

COMMITTEE CONFERENCE  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of: )  
 )  
Application for Certification for ) Docket No.  
the Carlsbad Energy Center Project ) 07-AFC-6  

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

TUESDAY, SEPTEMBER 13, 2011  
3:00 p.m.

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

COMMITTEE MEMBERS PRESENT

Karen Douglas, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Paul Kramer, Hearing Officer

STAFF AND CONSULTANTS PRESENT

Richard Ratliff, Senior Staff Counsel

Mike Monasmith, Project Manager

OFFICE OF THE PUBLIC ADVISER

Jennifer Jennings, Public Adviser

APPLICANT

John A. McKinsey, Attorney  
Stoel Rives LLP

George L. Piantka  
Scott Valentino  
NRG West

Gordon Chirdon (via teleconference)  
NRG

INTERVENORS

Ronald Ball, City Attorney  
Allan Thompson, Special Counsel  
City of Carlsbad Housing and Redevelopment Commission  
South Carlsbad Coastal Redevelopment Agency

William Rostov  
Center for Biological Diversity

Kerry Siekmann  
Terramar Association

Julie Baker  
Arnold Roe, PhD  
Power of Vision

ALSO PRESENT

Andrew Ulmer (via teleconference)  
Robert Sparks (via teleconference)  
Dennis Peters (via teleconference)  
California Independent System Operator

Jack Cumming

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P R O C E E D I N G S

3:04 p.m.

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ASSOCIATE MEMBER DOUGLAS: Good afternoon.

Welcome to the Carlsbad Committee Conference of the California Energy Commission. My name is Commissioner Karen Douglas. And as you all know, I'm sure, I am the newest member of this Committee. So anyway, I am happy to be here.

To my left is our hearing officer, Paul Kramer. And let me ask the parties to introduce themselves, starting with staff.

MR. RATLIFF: Dick Ratliff, staff counsel, and Mike Monasmith, project manager for the staff.

ASSOCIATE MEMBER DOUGLAS: Thank you. And applicant?

MR. MCKINSEY: John McKinsey representing the applicant, Carlsbad Energy Center LLC. And also with me, George Piantka from NRG Energy, the parent company of the applicant.

ASSOCIATE MEMBER DOUGLAS: Thank you. For the City of Carlsbad and South Carlsbad Coastal Redevelopment Agency?

MR. BALL: We're present. Ronald Ball, General Counsel for the Housing and Redevelopment Commission, General Counsel for the Redevelopment Agency, and City Attorney for the City of Carlsbad. And with me is Allan

1 Thompson, our special counsel for this proceeding.

2 ASSOCIATE MEMBER DOUGLAS: Thank you. Is anyone  
3 here from CURE? Is anyone from CURE on the phone?

4 (No response.)

5 ASSOCIATE MEMBER DOUGLAS: Okay. Is anyone here  
6 from the Center for Biological Diversity?

7 MR. ROSTOV: William Rostov representing the  
8 Center for Biological Diversity.

9 ASSOCIATE MEMBER DOUGLAS: Thank you.

10 MR. ROSTOV: Good afternoon.

11 ASSOCIATE MEMBER DOUGLAS: Good afternoon and  
12 welcome.

13 Is anyone here from Terramar Association?

14 MS. SIEKMANN: Kerry Siekmann from Terramar  
15 Association.

16 ASSOCIATE MEMBER DOUGLAS: Thank you. Is anyone  
17 here from Power of Vision?

18 MS. BAKER: Yes, Julie Baker on the phone from  
19 Power of Vision.

20 ASSOCIATE MEMBER DOUGLAS: Thank you.

21 DR. ROE: And Arnold Roe from Power of Vision.

22 ASSOCIATE MEMBER DOUGLAS: Great, thank you very  
23 much.

24 Is anyone here, is April Rose Sommer here  
25 representing Rob Simpson? Here or on the phone?

1 (No response.)

2 ASSOCIATE MEMBER DOUGLAS: The Public Adviser's  
3 Office is represented by our Public Adviser Jennifer  
4 Jennings, she is in the back of the room.

5 And is anybody here representing the California  
6 Independent System Operator?

7 MR. ULMER: Hi, good afternoon, Commissioner, this  
8 is Andrew Ulmer. My last name is spelled U-L-M-E-R. On the  
9 telephone, obviously. I'm an attorney with the ISO. I  
10 think as you are aware, perhaps, we have made a witness  
11 available through the CEC staff in this proceeding. And I  
12 am here as well as a couple of my colleagues who are joining  
13 via telephone via a different location, Robert Sparks and  
14 Dennis Peters.

15 ASSOCIATE MEMBER DOUGLAS: Thank you. All right,  
16 with that I'll turn this over to the Hearing Officer,  
17 Mr. Kramer.

18 HEARING OFFICER KRAMER: Thank you. Mr. Sparks  
19 and Mr. Peters, are you with us yet?

20 MR. SPARKS: I am. Yes, we're both here.

21 HEARING OFFICER KRAMER: Okay, thank you. And  
22 then we also have from the applicant, who identified himself  
23 earlier, Gordon -- is it Chirdon?

24 MR. MCKINSEY: Gordon Chirdon.

25 HEARING OFFICER KRAMER: Chirdon.

1 MR. MCKINSEY: On the phone.

2 HEARING OFFICER KRAMER: He's with NRG. Do we  
3 have anyone else on the telephone who wants to identify  
4 themselves. I see a fair number of callers on my control  
5 screen. You don't have to identify yourself if you are just  
6 going to listen but feel free to do so if you want to be  
7 noted in the record.

8 (No response.)

9 HEARING OFFICER KRAMER: Okay. Well with that,  
10 the purpose of today's hearing. Originally it was to be a  
11 prehearing conference for an evidentiary hearing that would  
12 be held next Monday. But intervening events have caused us  
13 to turn it into just a committee conference to discuss the  
14 status of the case, including a couple of specific items:

15 The request to postpone the evidentiary hearing,  
16 the schedule that we would have on this case going forward,  
17 and then the specific request of Terramar and Power of  
18 Vision to have the Committee order, issue an order changing  
19 the basic requirement for service of documents that even if  
20 you send somebody an emailed copy of a filing in this case,  
21 our rules also require under the current protocol that the  
22 Committee established that unless they specifically say that  
23 they do not need a paper copy you also have to send them a  
24 paper copy. We'll take that last, that matter up towards  
25 the end.

1           So let's get on to the request to postpone the  
2 hearing. We have the various filings of the parties. The  
3 applicant spoke most recently on the topic. Why don't we  
4 just go around the table, beginning with the applicant since  
5 I think they are most interested in the timetable for this  
6 case, to state their current position about when hearings  
7 might resume in this case and the factors that are leading  
8 to the delay that we are experiencing.

9           MR. PIANTKA: Good afternoon, Commissioner Douglas  
10 and Hearing Officer Kramer and the parties to the Carlsbad  
11 Energy Center Project. I'm George Piantka, I'm our Director  
12 of Environmental for NRG's Western Region.

13           I'm here on behalf of NRG to affirm our commitment  
14 to the Carlsbad Energy Center Project. And with that  
15 commitment we're seeking the removal of Land 2 and 3 from  
16 the PMPD. Really to place the project back as it was  
17 originally proposed.

18           I would like to go back and just go back a few  
19 months to the evidentiary hearing and the subsequent  
20 hearings in June and clarify a few actions of NRG. In May,  
21 considering the recommendations of the Committee, we  
22 proposed two conditions, Land 2 and 3. And we felt that  
23 those conditions were negotiated in good faith with the City  
24 of Carlsbad.

25           As we have seen since that time, the City has

1 continued to, continued to oppose the project. And even as  
2 of last week an ordinance, several ordinances were passed by  
3 the Planning Commission that seek to rezone Encina Power  
4 Station.

5 I'd also like to explain the, you know, the  
6 postponement to the evidentiary hearing that we filed on  
7 August 22nd. The Committee recommended that we consider  
8 with July 1 and the PSD requirements that would be beared on  
9 the project that we, you know, consider that component to  
10 the project. We did that and we did file our postponement.

11 You know, we do recognize that, you know, PSD is a  
12 new, a different permit condition that can be and that would  
13 be addressed post-licensing but it did cause us to step back  
14 and consider. When you look at July 1 as a date that the  
15 PSD requirements would be beared on the project. And then  
16 also looking at the July 18th vacating of PSD requirements  
17 as filed by EPA. That again was cause for us to sit back  
18 and consider.

19 But in conclusion, we continue to be committed to  
20 the project, continue to be committed to the Carlsbad Energy  
21 Center Project and it's process. We are seeking that Land 2  
22 and 3 be not included in a revised PMPD.

23 MR. MCKINSEY: I'd like to clarify one point on  
24 that; this is John McKinsey. The motion we filed emphasized  
25 and focused almost exclusively on the PSD topic. Partly --

1 at the time that was the scrutiny that was being brought  
2 upon the project.

3 At this point we are now comfortable with an  
4 understanding of the risks related to proceeding with the  
5 project, subject to a latter PSD permit and we have a better  
6 sense of what the EPA is likely to do to the project when  
7 they make a new PSD eligibility determination on the  
8 project.

9 So that's now something that we are now  
10 comfortable enough with to understand the project and the  
11 issue we now really have. And our basic position is that we  
12 would like to move forward on the project but we really  
13 think we have to back up and go back to where the project  
14 was before Land 2 and 3 were imposed on it.

15 And the reason for that is simply that the  
16 project, when NRG agreed to Land 2 and 3, the idea was that  
17 it's a significant cost burden to demolish and remove the  
18 existing building at some point. But it was supposed to  
19 have been done in the concept of a cooperative redevelopment  
20 process with the City. And so the idea was that that cost  
21 could be put into a pro forma related to redevelopment of  
22 that property west of the railroad tracks.

23 But as June and July unfolded it became  
24 increasingly clear that Land 2 and 3 had not stopped the  
25 City's opposition and aggressive tactics, that actually it

1 encouraged them. And in fact they were using Land 2 and 3  
2 as yet another means of claiming that the project was  
3 vulnerable and should be either not approved or delayed  
4 further.

5           And we realized that all we had done was taken and  
6 imposed tens of millions of dollars if not a hundred million  
7 dollars of costs onto the project. And the only way to go  
8 forward would be to put them on the pro forma for this  
9 project. Which would mean those costs would have to be  
10 applied to the rates that the project would generate, either  
11 burdening the rate payers, or more likely, making the  
12 project economically unviable and incapable of getting a  
13 long-term power procurement.

14           So the only way the project can go forward we  
15 realized was to go back to the project as it was proposed in  
16 the AFC and as it existed before Land 2 and 3 were proposed.  
17 Which is the smaller units east of the railroad tracks on  
18 their separate parcel, which includes the shutdown of Units  
19 1, 2 and 3 at Carlsbad.

20           And that is the position that NRG would like to  
21 advocate for and move forward from this point under whatever  
22 speed and direction the Committee so directs.

23           HEARING OFFICER KRAMER: Staff.

24           MR. RATLIFF: Good morning, Commissioner,  
25 Mr. Kramer. I think the request for what has been called a

1 suspension of the proceeding raises a number of questions  
2 that need to be answered before we know where we're going  
3 from here, as I think may have been intimated by the  
4 applicant's remarks.

5           The reason given for the suspension is not a  
6 reason at all. It has nothing to do with this process.  
7 It's a federal process. It's a different set of  
8 requirements, a separate permit will be issued separately.  
9 It is not a basis for delaying this proceeding.

10           There may be all kinds of legitimate bases for  
11 delaying this proceeding. If nothing else, as was  
12 suggested, perhaps it's necessary to take the time to really  
13 consider what additional obstacles there may be to the  
14 project. And maybe that's what the suspension is about.

15           But the fact that there is a PUC permit  
16 requirement now is not in and of itself a basis for delaying  
17 this proceeding.

18           The second thing that needs to be said, I think,  
19 is that we need to find a way, if we are going to go to  
20 another hearing or if the proceeding is to go forward, the  
21 request we have just heard is to delete two conditions that  
22 are in the current PMPD.

23           It would seem to me that the Committee is probably  
24 not going to issue still another PMPD removing those  
25 conditions, even if it should choose to do so prior to

1 holding an evidentiary hearing on whatever remaining issues  
2 need to be discussed. And we thought that there were two.  
3 One was the environmental analysis for Land 2 and 3 I think  
4 are the two conditions, which is what we filed testimony on.

5 (Interference on phone line.)

6 MR. RATLIFF: The other, the other issue that we  
7 have addressed in testimony is the alternatives analysis for  
8 the -- what have been called the PPA projects. And those  
9 are the two things that were still outstanding that we  
10 thought that the next hearing would be about.

11 I think the Committee needs to decide or needs to  
12 tell us how we get to the next hearing and what the next  
13 hearing includes. If not today then soon because I don't  
14 know how we go forward without knowing that.

15 Finally, I would just mention that Land 2 and Land  
16 3 were really a product of negotiations between the City and  
17 the applicant. They were never proposed as mitigation by  
18 the staff, although staff certainly did not oppose them.  
19 And that's all.

20 HEARING OFFICER KRAMER: Mr. Rostov, since you  
21 sort of started this issue going why don't you go ahead.

22 MR. ROSTOV: We do believe that, and agree with  
23 the applicant to a certain degree that until there is a PSD  
24 permitting process going forward that this proceeding should  
25 be delayed. We don't think the PMPD can consider all the

1 relevant air quality laws without a basis and knowing what  
2 is happening with the PSD permit.

3           We do disagree with applicant in the sense of they  
4 would like to -- their motion wanted to delay the proceeding  
5 to just the applicability determination. But I think if you  
6 really wanted to get an analysis from the PSD permit you  
7 would have to do the statement of basis, which is  
8 essentially the draft permit from EPA. And I think other  
9 than that I'd rest on my papers.

10           I do have a question. I'm not sure if it's  
11 appropriate to me to ask applicant the question but I was  
12 unclear from their presentation what their timing is with  
13 EPA?

14           HEARING OFFICER KRAMER: I don't think they  
15 addressed that yet. It's on my list of questions too.  
16 We'll probably have another round.

17           MR. ROSTOV: Okay.

18           HEARING OFFICER KRAMER: Why don't we put that on  
19 the list of questions to follow up on. Ms. Siekmann.

20           MS. SIEKMANN: Well, we've advanced into our fifth  
21 year of the proposed CEC project and there are many issues  
22 that still remain unresolved. Coastal dependance for a  
23 power plant that could be built anywhere has not been  
24 proven. Land use issues abound. The project does not  
25 comply with many local laws, starting with building height

1 and continuing down the line to not complying with  
2 redevelopment requirements.

3           And then there are these CEQA issues. Land Use 2  
4 and 3 are merely another preview of support that Encina will  
5 shut down in the not-so distant future. SDG&E's testimony  
6 supports this notion as they are working towards the 2017  
7 shutdown date.

8           Without Encina, Carlsbad by the Sea could have a  
9 coastline for the use of its citizens and visitors to be  
10 available for more appropriate tourism and serving needs.

11           There has been no CEQA analysis of CECP without  
12 Encina. CECP would become the tallest structure in the city  
13 of Carlsbad.

14           Safety issues are paramount. Carlsbad's first  
15 responders, the Carlsbad Fire Department's requirements for  
16 safety in this project have not been honored. Haven't we  
17 learned that lesson yet?

18           Reliability issues. SDG&E, our public utility  
19 which is in contract with CA-ISO, has made a thorough  
20 analysis supported by an independent evaluator and decided  
21 the CECP project was unnecessary; irrelevant to the  
22 reliability and need issues in San Diego.

23           During the proceeding NRG has not shown to be a  
24 forthright applicant by allowing the Commission and  
25 intervenors to think there was RMR status on Encina that had

1 ended more than three years earlier. And then sending out  
2 notices for start of construction without a permit from CEC  
3 or the City of Carlsbad.

4 And finally, the EPA issue that's come up. Today  
5 we're here to address a delay so NRG can readdress their EPA  
6 issues. In the past NRG has not been supportive of many  
7 intervenor requests and that's understandable. But as of  
8 yesterday I spoke to Shaherrah Kelly in the Ninth District  
9 of the EPA in the permitting office and she had not even  
10 seen any correspondence from NRG on this project.

11 Intervenor Terramar will not quarrel with the  
12 delay. But requests by motion that the CEC request the San  
13 Diego Air Pollution Control District update the FDOC to  
14 match the EPA baseline years. And NRG demonstrate they have  
15 the air credits needed to the CEC.

16 We received no pre-notice of this request for  
17 removal of Land 2 and 3. And if we go back to the project  
18 as proposed, is that before the desalination project, which  
19 was the original project which is what you quoted, or do we  
20 go back to the pair? NRG seems to continue to change this  
21 project so what is the project?

22 And if they were to follow -- if this request is  
23 not permitted, NRG has not submitted their testimony. Not  
24 followed the timeline procedures cited by the CEC.

25 So these are all issues that I guess need to be

1 answered today. Thank you very much.

2 HEARING OFFICER KRAMER: I don't see them as  
3 saying that they want to go forward with hearings without  
4 submitting their testimony and, for instance, justifying  
5 their request to remove those conditions. They're just,  
6 they're just telling you what they believe they need at this  
7 point in time.

8 And as to the request for the Air District to  
9 update their Determination of Compliance. There was a  
10 letter from them in the staff's testimony that to my reading  
11 indicated that they did not feel that they needed to do  
12 that. I don't think the Committee is going to order them to  
13 do that. You're certainly welcome to put on evidence at the  
14 appropriate time to prove that it's necessary. But the  
15 Committee won't order that as just a -- for precautionary  
16 reasons unless there is a real reason to do that.

17 MS. SIEKMANN: Well with a ten year old baseline.  
18 It seems that the years have gone by. That it's such an  
19 old baseline that the time has come to update it. And my  
20 reading of the letter was the opposite, was that NRG thought  
21 that the FDOC needed to be updated as well.

22 MR. RATLIFF: If I may?

23 HEARING OFFICER KRAMER: Mr. Ratliff.

24 MR. RATLIFF: The Air District's letter was to  
25 indicate that the baseline controversy with EPA was

1 irrelevant to the permit for NSR purposes. And that the  
2 permit for NSR purposes was in accordance with the  
3 District's rules.

4 (Sound system echoing.)

5 MR. RATLIFF: And that those -- there was simply  
6 no --

7 HEARING OFFICER KRAMER: Hold on a second.  
8 Somebody is logged on as Greg. Oh good, you muted yourself,  
9 thank you.

10 MR. RATLIFF: Anyway, those are completely  
11 separate issues. So EPA's withdrawal of its approval based  
12 on a separate baseline for a separate rule is entirely apart  
13 from the District's analysis in the FDOC. That was the  
14 intent of the letter and I think it's clear.

15 HEARING OFFICER KRAMER: Thank you.

16 Did you have anything else, Ms. Siekmann?

17 MS. SIEKMANN: Well, but it's a motion.

18 HEARING OFFICER KRAMER: And if I wasn't clear, we  
19 denied that.

20 MS. SIEKMANN: Okay.

21 HEARING OFFICER KRAMER: Okay. Ms. Baker.

22 MS. BAKER: Power of Vision, and also Dr. Roe may  
23 want to jump in here, would have no quibble with the  
24 continuance of the request by NRG to continue the  
25 application at this time.

1 HEARING OFFICER KRAMER: Thank you. Dr. Roe, did  
2 you have anything to add?

3 DR. ROE: No.

4 HEARING OFFICER KRAMER: Thank you. The City.

5 MR. BALL: Commissioner Douglas and Hearing  
6 Officer Kramer. We support the request for a continuance.  
7 If the applicant is not going to withdraw the application  
8 then we certainly want to participate in continued hearings,  
9 if necessary, and arguments and so forth.

10 I don't -- I thought that was what we were going  
11 do is a request -- address the request to continue the  
12 proceedings by particular conditions. I mean, it's probably  
13 appropriate, if there are revised conditions and there may  
14 be plenty of revised conditions if we get to the next phase.

15 And take those conditions and address them and put those on  
16 as appropriate. Include those as conditions of the license.

17 But we do, we are interested in participating in  
18 the PSD determination and the, and the air quality hearings  
19 before the Air Board.

20 But we're having difficulty with the EPA getting  
21 notice. I don't know. That's something we're hoping that  
22 the Commission might help us out on is to somehow get us  
23 enrolled. I know -- I understand those are different  
24 proceedings but to the extent that they could be used to  
25 coordinate with these proceedings would be helpful.

1           So that if the City and other interested parties  
2 want to participate in the, in the proceedings before the  
3 EPA then they'd be given notice that there are applications  
4 pending and so forth. As we're doing it right now we're  
5 independently calling the EPA quite frequently to see  
6 whether or not there has been any movement. And so it would  
7 be helpful if the applicant were requested to let us know  
8 when those proceedings commence and so forth.

9           The applicant did mention that there were some  
10 ordinances passed by the Planning Commission. Of course  
11 that's not correct; they're pending. They have been  
12 recommended by the Planning Commission for a hearing before  
13 the, before the City Council. I think that's scheduled for  
14 the later part of this month.

15           We agree with staff's remarks that the deletion of  
16 Land 2 and 3 won't be part of a revised PMPD proceedings. I  
17 don't think that should be taken separately. And that was  
18 necessary and sufficient. Everything was done in good  
19 faith. But there was never a promise or an agreement that  
20 that would be sufficient to withdraw opposition and I  
21 thought both parties understood that. So that's how that,  
22 that proceeded. And that's fine if Land 2, 1 and 2 or 2 and  
23 3 are taken off. Then that gets us back into the  
24 extraordinary benefits hearing and we'd be happy to present  
25 evidence on that.

1           Allan Thompson is with me here today and if I've  
2 forgotten anything he will fill it in. So thank you.

3           MR. THOMPSON: I just would like to add one thing.  
4 If the, if the end result of the motion by the applicant is  
5 to delay the proceeding we would like to have some notice  
6 period so we could gear back up. You can imagine the people  
7 that were preparing testimony are going to put a rubber band  
8 around the material and drop it in the nearest drawer until  
9 it may or may not be used again.

10           I don't think we quarrel with the sequence of  
11 events that the Committee put forth, the testimony,  
12 rebuttal, et cetera. But I would just hope that you would  
13 give us some time between those first events to gear back  
14 up.

15           HEARING OFFICER KRAMER: Okay. I think that would  
16 be pretty much built in because where we were in the  
17 previously proposed schedule was we were waiting for the  
18 applicant's testimony. And basically because they didn't  
19 file any testimony, the Committee had to take next week's  
20 hearing off the schedule, off the calendar. Because  
21 otherwise I could just imagine, you know, the concerns that  
22 would have been expressed about trying to go forward without  
23 having the applicant's testimony available to respond to.

24           Under that schedule you would have had -- the  
25 other parties other than the applicant would have had about

1 nine days after the applicant files its testimony. Since  
2 this was going to come up eventually and you've raised it,  
3 what is, do you think, the reasonable, minimum period of  
4 time that you would need after the applicant has filed its  
5 testimony?

6 MR. THOMPSON: Certainly less if staff is going to  
7 revise its testimony, given the two land provisions.

8 MR. RATLIFF: And we have no revisions to make to  
9 testimony.

10 MR. THOMPSON: You have no revisions to make?

11 MR. RATLIFF: I mean, our testimony was addressing  
12 the general impacts of those conditions, in part. If the  
13 conditions are not adopted then that testimony becomes  
14 surplus.

15 MR. THOMPSON: Okay.

16 MR. RATLIFF: But we would have no additional  
17 testimony with the deletion of those two. Because we never  
18 identified those conditions of certification as CEQA  
19 mitigation.

20 MR. RATLIFF: And you would not revise your  
21 testimony for any new greenhouse gas information that comes  
22 from EPA?

23 MR. RATLIFF: In the PSD context?

24 MR. THOMPSON: Yes.

25 MR. RATLIFF: Oh, absolutely not. I mean, that's

1 a separate process that will require a separate application  
2 to the EPA. And there will be separate noticing and a  
3 separate proceeding to address those issues, as I think you  
4 know.

5           Typically the PSD process will run after the  
6 Energy Commission licensing process and will conclude long  
7 after we have issued our license. There is no requirement  
8 that we would wait in any manner or even consider that a  
9 separate federal permit for PSD purposes is required.  
10 Because federal law will be enforced through that process  
11 through the PSD permit.

12           And in terms of greenhouse gas analysis. There is  
13 no guidance, at least the last I heard from EPA, on how that  
14 analysis would be done. But it is a separate consideration.

15           MR. THOMPSON: Okay. Then I guess what I would  
16 prefer is something like 30 days after the applicant files  
17 its testimony, if that is the next item to be filed.

18           HEARING OFFICER KRAMER: Okay. Does any other  
19 party have any comment on that particular issue, the timing?

20           MR. MCKINSEY: Hearing Officer Kramer, two things.  
21 I wanted to address the EPA comments that several parties  
22 raised. At least so you'll understand our end of the EPA  
23 timing topic and what we know.

24           And then to affirm that we -- I mean, you can so  
25 direct, avoiding an issuance of an order. But we can

1 provide our testimony by the end of next week and that's not  
2 an issue. Largely the staff did a very good job and much of  
3 our testimony may have been agreeing with the staff in large  
4 part.

5           Procedurally the EPA is a huge question mark in  
6 many ways but it has a very different effect on the timing  
7 of a project because it's an operational permit and not a  
8 construction permit. And so it's a risk topic when you want  
9 to start construction and it's a risk topic for finance to  
10 start construction. But the timing of it can look largely  
11 different.

12           That said, the EPA Region 9 right now is being  
13 notoriously and tremendously slow in processing any  
14 application related to PSD and so they have almost no track  
15 record. But where they have a track record it's taking them  
16 a year just to make a determination that the application was  
17 inadequate. The only PSD they have issued was after they  
18 were sued by the applicant to get one. And so almost every  
19 project before you that has a PSD eligibility issue has got  
20 huge issues with their current PPA and how they're going to  
21 meet those schedules. And they're mostly seeing those as an  
22 operational topic.

23           So all EPA applications are going to play out  
24 during the compliance phase for projects before the Energy  
25 Commission. And it's very easily addressable and it might

1 even already be a condition in Air Quality that the  
2 applicant has to provide copies of all correspondence  
3 involving the EPA anyway so that may already be where you  
4 get the information during the compliance phase as to the  
5 timing.

6           What NRG has done is engaged professionals to  
7 evaluate both the scope and the probability and the timing  
8 aspects the PSD determination and trying to fit those into  
9 the project. But we haven't actually -- we have no more a  
10 shining crystal ball than anyone else on that topic.

11           HEARING OFFICER KRAMER: But have you filed an  
12 application?

13           MR. MCKINSEY: No. The next step would be to file  
14 a new request for an EPA determination and that decision  
15 would require that we request that they determine we're  
16 either exempt or not exempt under various PSD thresholds and  
17 that has not been completed yet.

18           HEARING OFFICER KRAMER: Do you have an idea of  
19 when that might be?

20           MR. MCKINSEY: No, we do not.

21           HEARING OFFICER KRAMER: So then at this point  
22 there is no EPA process for the City and others to  
23 participate in.

24           MR. MCKINSEY: Correct. And the concept of an EPA  
25 process is a very good one and I think we all scratch our

1 heads sometimes trying to understand what that process is.  
2 But certainly at a minimum by virtue of being here it is  
3 very easy for parties to be kept informed of submittal,  
4 simply by requiring the applicant, if it's not already in an  
5 Air Quality condition, to provide copies to the CPM of those  
6 documents. And then they flow out accordingly.

7           And again though, these are almost all compliance-  
8 phase issues. And especially now because it may take more  
9 than a year just to get a new eligibility determination or  
10 more for any project being filed. And that's a problem for  
11 some projects that have PPA deadlines within the next year  
12 or two.

13           HEARING OFFICER KRAMER: Would the applicant be  
14 willing to commit to share at least the fact of those  
15 filings with the other parties in this interim period before  
16 a final decision has been made on its application?

17           MR. MCKINSEY: I believe everything we've filed  
18 we've docketed and served. The only issue lurking there is  
19 once this project is approved and it goes into compliance,  
20 that's a different world in terms of how things are  
21 accomplished. There is no longer a service list, for  
22 instance, there is a compliance requirement.

23           And so it has to -- what the City is asking for  
24 has to be in a condition. It has to say, you know, you will  
25 file this. And there are many conditions like that. Almost

1 every decision has a Water Board requirement that says, you  
2 know, provide copies of all correspondence with the Water  
3 Board. So once this project is approved then it would have  
4 to be in a compliance requirement of a condition of  
5 certification that that would happen because there is no  
6 longer a docket or a service list to serve it on the  
7 parties. But up until then, of course, we'll continue to  
8 serve --

9 HEARING OFFICER KRAMER: There is an interested  
10 parties list that people could get on.

11 MR. MCKINSEY: Yes.

12 HEARING OFFICER KRAMER: But what I'm talking  
13 about is the period between now and entering the compliance  
14 stage. Would the applicant be willing to let everyone know  
15 if you've done something like --

16 MR. MCKINSEY: Yeah, we will continue to docket  
17 and serve all such applications as we have with all the  
18 state agencies that are involved in the proceeding,  
19 including EPA and federal agencies.

20 HEARING OFFICER KRAMER: Okay.

21 MR. RATLIFF: If I may. I want to emphasize that  
22 the Committee should be very careful about not undertaking  
23 EPA's responsibilities for notice and process. Because that  
24 is a very complex process. It is -- Russell City  
25 discovered, to its misfortune, it's a complex process. And

1 even the Air Districts sometimes with delegation do not  
2 understand it.

3           So we don't, I think institutionally, want to take  
4 the responsibility or pretend to have the responsibility,  
5 for the PSD process or for notice of that process because  
6 that is all something that is done by Region 9 itself. Or  
7 in the case where there is a delegation agreement with the  
8 Air District, by the Air District with that delegation  
9 agreement acting in the shoes of EPA.

10           Notice that such process has begun, if it's no  
11 more than that, than that would be okay. But I think we'd  
12 want to be very wary institutionally of trying to step in  
13 and say, we'll do the noticing for other people or for  
14 another agency. There are very exacting requirements in the  
15 Code of Federal Regulations for what kind of notice must be  
16 provided.

17           Secondarily I would want to emphasize also that  
18 the PSD permit is not just an operational permit, it's a  
19 pre-construction permit. There will be no construction of  
20 any project licensed by this agency that requires a PSD  
21 permit until that permit is obtained. So any compliance  
22 phase that on a state level would really be dormant until  
23 the PSD process concluded.

24           I think the point the applicant makes about the  
25 slowness in which EPA has acted is an important one. I

1 think we're aware of it, we saw what happened in Avenal.  
2 The permit was only issued when Washington took the permit  
3 responsibility from Region 9 and issued the permit after a  
4 negotiated settlement with the Justice Department involved.

5 Therefore I think -- I suspect that this is one of  
6 the calculations that the EPA is considering regarding the  
7 PSD permit and the complexities of that.

8 HEARING OFFICER KRAMER: Okay, thank you. Let's  
9 go off the record, for a minute.

10 (Off the record.)

11 HEARING OFFICER KRAMER: A caution to everyone,  
12 especially in the room, I guess on the telephone as well.  
13 Please identify yourself each time you begin to speak so  
14 that those who cannot see you can still identify you. So  
15 thank you, Mr. Ratliff. I think we went through all the  
16 parties. Yes.

17 Since one of the issues that is to be tackled  
18 eventually is the direction the comments that Mr. Peters  
19 made at the June 30th Commission meeting. I want to ask the  
20 representatives of the CA-ISO if you have any particular  
21 comments you wanted to make for us today?

22 MR. ULMER: Hearing Officer Kramer, this is Andrew  
23 Ulmer. I think our comments probably are relatively  
24 limited. I think we joined in the comments of the CEC staff  
25 as they relate to the testimony that we prepared and

1 presented to the CEC staff. I don't think we have comments  
2 beyond that. And I think I'll leave it, leave it there.

3 HEARING OFFICER KRAMER: Okay, thank you.

4 So, Mr. McKinsey, when you said that you could  
5 file your testimony by the end of next week, is that, is  
6 that basically your request? You would like to see us move  
7 forward to hearings on that basis?

8 MR. MCKINSEY: That's correct, Hearing Officer  
9 Kramer. And we had one other comment. The word "testimony"  
10 gets mixed up with the word "hearing" quite a bit. And I  
11 think we noted this previously. But we are not convinced  
12 that a hearing, meaning a live, cross-examination and direct  
13 and cross-examination of witnesses, would have produced  
14 anything that useful compared to the cost and the extra  
15 amount of time and attention it would have required.

16 And so generally speaking, we would advocate that  
17 you simply need to complete the testimony picture. And  
18 applicant is prepared to provide written testimony. It does  
19 not believe it needs any live witnesses and doesn't need to  
20 conduct any cross-examination. And I don't think we have a  
21 right to, at this point. There is certainly no requirement  
22 that there be another live testimony exchange in this  
23 proceeding. Whatever requirements for live testimony that  
24 do exist, and there are very few of them, have certainly  
25 been met in this proceeding.

1           And I would suggest that the Committee could  
2 consider whether they simply need to request appropriate  
3 written and rebuttal testimony and then move forward with a  
4 revised PMPD from there.

5           HEARING OFFICER KRAMER: I think as a practical  
6 matter that would be difficult. It's likely that the  
7 Committee, if no other party, will have some questions. One  
8 of the issues that we really want to get to the bottom of is  
9 the system reliability support renewable integration aspects  
10 of this project in that particular area. So I suspect that  
11 if nobody else does, the Committee will have, for instance,  
12 follow-up questions for the ISO.

13           And if the City is moving to change its General  
14 Plan for this property we're probably going to have to  
15 discuss that.

16           I understand that the applicant probably isn't  
17 happy to have all the expense of another event down in  
18 Carlsbad but I don't -- given the public interest in this  
19 project, I don't see how we can, practically speaking, avoid  
20 that. And it will be much more efficient to clear up the  
21 details and ask the follow-up questions in the relative --  
22 and I say "relative" somewhat facetiously, but relative  
23 speed of a hearing as opposed to the exchange of written  
24 documents. Which, you know, will drag on and on. So I just  
25 don't see any way to avoid a hearing, another hearing.

1           And we have some new issues here. As far as  
2 whether Land 2 or 3 stay in or not. Staff has prepared an  
3 analysis of the sort of secondary impacts of those  
4 activities. So the record is better prepared on that point  
5 at this time and everybody else can provide their thoughts.

6       So we will be in a place to consider the applicant's  
7 request to remove those conditions or to leave them in  
8 because either avenue will be fully discussed, or at least  
9 to the extent that's required by CEQA at that point.

10           But there's going to be follow-up questions on  
11 this and that. We will try to limit the parties. We will  
12 tell people to leave their fishing equipment home. They  
13 will have to, they will have to explain the relevance of  
14 their line of questioning. It's not going to be an  
15 educational process. We're going to deal with the few  
16 issues that remain. But I think we need to do it in that  
17 forum. Mr. Rostov.

18           MR. ROSTOV: Do you mind if I make a couple of  
19 points in response to Mr. Ratliff and Mr. McKinsey?

20           HEARING OFFICER KRAMER: No, go ahead.

21           MR. ROSTOV: I came to this proceeding believing  
22 that the applicant had requested a continuance and now it  
23 seems like the applicant is no longer requesting a  
24 continuance. So I'd like to make three points, I guess, why  
25 a continuance is necessary.

1           One is Mr. Ratliff said the PSD is a pre-  
2 construction permit and it would just be a waste of  
3 resources to keep forward with this process while we know  
4 that the EPA is going to take at least another year.

5           Second, I believe and the applicant agreed with us  
6 at one point, that the CEC regulations, you know, 20 Cal.  
7 Code Reg. Section 1752.3(a) requires a Presiding Member's  
8 Proposed Decision cannot issue until full analysis and  
9 compliance with air quality laws is made. Without the PSD  
10 permit you will not be able to make a full analysis of  
11 compliance with air quality laws.

12           Third, my understanding is that EPA is in the  
13 process of potentially giving back their PSD permitting to  
14 the San Diego Air District. And that could happen in the  
15 next three to four months. And if that happens the PSD  
16 permitting would once again become a state law issue and  
17 that would reopen the FDOC.

18           So given the fact that you can't comply with  
19 1752.3(a) and given the fact that the PSD permitting is in a  
20 state of flux, I think a continuance makes sense.

21           MR. RATLIFF: Commissioner, I have to respond to  
22 that, if I may?

23           HEARING OFFICER KRAMER: Dick Ratliff.

24           MR. RATLIFF: For staff. There is, the last I  
25 heard, some discussion between the Air District and EPA

1 about a new delegation agreement from EPA to the Air  
2 District to issue the PSD permit. The last I heard the Air  
3 District was considering this but had not committed to it.

4           If that occurs, the federal law with regard to  
5 delegation agreements is that the Air District is not acting  
6 as the Air District on a state law permit, it is acting as  
7 EPA. As, in fact, the regional administrator of EPA, when  
8 it issues a federal permit. It is not a state permit, it  
9 does not raise a state law issue. It is a federal permit  
10 issued pursuant to federal requirements that Region 9 would  
11 itself enforce. So there is no state law issue involved in  
12 the state PSD permitting. That is the law.

13           Secondarily, the requirement that we determine  
14 compliance with air quality laws is one that would be no  
15 more than a predictive and an empty prediction on the part  
16 of the analysis that we would give regarding a PSD permit.  
17 Because that permitting process is going to unfold in the  
18 future anyway and it is going to unfold without defined  
19 guideline or guidance from the EPA with regard to, probably  
20 the most interesting aspect of that permit, which is  
21 greenhouse gases.

22           So it would be an empty, an impossible and a  
23 useless analysis that the staff would do of PSD  
24 requirements. That are going to be enforced and are going  
25 to be in a pre-construction permit anyway. So I just wanted

1 to point out the impossibility of trying to structure the  
2 proceeding in accordance with what has just been suggested.

3 MR. MCKINSEY: I had one comment I wanted to --  
4 we're using the word "continue" and a couple of different  
5 meanings, I think. I believe when the City was using  
6 continuance they meant continuing to move forward.

7 We didn't actually use the word "continuance" in  
8 our motion, it was a request to postpone the evidentiary  
9 hearing. So we used the term "postpone," which often is  
10 continuance in a legal context. But we certainly mean now  
11 that what we are prepared to do is proceed.

12 However, our primary concern remains that the  
13 project with Land 2 and 3 remains unpalatable. It looks  
14 like it's unviable. It's a very difficult situation for the  
15 applicant because the project that is being proposed -- in  
16 other words, the condition Land 2 and 3 which would  
17 incorporate and mandate to some -- under the process in them  
18 the retirement of 4 and 5 and the tear-down of that  
19 structure, to be something that the applicant is not willing  
20 to include in the project at this point.

21 And what may need to get resolved to save everyone  
22 a lot of hassle is to conduct that testimony or that  
23 briefing to decide whether the Committee can remove Land 2  
24 and 3. If they feel they cannot and they wish to approve a  
25 project that has components in it that the applicant is not

1 willing to prepare, the applicant may need at that point to  
2 simply do something other than continue the project.

3           The real issue lurking in here is that the way the  
4 project is crafted in the revised PMPD imposes a fiscal  
5 burden on the project that appears to make it unviable. And  
6 the applicant doesn't want to waste anybody's time if it  
7 remains that way.

8           And so what we're suggesting is that we would urge  
9 written testimony that can address these topics and the  
10 Committee could decide at that point if there appears to be  
11 a viable path. Maybe have another status conference and  
12 address whether we need to have evidentiary hearings and try  
13 to move a project forward that can be presented.

14           This is a really complex point because of the way  
15 in which -- it's the very same thing that happened when Land  
16 2 and 3 got included. And then the parties said, well wait  
17 a minute, with some legitimacy. There are all these aspects  
18 now of the project that aren't analyzed. And so then  
19 everybody started scrambling to analyze them.

20           But those aspects of the project are what the  
21 applicant is indicating they are not willing to include in  
22 the project. They can't. They are simply not viable  
23 because of the fact that they don't have any means of  
24 funding the demolition of that structure because they don't  
25 have any form of a redevelopment process or a municipal

1 entity that they could work with to do that.

2 HEARING OFFICER KRAMER: Ms. Siekmann.

3 MS. SIEKMANN: I just wanted to get a  
4 clarification from Mr. McKinsey. So what you're basically  
5 saying is that you would like Land Use 2 and 3 withdrawn so  
6 that you can build the new project and leave the old one  
7 sitting idle and abandoned and rotting?

8 MR. MCKINSEY: Well, that wasn't my words. And I  
9 could even indicate that as we have indicated, in all  
10 likelihood Units 4 and 5 are going to operate forever; and  
11 certainly into the future with no deadline for those. And  
12 so I don't think anything is sitting idle on the other side  
13 of the tracks.

14 That was our point originally. It was in the  
15 interest of everyone to find some harmonious way to bring  
16 that about. But clearly we weren't able to achieve that. I  
17 think that's what Commissioner Boyd wanted and it's what he  
18 meant when he made his comment that no good deed goes  
19 unpunished.

20 But we're not, I didn't make any comments about an  
21 idle, decrepit building and certainly the City even has  
22 authority to deal with such conditions. But this project  
23 included the removal or the shutdown of Units 1, 2 and 3 and  
24 Units 4 and 5 remained operational and would continue to do  
25 so under this project.

1 Land 2 and 3 added Units 4 and 5 on a shutdown  
2 schedule and the removal of the structure. And what we're  
3 indicating is that project is not a project that the  
4 applicant can go forward with.

5 HEARING OFFICER KRAMER: Are you suggesting that  
6 if CECP is built that Units 4 and 5 might continue to  
7 operate even with it being constructed and operating?

8 MR. MCKINSEY: That is correct.

9 HEARING OFFICER KRAMER: How would the once-  
10 through cooling rules affect that?

11 MR. MCKINSEY: So the applicant has made filings  
12 with the Regional Board under the OTC retirement rules. And  
13 included within those are efforts at finding alternative  
14 means of preserving the operational Units 4 and 5. There's  
15 quite a few different environmentally accomplishable options  
16 available under those. The filing with the Water Board at  
17 this point keeps all of them open. And so there's -- at  
18 this point there is no process or anything that would  
19 mandate the retirement of 4 and 5, pending.

20 MS. SIEKMANN: Mr. Kramer?

21 HEARING OFFICER KRAMER: Ms. Siekmann.

22 MS. SIEKMANN: So, Mr. McKinsey. It is my  
23 understanding that NRG has filed -- I'm not sure what the  
24 document would be called -- about the OTC. And the only way  
25 that you would upgrade 4 and 5 with the once-through cooling

1 is if someone else paid for it.

2 MR. MCKINSEY: You know, I haven't -- I've looked  
3 at that filing once; it was a year ago, the Regional Board  
4 filing, so I am not familiar at this point with exactly what  
5 we said. But again, I think you're probably, maybe  
6 unintentionally, mischaracterizing what they said. Which  
7 is, there are many options to go forward but something has  
8 to pay for everything. And it --

9 MS. SIEKMANN: I read that document.

10 MR. MCKINSEY: So were you asking me a question or  
11 trying to cross-examine me?

12 MS. SIEKMANN: I just wanted to see what the  
13 applicant, you know, if you agree with that?

14 MR. MCKINSEY: I'm lost in the dialogue.

15 HEARING OFFICER KRAMER: Presumably somebody at  
16 NRG meant what they said in their filing. Okay.

17 MR. RATLIFF: Mr. Kramer, it seems to me that the  
18 fundamental problem here that I'm hearing is -- what I'm  
19 hearing I think from the applicant, if we're hearing the  
20 same things. That the applicant is saying, we are not  
21 really willing to go forward unless we know that Land Use 2  
22 and 3 are not going to be in the decision.

23 This creates a sequencing problem, I think, for  
24 the Committee because -- and we don't know really where to  
25 go when you're being asked to delete two provisions. And if

1 you don't then we don't go forward. If somehow you indicate  
2 that you do, it sounds like we do go forward and we go  
3 forward to hearing on those issues that do not pertain to --  
4 really it's just alternatives, I believe, and do not pertain  
5 to the Conditions 2 and 3.

6 So I don't know how you deal with that. I don't  
7 know what the -- but I think that is the issue in terms of  
8 sequencing. I'm kind of stumped because I don't know how I  
9 would deal with that. I don't know what to propose that  
10 might get you there. But I think that is the question.

11 MR. MCKINSEY: I've got one other person I think  
12 would like to speak on this. It's Scott Valentino from NRG.  
13 he's the Development Director for NRG West and he wants to  
14 make a couple of comments addressing this very topic. So I  
15 can quit speaking on his behalf.

16 HEARING OFFICER KRAMER: So could you please first  
17 spell your name for the court reporter.

18 MR. VALENTINO: It's Scott, S-C-O-T-T, the last  
19 name is Valentino, V-A-L-E-N-T-I-N-O.

20 HEARING OFFICER KRAMER: Go ahead.

21 MR. VALENTINO: I think one of the clarifications  
22 I wanted to make. And I think that, you know, in the  
23 discussions when Land 2 and 3 were introduced. I think John  
24 mentioned, you know, I think we have all stated, everything  
25 has to pay for itself. In other words, you know, we don't

1 know how long Units 4 and 5 will be needed for reliability.

2 When they're no longer needed, any future project on that  
3 portion, on that side of the property west of the tracks,  
4 has to justify the demolition of the building. Without that  
5 the building will remain in place and any future land use  
6 has to contemplate the cost of removing that.

7           You know, we represent -- we're a public company,  
8 we represent shareholders here. We obviously cannot make  
9 commitments that actually are going to be NPV negative. In  
10 other words, obligations that were never contemplated and  
11 that have no, have no positive return.

12           If at some point in the future those units are  
13 able to come down and the building is able to come down it  
14 will depend upon, ultimately, future redevelopment scenarios  
15 on the site. It really has nothing to do with what we're  
16 proposing on the east side of the railroad tracks.

17           I think, you know, one of the things from a  
18 larger, land use perspective. We have a lot of aspects that  
19 will impact that project going forward, including  
20 transmission infrastructure that is on the west side of the  
21 tracks that may or may not go away. That has a cost. As  
22 well as the Poseidon desalination facility that's going to  
23 be built on the west side of the tracks.

24           So I think our concern is primarily around mixing  
25 two different decisions here. What ultimately happens with

1 the portion of that property and, you know, lack -- and our  
2 inability to make commitments until we have further  
3 clarification around it.

4 MR. THOMPSON: Mr. Kramer?

5 HEARING OFFICER KRAMER: Mr. Thompson.

6 MR. THOMPSON: The City came here today, in good  
7 faith, prepared to deal with the motion of NRG on the delay  
8 or continuance of this proceeding. We also came with the  
9 understanding that Land 2 and 3 would be in there. And not  
10 only would the redevelopment of the west side of the tracks  
11 take place pursuant to Land 2 and 3 but it would also  
12 possibly satisfy the redevelopment requirements.

13 I feel we have been somewhat blind-sided. Not  
14 only on the schedule but on the implications of taking out  
15 Land 2 and 3. And I guess if we all go back to schedule we  
16 would like some more time because there's issues that we had  
17 put aside thinking that they were solved by those two  
18 conditions of certification that we would have to revisit.

19 HEARING OFFICER KRAMER: Okay. Anyone on the  
20 phone? Nobody has spoken up but does anyone on the phone  
21 have any comments on these issues?

22 (No response.)

23 HEARING OFFICER KRAMER: Okay. Mr. Thompson, I  
24 was kind of working on a decision tree for this, what I  
25 would call a bifurcated proceeding.

1           Of course, anything the Committee recommends, you  
2 know, has to go to the full Commission and there is never a  
3 guarantee. But I think one question that remains is does  
4 the Committee need more evidence before it could decide  
5 whether it was willing to recommend the removal of Land 2  
6 and 3?

7           And, you know, that has to be answered ultimately  
8 by the Committee but I would imagine most of the parties  
9 have a perspective on that. Mr. Thompson, I think, at least  
10 implied that the City would like produce either more  
11 evidence and/or argument on that point before the Committee  
12 decided.

13           Ms. Siekmann seems to be nodding her head saying  
14 that they would like to weigh in a little more.

15           Mr. Rostov is -- I can't read his face.

16           (Laughter.)

17           HEARING OFFICER KRAMER: And Mr. Ratliff, am I  
18 correct that staff is rather ambivalent since this isn't  
19 your, wasn't really your dog, so to speak?

20           MR. RATLIFF: No, we don't think -- we think  
21 you've got an exhaustive amount of testimony about this  
22 project and the benefits that it provides. The only  
23 relevance to Land Use 2 and 3 were to whether there was a  
24 benefit to the project, as far as we were concerned.

25           We felt that that benefit was apparent and the

1 Committee didn't disagree in its decision that said they  
2 would like to see more. So that was what led to 2 and 3 and  
3 that negotiated agreement. It was never staff's view that  
4 we needed more than what you've got and we think that it  
5 would only add to the amazing record of the procedure that  
6 we've already got to add another hearing on an open-ended  
7 issue such as that. So we don't, we don't want to encourage  
8 that.

9 HEARING OFFICER KRAMER: Okay. Mr. McKinsey, did  
10 you feel that more is necessary?

11 MR. MCKINSEY: I think I respect the rights of all  
12 the parties to respond to testimony. As to the topic that  
13 the City raises most clearly, which is, does the removal of  
14 Land 2 and 3 raise a question regarding the satisfaction of  
15 land use requirements such as an extraordinary benefit  
16 requirement? I think that that's something that they should  
17 have an opportunity to respond and comment on.

18 Procedurally speaking whether they're commenting  
19 on that by providing more evidence to you. Mostly I think  
20 that is legal argument regarding extraordinary benefit that  
21 can be accomplished through comments on a revised-revised  
22 PMPD, or you could take it in the form of hearings or  
23 workshops. But I do think they would get an opportunity,  
24 regardless of how the Committee proceeds to direct the  
25 parties. I don't think that we need an evidentiary hearing

1 or testimony more than we have. And in that sense we're on  
2 the exact same page as the staff.

3 MR. ROSTOV: Mr. Kramer, can I make a brief --

4 HEARING OFFICER KRAMER: Mr. Rostov.

5 MR. ROSTOV: My client is not involved in Land Use  
6 2 or 3 but it does seem like it's a dispositive issue. I  
7 think you were using the word "bifurcation." And if you  
8 were going to deal with these issues I would recommend that  
9 you would deal with Land Use 2 and 3 first before we did  
10 evidentiary hearings on the other issues that the Committee  
11 had ordered. And I'm not taking a position on how to deal  
12 with that. I think that should be left to the parties who  
13 are more interested.

14 HEARING OFFICER KRAMER: Okay. We're going to --

15 MR. BALL: Can I make a comment?

16 HEARING OFFICER KRAMER: Go ahead.

17 MR. BALL: Thank you. I thought --

18 HEARING OFFICER KRAMER: For the phone folks, give  
19 us your name.

20 MR. BALL: I'm sorry, Ronald Ball, city attorney  
21 and general counsel for the redevelopment agency.

22 I think we need to take a step back here. What  
23 we're doing today is not looking at -- at least I didn't  
24 think we were looking at particular conditions. And it's  
25 kind of remarkable, actually. The condition was proposed by

1 the applicant itself as being economically viable and now a  
2 short time later, two months later, it's going to make the  
3 project unviable economically.

4           But leaving that aside, the matter was remanded  
5 for a revised condition. Not because of Land 2 and 3 which  
6 were included, but because of the other conditions and the  
7 other arguments that were brought forth about the other  
8 conditions. And that's -- I thought that's why we were  
9 here. Not to discuss any particular set of conditions but  
10 to decide how to process the remanded, revised PMPD. In  
11 which case there would be testimony required, I think. And  
12 then it would require the recommendation of the full --  
13 discussion of all the arguments and issues when it comes  
14 back to a full Commission.

15           So I don't think it should be bifurcated. I think  
16 that should be, it should be all part of the same thing.  
17 And this will be included -- those conditions would be  
18 included, a discussion of those, along with any of the other  
19 reasons that the case was remanded for a revised PMPD.

20           HEARING OFFICER KRAMER: So in effect you're  
21 saying the applicant should just come to the hearing  
22 prepared to talk about everything but doesn't get, shouldn't  
23 get the opportunity to know if it's, as they said, wasting  
24 their time because they're going to have Land 2 and 3 to  
25 deal with as part of their permit.

1           MR. BALL: The proceedings, I thought, were a  
2 search for the proper conditions on licensing. Those are  
3 two conditions that may or may not be proper along with  
4 other conditions. No, I'm just suggesting that the limited  
5 issues that were raised by the Committee are those that are  
6 subject to evidence. And then when we return to the full  
7 Commission, that will be when all those things are argued  
8 again. They don't need additional evidence to be taken but  
9 only on the limited purposes that the Committee -- that the  
10 Commission had remanded it. Remanded for the proceedings  
11 and revised PMPD.

12           HEARING OFFICER KRAMER: As I recall the remand  
13 did give the Committee some options to adjust and add to the  
14 list so I think we have that flexibility.

15           And the purpose of committees in this Commission  
16 is to do the hard work of listening to all the testimony and  
17 sorting through the evidence. So if there was something  
18 that was going to be argued to them, they would want it to  
19 have been argued and discussed with this committee first.

20           So we're going to take a five minute break and the  
21 Committee is going to deliberate a little bit. Then we'll  
22 come back and continue our discussion. So we'll go off the  
23 record.

24           (Off the record at 4:11 p.m.)

25           (On the record at 4:34 p.m.)

1 HEARING OFFICER KRAMER: Okay, regarding the  
2 question of how to go forward and the, at least in the  
3 applicant's view, a precatory question about whether Land 2  
4 and Land 3 continue to be a part of the project.

5 What we want to do is invite any party who wishes  
6 to file additional comments. And this is in recognition  
7 that the request for most of us just came on our radar  
8 screens today. By close of business, and here that's five  
9 p.m. Pacific Daylight Time, on September 23rd. The parties  
10 are invited to, including the applicant, to send any  
11 additional written comments they want to provide on the  
12 question of how to resolve that question and the other  
13 questions that are before the Committee.

14 And then after that the Committee will consider  
15 all the comments and issue an appropriate order or orders  
16 following that time. Any questions about that?

17 MS. BAKER: Julie Baker.

18 HEARING OFFICER KRAMER: You're breaking up,  
19 Julie. Did you want to say something, Julie?

20 (No response.)

21 HEARING OFFICER KRAMER: From what I can tell on  
22 my control screen everything looks good.

23 MR. CUMMING: Her battery on her cell phone --

24 HEARING OFFICER KRAMER: Okay, she's changing her  
25 battery?

1 MR. CUMMING: No, I'm just guessing, because I'm  
2 on a battery-operated phone.

3 HEARING OFFICER KRAMER: Okay, could you say your  
4 name for our court reporter, sir.

5 MR. CUMMING: I'm Jack Cumming, C-U-M-M-I-N-G.

6 HEARING OFFICER KRAMER: Jack Cumming, C-U, double  
7 M, I-N-G. Your voice is a little bit soft so that's why I  
8 had to repeat it for the court reporter.

9 Ms. Baker, are you back with us?

10 (No response.)

11 HEARING OFFICER KRAMER: Okay, well, she'll  
12 certainly have the opportunity to file written comments. If  
13 she has a procedural question she can always, as many of you  
14 do, email me and I'll get back to her with the answer.

15 MS. BAKER: Okay.

16 HEARING OFFICER KRAMER: You're back.

17 MS. BAKER: Okay, yeah. My question was, the  
18 decision that the Commission will render on the comments on  
19 September 23rd, will those just be comments on Land 1 and 2?

20 HEARING OFFICER KRAMER: You mean 2 and 3.

21 MS. BAKER: Or 2 and 3.

22 HEARING OFFICER KRAMER: Well the question of how  
23 to go forward. Should we split it up into some kind of  
24 procedure about Land 2 and 3 and then after that's resolved  
25 have another hearing on the other issues or hear it all at

1 once? Do you think it's important that Land 2 and 3 be in  
2 there? That sort of thing.

3 MS. BAKER: Okay. But I guess what my question  
4 was, so that we file the comments on Land 2 and 3 at five  
5 p.m. on September 23rd and then the Commission will make a  
6 decision. But the decision will be on how to go forward,  
7 not just their decision on Land 2 and 3?

8 HEARING OFFICER KRAMER: Correct. So how to go  
9 forward is also a part of it. So if --

10 MS. BAKER: I understand now. I was just  
11 confused. Thank you.

12 HEARING OFFICER KRAMER: You're welcome.

13 MR. BALL: Can I make a suggestion before we go  
14 forward?

15 HEARING OFFICER KRAMER: Well let me just clarify  
16 that. In those comments we want all your substantive  
17 arguments about whether it's a good idea or not to take out  
18 those conditions and anything that's related to that  
19 question.

20 And if you have -- also if you have some thoughts  
21 about the timing of the schedule going forward we would like  
22 to hear that as well.

23 If you have major vacations planned that might be  
24 a good time to let us know about that too. It is so hard to  
25 get this many people available on any particular day. We

1 can't guarantee we can honor, you know, vacations. But, you  
2 know, if we have two or three choices we can perhaps make  
3 the -- certainly we'll try to make the choice where it  
4 inconveniences the fewest people.

5 Mr. Ball.

6 MR. BALL: Yes. The suggestion I was going to  
7 make is that this really was kind of an unnoticed motion for  
8 relief of particular conditions and now the parties are  
9 being asked to comment on that. Which is fine. But it  
10 seems like the most orderly way to do that would have the  
11 applicant file a motion and say exactly what it wants and  
12 what it wants relief from and then the other parties to  
13 comment on that motion.

14 That would give the Committee the benefit of  
15 arguments made in a logical order rather than comments  
16 guessing about what the scope of the proceedings will be and  
17 what the scope of the proceedings that the applicant  
18 requests and what the relief from which conditions the  
19 applicant wants.

20 So my strong suggestion is that the applicant be  
21 requested to make a motion and tell us what the, what the  
22 suggestions are on the proceeding and then the parties make  
23 comments in response to that. Leading to orderly  
24 information for the Committee.

25 MR. MCKINSEY: I would just say that I don't think

1 we made a motion. There aren't any conditions that exist  
2 yet because there isn't a decision. There is a proposed  
3 decision prepared by the Committee that was sent back so the  
4 Committee now has their normal proceeding in place. So that  
5 proceeding is tremendously flexible and doesn't require  
6 something formal and rigid like a motion. I think it was  
7 pretty straightforward what you suggested the parties do and  
8 I think that would work quite well.

9 MR. RATLIFF: Mr. Kramer, if I may? Dick Ratliff,  
10 staff counsel. We're satisfied going forward without a  
11 motion. We think we understand what's been proposed here.

12 Thinking it over and discussing it a little bit it  
13 seems to me that one of the ways the Committee might proceed  
14 would be to simply go forward with the evidentiary hearing  
15 on the discrete issues that the testimony addresses.

16 I don't want to say "unfortunately" but I think  
17 probably that requires us to go to San Diego and have a  
18 hearing. San Diego has always been nice to us so -- or  
19 Carlsbad has been, I should say, so we can probably suffer  
20 that. With or without knowledge of whether or not 2 and 3  
21 are going to be deleted.

22 We could go to hearing on those limited issues and  
23 let the Committee then reissue the PMPD with our without the  
24 conditions, depending on what the Committee thinks is  
25 appropriate after it's taken the comment that you're

1 referring to. I don't see how else actually you can  
2 proceed, when I think about. So maybe that's the way you  
3 want to proceed.

4 MS. SIEKMANN: Mr. Kramer?

5 HEARING OFFICER KRAMER: Ms. Siekmann.

6 MS. SIEKMANN: If you so choose to -- Kerry  
7 Siekmann, Terramar. If you so choose to take Mr. Ratliff's  
8 suggestion then I would just request that all of us are  
9 given a fair amount of time to prepare because we thought  
10 there was a delay going on so we are not caught up. Like it  
11 sounds like the applicant is saying that they were ready to  
12 do testimony next week. Because we thought there was an  
13 extensive delay that was going to happen. So I just wanted  
14 to make that comment, thank you.

15 MR. THOMPSON: Mr. Kramer, if I may?

16 HEARING OFFICER KRAMER: Mr. Thompson.

17 MR. THOMPSON: Two short points. Number one, I  
18 don't think we can say right now what our comments are going  
19 to be on taking out Land 2 and 3. This is a surprise. But  
20 our comments may include material that would need or that  
21 other parties here may need to or feel may need to respond  
22 to. And I would put that in front of you for consideration.

23 With regard to Mr. Ratliff's suggestion that we  
24 move forward. One of the items that the full Commission  
25 remanded to the Committee for consideration was the

1 alternatives of the three PPAs signed by SDG&E at the Public  
2 Utilities Commission.

3           While I am not requesting for your consideration  
4 that you wait until the final decision be out on that, I  
5 would put in front of the Committee that hearings are  
6 scheduled for November 7 and 8. The parties in the Public  
7 Utilities Commission proceeding are just about everybody  
8 here. I'm not sure that the Energy Commission is there but  
9 the City, SDG&E, which is an important party to this. It  
10 may, it may make the record better to have that record  
11 available to this Commission.

12           HEARING OFFICER KRAMER: Well, the Committee  
13 previously ruled on that particular ground for delaying the  
14 hearing in the scheduling order of August 12 and declined to  
15 postpone on that basis. So I don't see any reason to change  
16 that ruling at this point.

17           MR. THOMPSON: Other than the fact that we now  
18 understand that construction is not going to start for at  
19 least a year and there is no real rush, as I can see it.

20           HEARING OFFICER KRAMER: Well, I don't think the  
21 Commission has ever considered the existence or non-  
22 existence of PPAs as a particularly relevant factor in  
23 whether or not power plants are permitted. There are other  
24 rounds of solicitations. That's another deciding factor in  
25 whether a project gets built. But the Commission doesn't

1 require PPAs in order to apply or be approved and doesn't  
2 deny the project, to my knowledge, because it did not have a  
3 PPA.

4 MR. THOMPSON: I understand and I apologize if I  
5 was not clear. What I believe that the Commission asked the  
6 Committee to look at were the alternatives of those three  
7 projects as an alternative to this project. And I was  
8 suggesting that that issue of the alternatives, the  
9 feasibility of those projects, the selection process et  
10 cetera, are all issues that will be heard in the CPUC as a  
11 forum. That was my suggestion.

12 HEARING OFFICER KRAMER: We're not counting on  
13 them to collect and sift our evidence for us so staff, one  
14 of staff's assignments was to conduct that alternatives  
15 analysis. And if you don't think they have done adequately  
16 certainly that would be the topic of some of the discussion  
17 at an evidentiary hearing at some point in the future.

18 So we're going to stick to the plan, which is  
19 written comments on the question of -- the Applicant has  
20 basically asked the Committee to make an initial  
21 determination, if you will, of whether Land 2 and 3 could be  
22 omitted from the project. And as suggested, you know, they  
23 probably would not further pursue the project if the  
24 Committee was unwilling to recommend removal of those  
25 conditions.

1           So to answer that question, we are first  
2 soliciting additional input from the parties, in written  
3 form, by close of business on September 23. And then we  
4 will, we will consider those comments, the comments that  
5 have been made here today, and issue some kind of order  
6 which may be, may be an answer to the applicant's question  
7 one way or another.

8           Or it may simply say, we need more information and  
9 in order to do that we are going to have to go forward to  
10 hearing. And then the applicant, if that is the answer,  
11 will have to decide if it wants to continue to pursue the  
12 application.

13           But today we are not saying what the answer is.  
14 We are simply saying we are going to give you more time  
15 since most of you are very new to that question, to gather  
16 your thoughts and convey them to us on paper.

17           So let's move on then to the other question which  
18 was, relief from the requirement that a paper copy of  
19 filings accompany filings that are sent to the other parties  
20 by email.

21           Given that at least in the next few weeks there  
22 won't likely be any major filings of volume I can tell you  
23 that on a Commission-wide basis we are working on a  
24 protocol.

25           As you may recall, last year I think it was, maybe

1 even earlier, we adopted what I call an opt-out process  
2 where people could say "I don't need paper" and then we  
3 indicated that on the Proof of Service. We are on the edge  
4 of converting to an opt-in process where everyone will be  
5 assumed to not need paper unless they say so.

6 But we are working on a standard protocol for that  
7 that will apply across all the cases so that we don't have  
8 slightly different formulations of the standard because  
9 that, you know. For people who participate in more than one  
10 case that's annoying when you have to remember the special  
11 little rules for each case. That may come out in a couple  
12 of weeks. Just as a -- so for those reasons we are going to  
13 wait until we have that general protocol that we can adopt  
14 in each case, including this one.

15 But I don't recall anybody who responded to  
16 Terramar/Power of Vision's motion saying anything that was  
17 not in favor of changing the rule. In fact, helpfully,  
18 several of you said at that time when you responded, I don't  
19 need paper. And we have -- I don't know if we've issued it  
20 yet but we have modified the Proof of Service List to list  
21 those, those new people who became what we call the "email  
22 preferred."

23 So just stand by. It's likely that you will get  
24 the positive answer to your motion that you're looking for  
25 but it will be a general rather than a case-specific

1 formulation of that.

2           So with that do we have any other business we need  
3 to discuss today?

4           MR. ULMER: Hearing Officer Kramer, this is Andrew  
5 Ulmer with the California ISO. I just had one question.  
6 I've understood the procedural next steps. After parties  
7 submit comments September 23rd and there's some additional  
8 order, do you anticipate having a subsequent prehearing  
9 conference to discuss the next procedural steps after that  
10 order issues?

11           HEARING OFFICER KRAMER: Well, it all depends.  
12 It's possible we could issue a new schedule and that's why  
13 I'm soliciting the vacation information. We may need to  
14 have another conference.

15           We will, when we get to the point of an  
16 evidentiary hearing, we will have a true prehearing  
17 conference to go over witness time estimates and that sort  
18 of thing so we can prepare a schedule that people can rely  
19 upon. But until we decide that next question we won't know  
20 precisely how it's all going to lay out.

21           MR. ULMER: Okay, that's fair enough. I simply  
22 wanted to raise a procedural question about the opportunity  
23 maybe to attend any evidentiary hearing, if one occurs, via  
24 telephone. To make the ISO as a witness available  
25 telephonically to the parties.

1 HEARING OFFICER KRAMER: Well let me just ask.

2 MR. ULMER: I can raise it at a later time.

3 HEARING OFFICER KRAMER: Well let me ask today.

4 Is anybody going to object to the ISO witnesses being on the  
5 telephone?

6 MR. ROSTOV: I would prefer that they are at the  
7 hearing. It's just easier to see people when you're asking  
8 questions. So yes.

9 HEARING OFFICER KRAMER: Mr. Rostov has made --  
10 posed an objection. So, Mr. Ulmer, please feel free to,  
11 either yourself or via staff, renew your request prior to  
12 the prehearing conference and we'll discuss it at that  
13 point.

14 MR. ULMER: Okay, that's fine. We'll be prepared  
15 to discuss it in terms of, you know, whatever is an  
16 acceptable approach for purposes of an administrative  
17 hearing before the CEC.

18 HEARING OFFICER KRAMER: Okay, any other business?

19 Thank you all for your attention and we are -- did  
20 you want to say something?

21 PRESIDING MEMBER DOUGLAS: Thank you all for your  
22 attention, we're adjourned.

23 (Whereupon, at 4:53 p.m. the  
24 Committee Conference was adjourned.)

25 --oOo--

## CERTIFICATE OF REPORTER/TRANSCRIBER

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 19th day of September, 2011.

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JOHN COTA