
12 would inform us in our next cycle.

13 I think one of the things that is
14 troubling to me, it's somewhat akin to the
15 discussion we had on the petroleum information
16 earlier in our business meeting today, I think the
17 staff is going to need to determine, based on its
18 experience in this cycle, what information is it
19 that is actually usable to us.

20 We tend, like most other organizations,
21 to have this enormous vacuum cleaner interest in
22 sweeping up information. But how much of it is
23 actual vital information that is either of value
24 to us, as a regulator, or is valuably disseminated
25 to the public and the various parties that

1 participate in our process.

2 I think Kevin's right, a dialogue would
3 very much inform those types of decisions. But I
4 don't think we can do that in time to affect this
5 cycle of the IEPR. And for this cycle I think
6 we're left with the Public Records Act, our own
7 regulations, the Warren Alquist Act.

8 I find the Executive Director's
9 determination persuasive. I've not heard anything
10 today that would suggest that it wasn't the right
11 decision for the Executive Director to make. And
12 when the Chair so indicates, I'm prepared to move
13 that we ratify and uphold his decision in each of
14 the appeals that's been filed.

15 ACTING CHAIRPERSON PFANNENSTIEL: Thank
16 you, Commissioner Geesman.

17 I'd like to say that I wasn't involved
18 in the earlier letter that was signed. And I came
19 in today having read the material, and I believe,
20 with a fairly open mind about what we needed to
21 do. And I have to say that I do come down very
22 strongly, in general, public policy standpoint, on
23 the side of transparency. I think that
24 transparency is better for the citizen of
25 California and for the electric customers of

1 California.

2 I think in the immediate case there is
3 that question about is there some harm that would
4 be caused by release, disclosure of certain
5 information. And I haven't heard that harm. I've
6 heard some potential fears of, you know, potential
7 outcomes. But I haven't seen the conclusion which
8 says that there is something that would harm
9 customers or provide a competitive disadvantage
10 from the disclosure of the information that is
11 being questioned here. I feel that the Executive
12 Director's analysis and results were compelling to
13 me.

14 I also think that we do need to move
15 forward. We need to move forward not just with
16 the IEPR, although, you know, that's in front of
17 us this year, but with the IEPR feed into the
18 procurement process. And that's important to all
19 of us in California.

20 There is an opportunity, I don't think
21 this is the end of anything, I think there's an
22 opportunity and perhaps compelling need to look
23 for areas of compromise. And there were several
24 raised today, and I think we can keep talking
25 about them, to see if we can find some areas,

1 whether it's a matter of aggregation or of
2 separate discussion.

3 We're going to be working with the
4 parties; we're going to continue through the IEPR
5 and through all of the Energy Commission
6 processes, to working with the same people who are
7 here in this room. And so I think that through
8 those processes, perhaps by the next cycle, we'll
9 have resolved some of what seems so unresolvable
10 today.

11 I think it is now the time that we do
12 need a motion on each of the items, 12 through 17.
13 And we would be voting to uphold or affirm the
14 decision of the Executive Director in each of
15 these.

16 So perhaps we should go in order.

17 COMMISSIONER GEESMAN: Madam Chair, I
18 move that we uphold the Executive Director's
19 decision in the appeal of Strategic Energy, LLC.

20 COMMISSIONER BOYD: Second.

21 ACTING CHAIRPERSON PFANNENSTIEL: In
22 favor?

23 (Ayes.)

24 ACTING CHAIRPERSON PFANNENSTIEL:
25 Continue.

1 COMMISSIONER GEESMAN: Madam Chair, I
2 move that we uphold the Executive Director's
3 decision in the appeal of Constellation NewEnergy,
4 Inc.

5 COMMISSIONER BOYD: Second.

6 ACTING CHAIRPERSON PFANNENSTIEL: In
7 favor?

8 (Ayes.)

9 COMMISSIONER GEESMAN: Madam Chair, I
10 move that we uphold the Executive Director's
11 decision in the appeal of APS Energy Services,
12 Inc.

13 COMMISSIONER BOYD: Second.

14 ACTING CHAIRPERSON PFANNENSTIEL: In
15 favor?

16 (Ayes.)

17 COMMISSIONER GEESMAN: Madam Chair, I
18 move that we uphold the Executive Director's
19 decision in the appeal of Southern California
20 Edison Company.

21 COMMISSIONER BOYD: Second.

22 ACTING CHAIRPERSON PFANNENSTIEL: All in
23 favor?

24 (Ayes.)

25 COMMISSIONER GEESMAN: Madam Chair, I

1 move that we uphold the Executive Director's
2 decision in the appeal of San Diego Gas and
3 Electric Company.

4 COMMISSIONER BOYD: Second.

5 ACTING CHAIRPERSON PFANNENSTIEL: All in
6 favor?

7 (Ayes.)

8 COMMISSIONER GEESMAN: Madam Chair, I
9 move that we uphold the Executive Director's
10 decision in the appeal of Pacific Gas and Electric
11 Company.

12 COMMISSIONER BOYD: Second.

13 ACTING CHAIRPERSON PFANNENSTIEL: Before
14 we vote on that, I recuse myself on this because
15 of potential conflict.

16 But, in favor?

17 (Ayes.)

18 ACTING CHAIRPERSON PFANNENSTIEL: Three
19 to nothing.

20 Thank you, all.

21 (Conclusion of agenda items 12 through
22 17.)

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CERTIFICATE OF REPORTER

I, PETER PETTY, an Electronic Reporter,
do hereby certify that I am a disinterested person
herein; that I recorded the foregoing California
Energy Commission Business Meeting Partial
Transcript; that it was thereafter transcribed
into typewriting.

I further certify that I am not of
counsel or attorney for any of the parties to said
meeting, nor in any way interested in outcome of
said meeting.

IN WITNESS WHEREOF, I have hereunto set
my hand this 17th day of April, 2005.