

PREHEARING CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

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

)

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

FRIDAY, DECEMBER 9, 2011
10:00 a.m.

Reported by:
Peter Petty
Contract No. 170-09-002

COMMITTEE MEMBERS PRESENT

James D. Boyd, Vice Chair and Presiding Member

Karen Douglas, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Paul Kramer, Hearing Officer

Galen Lemei, Advisor to Commissioner Douglas

Tim Olson, Advisor to Commissioner Boyd

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
NRG West

Joe Garuba

Bob Therkelsen

Scott Valentino (via WebEx)

INTERVENORS

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

William Rostov (via WebEx)
Center for Biological Diversity

Rob Simpson (via WebEx)

Kerry Siekmann
Terramar Association

Julie Baker
Power of Vision

ALSO PRESENT

Andrew Ulmer (via WebEx)
Bill Di Capo (via WebEx)
California Independent System Operator

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P R O C E E D I N G S

10:08 a.m.

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2
3 PRESIDING MEMBER BOYD: I think we're ready now
4 and organized to get started; we have the system here
5 working.

6 Welcome to the prehearing conference. There was
7 an extensive hearing notice about the processes and
8 procedures before us over a series of days and I am not
9 going to repeat them, other than to welcome you to this
10 prehearing conference.

11 I am Jim Boyd, the Presiding Commissioner for the
12 siting committee for the Carlsbad Energy Center. I am
13 joined at the dais by, two chairs to my right by
14 Commissioner Karen Douglas who is the Associate Member of
15 the siting committee. And of course, our Hearing Officer,
16 Paul Kramer, will be taking over this hearing in a minute or
17 two from me. On my left is my advisor, Tim Olson; and to
18 Karen's extreme right is her advisor, Galen Lemei.

19 So thank you all for being here. And I think with
20 that, since I have a terrible cold and am isolating myself
21 from everybody else, I am just going to turn it over to the
22 Hearing Officer to continue with the introductions of the
23 staff and all the parties so I don't start coughing here in
24 a minute. Thank you.

25 HEARING OFFICER KRAMER: Okay, thank you,

1 Commissioner Boyd. Good morning, everyone. Can somebody on
2 the phone confirm that we are being heard okay.

3 MR. ROSTOV: Hi, this is Will Rostov. I can hear
4 you well.

5 HEARING OFFICER KRAMER: Okay, thanks. We'll get
6 to introductions in the room first and then we will go to
7 folks on the telephone. So let's begin with the applicant.

8 MR. MCKINSEY: Thank you, Hearing Officer Kramer.
9 I am John McKinsey, counsel to the applicant. And also
10 with me is George Piantka from NRG.

11 HEARING OFFICER KRAMER: Staff?

12 MR. RATLIFF: Dick Ratliff, staff counsel. With
13 me is Mike Monasmith, the project manager.

14 HEARING OFFICER KRAMER: City of Carlsbad?

15 MR. THOMPSON: Thank you. Allan Thompson, special
16 counsel to the City and Redevelopment Agency. To my left is
17 Ron Ball, the city attorney. Behind me, Joe Garuba, who is
18 familiar to you all, and Bob Therkelsen who is also familiar
19 to you all.

20 PRESIDING MEMBER BOYD: You know, you people are
21 all way to familiar to all of us. This has been a long
22 process.

23 MR. THOMPSON: Indeed.

24 HEARING OFFICER KRAMER: CURE hasn't been with us
25 for awhile because I think their concerns were satisfied but

1 is anyone here from CURE or on the telephone?

2 (No response.)

3 HEARING OFFICER KRAMER: Okay, I guess not. The
4 Center for Biological Diversity?

5 MR. ROSTOV: This is Will Rostov representing the
6 Center for Biological Diversity. I want to thank you for
7 allowing phone-in access today.

8 HEARING OFFICER KRAMER: You're welcome.
9 Terramar?

10 PRESIDING MEMBER BOYD: Folks, we'll have to
11 share. We'll try to stretch them over there.

12 MS. SIEKMANN: Kerry Siekmann representing
13 Terramar.

14 HEARING OFFICER KRAMER: And Power of Vision?

15 MS. BAKER: Julie Baker representing Power of
16 Vision.

17 HEARING OFFICER KRAMER: Okay. Rob Simpson? Is
18 Mr. Simpson on the telephone or Ms. Sommer?

19 (No response.)

20 HEARING OFFICER KRAMER: Okay, we have standing up
21 behind the table there our Public Adviser, Jennifer
22 Jennings. Did you want to say something?

23 MS. JENNINGS: Mr. Simpson is going to try to call
24 in by phone but wasn't sure about the connection.

25 HEARING OFFICER KRAMER: Okay. Ms. Jennings is

1 available to help any members of the public if they have
2 questions about how to participate in our process. She is
3 the person to see.

4 Another non-party but hopefully an active
5 participant next week is the California Independent System
6 Operator. Do we have anyone from CAISO with us on the
7 telephone or in the room?

8 MR. ULMER: Hearing Officer Kramer, hi, this is
9 Andrew Ulmer with the California ISO. I'm on the line. And
10 I think also joining will be Bill Di Capo who is an attorney
11 with the California ISO as well as dennis Peters with the
12 California ISO. We should all be on the phone.

13 MR. DI CAPO: Yes, this is Bill Di Capo, I'm here.

14 HEARING OFFICER KRAMER: Okay. Andrew, could you
15 spell your last name for our court reporter?

16 MR. ULMER: Absolutely. It's U-L, M as in Mary,
17 E-R. I'm calling in from the East Coast, unfortunately I'm
18 stuck out here, and so Bill has kindly agreed to take the
19 baton for me and come down to Carlsbad with Robert Sparks
20 next week.

21 HEARING OFFICER KRAMER: Okay. Bill, can you
22 spell your last name for us?

23 MR. DI CAPO: Sure. It's Di Capo, D-I, capital C-
24 A-P-O.

25 HEARING OFFICER KRAMER: Is there a space at all?

1 MR. DI CAPO: Yes there is, D-I, space, capital C-
2 A-P-O. Thank you.

3 HEARING OFFICER KRAMER: Okay. And Mr. Peters,
4 you're not with us yet, I guess?

5 (No response.)

6 HEARING OFFICER KRAMER: Okay.

7 MR. ULMER: I --

8 HEARING OFFICER KRAMER: Go ahead.

9 MR. ULMER: This is Andrew Ulmer again. I believe
10 Dennis intends to phone in but he may be stuck away from a
11 telephone at the moment.

12 HEARING OFFICER KRAMER: Okay. Let's see. On the
13 telephone we have several people who have not entered their
14 name into the system. Let's see. Mr. Valentino, Scott,
15 Valentino. You're there, correct?

16 MR. VALENTINO: Yes I am.

17 HEARING OFFICER KRAMER: Okay. Does anyone else
18 on the -- and you're going to be a witness next week, as I
19 recall.

20 MR. VALENTINO: Yes I am.

21 HEARING OFFICER KRAMER: Okay. Does anybody else
22 who is on the telephone want to identify themselves for the
23 transcript.

24 MR. SIMPSON: Sure. This is Rob Simpson.

25 HEARING OFFICER KRAMER: Okay, thank you,

1 Mr. Simpson. Speak again for me so I can see which line
2 you're using.

3 MR. SIMPSON: Hello, it's Rob.

4 HEARING OFFICER KRAMER: Okay, one more time.

5 MR. SIMPSON: Did that work for you? Rob Simpson
6 on the line here.

7 HEARING OFFICER KRAMER: I guess so. Yes, okay.

8 Okay. The purpose of today's Committee Prehearing
9 Conference is to discuss some issues in preparation for the
10 hearing on Monday. We are intending for that to start at
11 8:30. Mr. Ratliff, you mentioned to me the other day that
12 the ISO witnesses would like to be done by noon. Is that
13 still the case? Maybe one of them wants to confirm that.

14 MR. RATLIFF: I think, yes, you should probably
15 ask them but my understanding is that they have engagements
16 in San Francisco later in the day and want to be able to
17 leave the hearing at noon. So we would propose to have them
18 have their opportunity to testify and be questioned in that
19 time frame.

20 HEARING OFFICER KRAMER: Okay. Now that will be
21 one of the constraints we'll have to consider. Are there
22 any other timing issues that any of the parties have for
23 their witnesses?

24 MR. MCKINSEY: Hearing Officer Kramer, this is
25 John McKinsey. We have one constraint. And I think the

1 schedule, at least in the order therein is fine. Our
2 Alternatives witness, Robert Mason, is not available until
3 the afternoon. He has another commitment in the a.m. and he
4 wouldn't be available until 1:00 p.m. or later.

5 HEARING OFFICER KRAMER: Okay. Well the order
6 that is in the spreadsheet is simply the way the words fell
7 to the paper so that will likely change.

8 And for those of you on the telephone who are
9 parties, you would have received an email from me a little
10 while ago with a copy of a spreadsheet that we have used
11 before to try to add up the time estimates for the different
12 topics and see if it's all going to fit within the time that
13 we have allotted. In this case that's basically from 8:30
14 a.m. on Monday until -- we were hoping to get a dinner break
15 at about 4:30. But we are starting public comment
16 officially at 5:30 on Monday and we really want to fit all
17 of this into that time period.

18 So let's then -- I suppose first we should deal
19 with some of the pending motions because that, at least in
20 theory, could affect the presentation of evidence. Those
21 that I have in mind that were not already dealt with, there
22 were several requests made during the time when evidence was
23 exchanged to extend the time for the parties to reply to the
24 applicant's and the staff's evidence and we, the Committee
25 did extend that until December 5th, and we consider that to

1 be our response to those motions.

2 Still pending, though, are data requests from
3 Power of Vision.

4 The Center for Biological Diversity asked to
5 strike a Dennis Peters quote from the applicant's testimony.

6 Mr. Simpson has three data requests, a request to
7 postpone the hearings and a request to take official notice
8 of the Palmdale PSD appeal. I'm not sure if he filed it or
9 someone else. But anyway the existence of that separate
10 proceeding that is not before -- it's before, I imagine, the
11 Environmental Appeals Board or perhaps the local air
12 district but it's not before the Energy Commission.

13 And then finally the City of Carlsbad has asked us
14 to take official notice of a couple of their land use
15 decisions that they made recently. I noticed, Mr. Ball,
16 that you included all those materials as exhibits, correct?

17 MR. BALL: Yes sir, I did and hopefully they came
18 through. There was some problem in the transmission, I
19 think, but we tried our best to make sure it was available
20 to everybody.

21 HEARING OFFICER KRAMER: Right. Is anybody still
22 not with electronic copies of the City's filings? We had it
23 uploaded to the Commission website so anybody could download
24 it from there. So I'm hoping that problem is resolved.

25 Okay, hearing none --

1 MR. RATLIFF: Before we --

2 HEARING OFFICER KRAMER: -- so then is it fair to
3 say --

4 MR. RATLIFF: Before we move on could I just
5 verify that that was, I think, a 72 page transmission, is
6 that correct?

7 MR. THOMPSON: I think that's right. There were
8 two documents that the City of Carlsbad asked for official
9 notice. We included those documents in our documents, did
10 not assign numbers to them. But for the parties'
11 convenience we included the -- we included those documents
12 at the end of our other documents.

13 MR. RATLIFF: And just to make sure I have it, it
14 was the 72 pages that came, I think, under Ron Ball's
15 message?

16 MR. THOMPSON: Yes.

17 MR. RATLIFF: Okay, thanks.

18 HEARING OFFICER KRAMER: I think they were given
19 an exhibit number though. I'll find it here. I almost have
20 the exhibit list done and I'll be sending that around later
21 today. Ordinance CS-159 is Exhibit 448 on my new list and
22 CS-160. Wait, those are different ones, aren't they?

23 MR. THOMPSON: Yes. If you're looking at the
24 exhibit list that we submitted, at the tail end of that
25 there should be the description of the two documents that we

1 asked for official notice. If my draft of that document
2 turned up as the same in the final we did not assign or give
3 numbers to them, although we could.

4 HEARING OFFICER KRAMER: Well, there probably is
5 some value in assigning them just because then we could get
6 a contemporaneous copy of it, it won't change over time.
7 Because one of the problems when people cite to web pages is
8 if a year from now we go to look it up, it may not be there
9 anymore. So I always insist that we reduce those things to
10 a PDF file, a printout of the page, so that we have a
11 historical record.

12 So then we'll grant -- is there any objection to
13 taking official notice of those actions of the City?

14 (No response.)

15 HEARING OFFICER KRAMER: Hearing none then we will
16 grant that, the City motion to do that. And I'll add i to
17 the exhibit list as well just so we can keep track of it.

18 Okay then working from the top again. Power of
19 Vision's data request.

20 MR. MCKINSEY: Hearing Officer Kramer, I have one
21 question. There was also -- there may not have been a
22 motion but it's a request and the supplemental testimony
23 from Mr. Zinn by the City that came in on Thursday. It
24 isn't cause to have a motion but it is a request and I don't
25 know if that means -- and I think the idea was that it was

1 intended to be direct, original testimony, correct, and not
2 rebuttal testimony?

3 MR. THOMPSON: That's right.

4 MR. MCKINSEY: That came in a day late and I think
5 they filed it so they gave an explanation and made a request
6 for that. And I'm not raising it because we have any
7 objections to it, I just wanted to highlight that we might
8 consider that a motion.

9 HEARING OFFICER KRAMER: Okay, let's finish that
10 thought then. Does anybody object to that testimony of
11 Mr. Zinn coming in as his testimony? It is already on the
12 exhibit list as -- but of course it's not accepted yet.

13 (No response.)

14 HEARING OFFICER KRAMER: Okay, it sounds like
15 that's not going to be an issue.

16 MS. SIEKMANN: I just have one question. Was it
17 added into this witness list worksheet? Did it add to their
18 time? I just want to make sure that --

19 HEARING OFFICER KRAMER: It wasn't clear to me
20 that they wanted him to be a live witness. Did you?

21 MR. THOMPSON: We did want to offer him up. Our
22 direct of Mr. Zinn is going to be very short and we can take
23 time from our -- the time that we asked for cross on the PSD
24 permit and give him half of that. I think that's all we
25 would need. We finally remembered the game of trading

1 minutes and banking minutes.

2 HEARING OFFICER KRAMER: Well, and we're going to
3 have to discount people too, I think. Okay, refresh me as
4 to which topic he would be under?

5 MR. THOMPSON: The PSD topic. The first one,
6 federal PSD.

7 HEARING OFFICER KRAMER: Okay, so he's in there,
8 okay. So then he would be along with Mr. Rubenstein,
9 another witness.

10 MR. THOMPSON: If that's a panel, yes sir.

11 HEARING OFFICER KRAMER: Okay. And then you --
12 I'm sorry,, he's not the applicant. Okay, so add --

13 MR. RATLIFF: Mr. Kramer, since we're into that
14 topic area I wanted to clarify that we did not file any
15 testimony on PSD, we merely addressed it in our brief. And
16 we wanted to make Will Walters available to the Committee
17 for any questions that they may have and also Steve Moore
18 likewise on that issue. But we did not have any testimony
19 and we don't intend to offer any.

20 HEARING OFFICER KRAMER: Okay, so you're planning
21 on having Steve Moore there?

22 MR. RATLIFF: Yes.

23 HEARING OFFICER KRAMER: Okay. Ms. Siekmann, you
24 had suggested you were going to ask him some questions as
25 well, is that still the case?

1 MS. SIEKMANN: Yes.

2 HEARING OFFICER KRAMER: Okay. That can be either
3 by direct or cross examination?

4 MS. SIEKMANN: Of him, yes.

5 MR. ROSTOV: This is Will Rostov. While you're on
6 the federal PSD permit. I notice that I was down for 35
7 minutes and on that topic I only need ten.

8 HEARING OFFICER KRAMER: Cool.

9 MR. RATLIFF: And likewise you have a blank for
10 staff under cross examination and we won't have very much
11 cross examination because certainly we may have none at all.

12 But I would like to have at least the possibility, if
13 Mr. Zinn does testify, to be able to ask some questions.

14 HEARING OFFICER KRAMER: Five or ten?

15 MR. RATLIFF: Five, no more than five, I think.

16 MR. MCKINSEY: And since we're on that topic,
17 Hearing Officer Kramer, the applicant is in almost the exact
18 same camp regarding Mr. Zinn. That if he testifies we would
19 probably want to ask him some -- a few questions as well.
20 So we didn't indicate any cross but that we may want to ask
21 him some questions so we'd want say --

22 HEARING OFFICER KRAMER: Five?

23 MR. MCKINSEY: About five minutes.

24 HEARING OFFICER KRAMER: Okay.

25 MR. RATLIFF: And Mr. Kramer, another thing. I'm

1 sorry, I think I may have mis-spoke when I said we have no
2 testimony on PSD. Actually Will Walters did address in one
3 paragraph the issue of PSD in his testimony that we filed
4 yesterday. So I think I mis-spoke when I said we didn't
5 have any or intend to offer any. He did address it in a
6 very limited manner.

7 HEARING OFFICER KRAMER: Okay, understood. Okay.
8 Well we are hearing no objections to Mr. Zinn's testimony
9 and it is on the exhibit list so it can be moved into
10 evidence at the appropriate time on Monday.

11 Back then to Power of Vision's data request. They
12 wanted, in essence, additional information about the
13 operations of the Encina plant. Ms. Siekmann -- I'm sorry,
14 Ms. Baker, I think you've got a really tough row to hoe to
15 convince us that at this late stage in the proceeding, on an
16 issue that is not new, so to speak, but refinement and
17 perhaps a variation on themes that have played out
18 throughout the case, that we should stop and wait for more
19 discovery. So we'll give you a chance to argue to that.

20 MS. BAKER: Well unfortunately Dr. Roe is the one
21 who does the technical kinds of stuff and he was the one who
22 wanted more information on this so it will be difficult for
23 me to argue that. But I would suggest that it is relevant
24 in the terms of the PSD permit because of the look-back
25 period. And so you would have more recent and accurate data

1 when we're talking about the look-back times in the years in
2 terms of the PSD permit. So I believe that is why he
3 requested it.

4 HEARING OFFICER KRAMER: Okay. Well, he can --
5 will he be there on Monday?

6 MS. BAKER: Yes.

7 HEARING OFFICER KRAMER: Okay. Well he can
8 attempt to explain in the context of the PSD discussion.
9 And maybe this would be a good time for me to explain where
10 we're coming from.

11 We are trying to find out if it is, at least on
12 the one hand, if it's necessary to wait for this Commission
13 to wait for the PSD permit to be more fully fleshed out. I
14 think Mr. Rostov suggested at one point in time that there
15 be at least a draft decision from the federal agencies, if
16 not a final decision.

17 But an alternative that we also need to explore is
18 whether it's possible for the Commission to go ahead. And
19 we all understand that without a PSD permit the project is
20 not going to get constructed. I think somebody at one of
21 the more recent hearings suggested that the PSD is a
22 prerequisite only to operating a plant but it's -- I think
23 people have now all clarified that it's a construction
24 prerequisite.

25 So if you think that the plant is -- if you know

1 that the plant is not going to be built unless they get that
2 permit. And one question that the Committee has is, why is
3 it necessary for us to wait to see if that actually happens
4 when we could do our portion of the permitting. And then
5 with perhaps a condition that makes it clear that no
6 construction can start until the permit is issued and then
7 just let the feds go on their way and do their part of it.

8 But that will be part of the discussion on Monday.

9 I think it may help people focus if they know that that's
10 -- you may, of course, have other theories that you want to
11 try to convince us we should accept but the Committee is
12 looking at the question kind of from that standpoint. Yes,
13 we'd like to know all we can about what's likely to be in
14 the permit but we're not necessarily of the mind that
15 incomplete knowledge there is a reason to postpone our
16 efforts to finish our decision on this permit.

17 MS. BAKER: I understand. Although I would say
18 that it was this body that put the PSD permit in an
19 applicability to these proceedings on the list so we were
20 merely trying to fulfill our role as intervenors with as
21 much information as we possibly could have.

22 HEARING OFFICER KRAMER: No, I understand. And I
23 wanted to make that clear because a lot of the testimony is
24 about the details of the PSD permit and what's required.
25 And, you know, saying, well, you know, it's too speculative.

1 And frankly, hearing that it's speculative may or may not
2 be a roadblock in the perspective of the Committee.

3 So we will deny Power of Vision's data request.

4 MS. BAKER: But there was a second request.

5 HEARING OFFICER KRAMER: Remind me of that one.

6 MS. BAKER: It was the, the financial viability of
7 conditions Land-2 and -3, that the applicant themselves
8 wanted to be relieved of those conditions, Lands 2 & 3,
9 because of their -- they were economically unviable. So our
10 position is that if that's the case then we would like
11 information from them that makes that so.

12 HEARING OFFICER KRAMER: That's in the nature, it
13 sounds like, of asking the applicant to perform research for
14 you and prove something to you. They're going to have to
15 prove -- perhaps if it's relevant to that question, they're
16 going to have to prove that portion of their argument at the
17 hearing. So you're certainly able to ask them questions.

18 But our rules about discovery don't allow one
19 party to assign homework to the other. In other words, you
20 have to go look things up and perform calculations and that
21 sort of thing. All you can ask for is data. And I don't
22 know that you're asking for any specific data.

23 MS. BAKER: Well, we're asking, to quote from the
24 request, it says: "request data showing that the project is
25 viable without conditions Land-2 and Land-3.

1 HEARING OFFICER KRAMER: Does the applicant want
2 to respond at all to that or any other party before we rule?

3 MR. MCKINSEY: Hearing Officer Kramer, I think we
4 would say that what you're asking us to do is make a case
5 and not provide data, so it's not a data request as much as
6 it is justify a position we have taken. I think that's
7 exactly what we have to do, that the Committee asked us to
8 do anyway as part of this proceeding. And so to some extent
9 what we would have tried to do in response to that type of
10 data request is what we have done in our testimony.

11 But we do -- I would say that we would object to
12 the data request probably more than anything else. The
13 timeliness issue is always an issue. But if we had some
14 data and we could get it fast enough that wouldn't be an
15 issue but I don't really understand that there is a
16 particular piece of data. That at this point I don't think
17 we could produce any data by Monday morning as well.

18 HEARING OFFICER KRAMER: And the economic
19 viability of projects, it's not a -- in some ways it's not a
20 factor at all in Commission decisions but it's certainly
21 never an important factor. Because you're asking a
22 different question than whether the extra cost of Land-2 and
23 -3 would so burden the project that it's economically
24 impossible to build and operate it. You're asking, if I
25 understand correctly, if the project is viable even without

1 those conditions, right?

2 MS. BAKER: Well, I mean, this was brought up by
3 the applicant at the September meeting, it wasn't something
4 that we just pulled out of thin air and are trying to cause
5 anybody heartburn. It was brought up by the applicant
6 themselves when they asked to be relieved of those
7 conditions.

8 HEARING OFFICER KRAMER: Well, they have provided
9 some evidence based on another project's actual worth.

10 MS. BAKER: Well, we believe though that that
11 other project has some different issues and I believe we
12 submitted that in our response that we filed on December 5th
13 on why those two projects are not exactly the same. And so
14 that you can't necessarily look at one and say, that's what
15 it's going to cost on the Encina remediation.

16 HEARING OFFICER KRAMER: Okay. Well you are free
17 to ask questions along those lines of their witnesses at the
18 hearing but we are going to deny the request for them to
19 provide data.

20 Okay, the next request or motion was the Center
21 for Biological Diversity's request to strike a quotation of
22 Mr. Peters, Dennis Peters from the ISO, from the applicant's
23 testimony. Mr. Rostov, Mr. Peters -- well, let me ask
24 Mr. Ratliff. Is Mr. Peters, is going to be present but was
25 he planning on testifying?

1 MR. RATLIFF: No. And I wanted to clarify that
2 and I guess this is the time to do it. The ISO has
3 clarified and they can, if necessary, clarify further that
4 only Mr. Sparks is a witness at the hearing.

5 HEARING OFFICER KRAMER: Okay. Mr. McKinsey, do
6 you, do you have any strong feelings about that quote?

7 MR. MCKINSEY: Yes sir, Mr. Kramer, I think the
8 quote is relevant. Perhaps we could understand the basis.
9 But if it's like a hearsay rule I don't think that's an
10 issue in an administrative proceeding. You can quote other
11 statements and things made. Certainly the parties are free
12 to challenge the authenticity of evidence or provide
13 counter-evidence but to us it's relevant information and we
14 shouldn't have a reason to strike it simply under some type
15 of a hearsay reason.

16 HEARING OFFICER KRAMER: Well, and the --

17 MR. RATLIFF: All of our testimony basically cites
18 to unsworn forms of statements, whether they be documents or
19 otherwise. I mean, that's hearsay but there is no
20 prohibition on hearsay, as Mr. McKinsey just stated. So I
21 don't, I don't see any purpose in going through and trying
22 to strike all the hearsay statements in all of our
23 testimony. We wouldn't have much left, probably, when we
24 get done.

25 HEARING OFFICER KRAMER: And our hearings would be

1 probably five times as long.

2 MR. ROSTOV: It wasn't -- excuse me. This is Will
3 Rostov. It wasn't a hearsay objection. The objection was
4 that he made that comment on public comment and the Chair of
5 the Energy Commission specifically said that he wasn't sworn
6 and that wasn't testimony and now it's being used as
7 testimony.

8 And my second point is that the staff has put on
9 testimony from ISO and that will become just a cross
10 examination. Mr. Peters' statement as well. So whatever
11 ISO's testimony is should be what's challenged in the
12 evidentiary record, not Mr. Peters' statement. The staff's
13 had opportunity now to put in the testimony and ISO will
14 also have the opportunity to defend that testimony on
15 Monday.

16 HEARING OFFICER KRAMER: Okay. So then you will
17 be -- to the extent that Mr. Peters said something that
18 upset your notion of the truth, you will be asking about
19 those statements of the witness, Mr. Sparks, is that right?

20 MR. ROSTOV: Correct.

21 HEARING OFFICER KRAMER: Okay. So then any harm
22 or -- you are not harmed because you are unable to cross
23 examine that statement.

24 MR. ROSTOV: Well, I don't know. That's my point.
25 I don't know what Mr. Sparks' position is on that statement.

1 But there is just no need to have that statement because it
2 wasn't part of the evidentiary record. The ISO has now put
3 something in the evidentiary record. If they wanted to put
4 that statement verbatim in they had the opportunity.

5 HEARING OFFICER KRAMER: Okay. Well, the
6 Committee will deny your request but we will give the
7 appropriate weight to the unsworn testimony that, as you
8 said, was recognized by the Chairman of the Commission as
9 that and not intended to be evidence as such. But I'm
10 presuming that Mr. Sparks will cover the same ground and
11 hopefully in much more detail.

12 MR. RATLIFF: Mr. Kramer, if I can just add. I
13 mean, this agency has always allowed other agencies with
14 responsibilities in regard to the licensing of power plants
15 to make comments that were unsworn. They could be sworn or
16 unsworn. We have allowed them to be made in these
17 proceedings and there's really no, I think, good reason why
18 we can't put them in our testimony. Certainly it is
19 probably much more reliable than other hearsay that we put
20 in our testimony, all of us, including the Center for
21 Biological Diversity.

22 HEARING OFFICER KRAMER: Okay. Well, and we have
23 left it in with the appropriate weight.

24 MS. SIEKMANN: Mr. Kramer, could I ask a question?

25 HEARING OFFICER KRAMER: Go ahead.

1 MS. SIEKMANN: Is it normal for CAISO to be a
2 witness at most power plant hearings?

3 HEARING OFFICER KRAMER: When there's an issue.
4 Quite often they give us input on things like the amount of
5 system improvements, the studies that tell us how many
6 transmission lines may have to be upgraded or circuit
7 breakers, et cetera. So they're very involved in that since
8 they run that system. But this issue of need does not come
9 up in every case.

10 Okay, so then on to Mr. Simpson's request, his
11 data request. Well, let's take the easiest one first.
12 Mr. Simpson requested that we postpone the hearings. That
13 was one of many. We denied those previously and we'll deny
14 this one. Subject, of course, to our determining after we
15 hear the PSD issue whether there is a need to wait further
16 before we issue the Commission decision. But we won't know
17 that until after we have heard that discussion on Monday.
18 But regardless we want to use the time to hear all the other
19 issues and put the record to a close on those.

20 Your data request, Mr. Simpson. Please summarize
21 it briefly and argue for it.

22 MR. SIMPSON: Well, there's a few things What I'm
23 looking for is an FDOC that shows that this thing is
24 credibly legal. The staff analysis of that FDOC. I'd like
25 the applicant to be adequately identified so that we know if

1 we're dealing with NRG, is this a modification of the
2 existing plant, is this a new facility? How they're
3 categorized for these land use issues.

4 I mean, my understanding was that this was a
5 modification of an existing facility. Now they're saying
6 well that's not us, that's some other guys that own the
7 existing facility, we just have the new stuff. I think the
8 proposed air district license is for a modification of the
9 existing facility. So I think adequately identifying the
10 project and the impacts was the question of -- does it
11 require a PSD permit or not? And demonstrate for the
12 Commission why it either does or doesn't.

13 HEARING OFFICER KRAMER: Those sounds like legal
14 arguments and ultimate questions, not requests for specific
15 information. And to the extent you're talking about the
16 FDOC, I think the record is closed on that point. The Air
17 District has written a letter telling us that they do not
18 believe that they have to revise it in light of the letter
19 that EPA sent withdrawing, basically, the PSD exemption or
20 waiver. So on that basis your data request is denied.

21 Finally you had, you wanted us to take official
22 notice of the Palmdale PSD appeal. What would the purpose
23 of that be? How would that inform the decision of the
24 issues that remain on the table for hearing on Monday?

25 MR. SIMPSON: Well both the applicant and staff

1 have referenced that this project is going to be okay
2 because Palmdale got a PSD permit. But the fact is, I
3 appealed the Palmdale PSD permit so it's not a final permit.
4 For the opposite reasons that they say Palmdale is okay, I
5 am demonstrating through the Palmdale appeal and my comments
6 on the Palmdale project, that Palmdale is not okay and in
7 turn Carlsbad is not okay.

8 MR. RATLIFF: Mr. Kramer, if I may? Could I ask
9 on what basis official notice would be taken of a pleading
10 filed in another proceeding of this nature?

11 HEARING OFFICER KRAMER: Well that is another good
12 clarifying question. Are you asking that we just accept the
13 pleading you filed, Mr. Simpson, or the whole record in that
14 case or what?

15 MR. SIMPSON: The whole record, which at this
16 point is primarily the pleading. There hasn't been a
17 response yet.

18 HEARING OFFICER KRAMER: Okay, so they're simply
19 just allegations on your part. You're free to make
20 arguments.

21 MR. SIMPSON: Well no, there's a permit that's not
22 final there.

23 HEARING OFFICER KRAMER: Oh, because it's under
24 appeal?

25 MR. SIMPSON: That's correct.

1 HEARING OFFICER KRAMER: It sounds like a legal
2 argument. Which you can testify to the status of your
3 appeal and argue the legal consequences if you want. But we
4 don't need to have your pleading in that case, not should
5 we. It is not appropriate to make legal arguments to us by
6 simply giving us legal arguments that you made in some other
7 case. You need to make the effort to make those arguments
8 specific to this project that's before us, and you're
9 welcome to do that. But we will deny your request to take
10 official notice.

11 I think you have at least one or two of the
12 documents, or maybe the one pleading from that case, that is
13 -- you list it as an exhibit and I have on the tentative
14 exhibit list. So we'll just remember that in effect we've
15 denied it and it would be appropriate to refuse to accept
16 that as an exhibit in this case as well.

17 While I have --

18 MR. SIMPSON: But it will remain as part of my
19 public comment?

20 HEARING OFFICER KRAMER: Okay. You also had a
21 pleading from the Chabot College District that was included
22 in your materials.

23 MR. SIMPSON: I'm sorry, I didn't, I didn't --

24 HEARING OFFICER KRAMER: You had a pleading --

25 MR. SIMPSON: I didn't hear a response to my

1 question. You're saying not only is administrative notice
2 not taken but the exhibit is struck from the record?

3 HEARING OFFICER KRAMER: We are probably not going
4 to accept it as an exhibit. And if you want to make it a
5 public comment I think you need to explain to us what it
6 means. We don't want people just giving us documents and
7 expecting us to try to read them and formulate the argument
8 that you're trying to make to us. You need to spell it out,
9 if you will, for us. So this document, it's actually a
10 pleading in the Eastshore case filed by the Chabot College
11 District. You included that with your materials, do you
12 recall?

13 MR. SIMPSON: Yes, I think that was part of my
14 public comments on the, it's at the bottom of the public
15 comment on the Palmdale project.

16 HEARING OFFICER KRAMER: Okay, so it was a part of
17 the Palmdale -- so it was a part of, it was an exhibit to
18 the Palmdale comment document then?

19 MR. SIMPSON: Yes.

20 HEARING OFFICER KRAMER: Okay. So then it would
21 suffer the same fate as the Palmdale comment itself. Okay,
22 thanks for clarifying that.

23 MR. SIMPSON: Let me make sure I have this clear.
24 Everything I submitted as part of my public comment,
25 whether you struck it as exhibits or not, that's certainly

1 your choice but I don't think it's appropriate to be
2 striking my public comment.

3 HEARING OFFICER KRAMER: Well, we understand
4 that's your position. Okay, I think that deals with all of
5 the motions that I kind of scraped out of the various
6 pleadings. Does anybody believe that I have missed one that
7 is still pending?

8 MR. ROSTOV: Actually, this is Will Rostov from
9 the Center. And there was, we did request judicial notice
10 of the EPA letter but I believe that was included as an
11 exhibit in Matthew Zinn's testimony. So I am just going to
12 withdraw that request because it would be an exhibit as part
13 of that testimony.

14 HEARING OFFICER KRAMER: Yes, I think four or five
15 of you included that. You're talking about, I think it was
16 the July 18th letter?

17 MR. ROSTOV: Yes.

18 HEARING OFFICER KRAMER: Yes, it's on many lists.
19 Okay, any other motions we need to deal with?

20 Okay, let's then turn to the, to the worksheet.
21 Let's see. We've added about 20 minutes so far and we were
22 at nine hours total, which is probably a little bit too
23 much.

24 MR. ROSTOV: And I subtracted 25 minutes on the
25 federal PSD permit.

1 HEARING OFFICER KRAMER: That's right, yes.
2 Presumably you were holding on to trade that with somebody.
3 Okay, so we're about at the same place we were then, 9.4
4 hours.

5 MR. RATLIFF: Mr. Kramer, if I may, since we're
6 talking about scheduling and the importance of completing
7 the hearing in timely way. Staff would like you to
8 consider, first of all doing the alternatives and grid
9 reliability issues first in order that the CAISO can meet
10 their obligations to leave the hearing early.

11 And we would also request that you consider doing
12 what you did in prior proceedings whereby you used the
13 ability of the Committee to have informal hearings, which is
14 to say that you might empanel all of the alternatives
15 witnesses at one time. And as was the format in the prior
16 hearings, have each of them give a statement and have each
17 of them be able to interact with the Committee directly and
18 answer your questions.

19 And to the extent necessary, and I realize that
20 this is something of a hybrid process but it was necessary
21 to accommodate the wishes of some of the intervenors, to
22 allow cross examination to the extent that's necessary by
23 the parties -- by the counsel to the parties or the parties
24 themselves. But I think if you do it that way, rather than
25 taking one witness at a time in a serial nature, it's more

1 likely that we would accomplish getting the alternatives and
2 grid reliability issues done in time for the ISO to leave.
3 And those are kind of overlapping issues so I think it's
4 best that they be heard together.

5 HEARING OFFICER KRAMER: We certainly agree and
6 that was our intention. Right now the grid reliability
7 issues add up to 2.2 hours and we only have four witnesses.

8 That seems like more time than we should need. Mr. Rostov,
9 you've got the biggest cross examination block there, you're
10 asking for 45 minutes. Do you think you're going to need
11 all of that?

12 MR. ROSTOV: Probably not. I probably should do
13 it in 30, especially if it's the appearance before me. And
14 it looks like there's other intervenors.

15 HEARING OFFICER KRAMER: Okay.

16 MR. ROSTOV: I will say that there was -- sorry.
17 There was a bunch of rebuttal testimony put in yesterday,
18 which I haven't fully reviewed. But I intend on all my
19 cross examination to be as short as possible.

20 HEARING OFFICER KRAMER: And for the alternatives,
21 so far we're adding up to two hours. Mr. Ball, from the
22 City's perspective what's your big issue there? In some
23 ways this was meant to be just an update of all the sections
24 to account for any new impacts that might result from the
25 three new projects. Staff's testimony was basically to the

1 effect that they didn't find any. So how are we -- is this
2 really kind of the effect of the cross-pollenization between
3 the need issue and the PPAs?

4 MR. RATLIFF: I'm sorry, Mr. Kramer, what topic
5 are we on at this point?

6 HEARING OFFICER KRAMER: Alternatives.

7 MR. RATLIFF: Oh, alternatives.

8 HEARING OFFICER KRAMER: Yes. I'm trying to see
9 why that's up at two hours.

10 MR. BALL: That's the one, three new --

11 HEARING OFFICER KRAMER: Right.

12 MR. BALL: Three new PPAs and the effect on
13 cumulative analysis. Our intention was to provide the
14 testimony of Mr. Garuba and Mr. Hogan on those alternatives
15 that hadn't been considered previously. I think the
16 Committee will benefit from the testimony from both of those
17 witnesses.

18 HEARING OFFICER KRAMER: Okay, so they're pretty
19 much related to the alternatives aspect then?

20 MR. BALL: Yes sir.

21 MR. RATLIFF: And Mr. Kramer, the staff objects to
22 Mr. Hogan being a witness for what is essentially a legal
23 brief. I don't think CEQA legal briefs are testimony. I
24 think that they are briefs. Just as my briefs are briefs
25 Mr. Hogan's briefs are briefs and these are the things they

1 can file in court. We shouldn't be wasting our time, which
2 is, I think, quite precious and limited, on his brief.

3 HEARING OFFICER KRAMER: As a general matter, we
4 don't want people just orally presenting their testimony
5 that has already been written down.

6 Let me ask you, Mr. Ratliff, you had ten minutes
7 for staff. Did you intend for them to present anything or
8 just be available for questions?

9 MR. RATLIFF: You're talking about page three, the
10 PPA alternatives?

11 HEARING OFFICER KRAMER: Right.

12 MR. RATLIFF: Well, we'll have -- we have
13 testimony that was filed in August and we have testimony
14 that was filed yesterday, which I think is really very much
15 the nub of what the hearing is about. It's about the PPA
16 projects as an alternative to the CECP and it's about the no
17 project alternative, in that context and about the
18 reliability issues in San Diego. I think, like I say, I
19 think these are probably not easily divorced from grid
20 reliability. I think they'd have to be all considered
21 together.

22 But yes, we have affirmative testimony that will
23 be summarized. It has already been filed but will be
24 summarized by Mr. Jaske and very briefly by Mr. Monasmith,
25 whose name doesn't appear here. And I don't expect that to

1 take more than the ten minutes or so you have allocated.
2 But I think that the City has also filed fairly significant
3 testimony on this issue and I really think that's what the
4 hearing is about so I suspect that, you know, the City wants
5 to take some time to present their testimony as well.

6 HEARING OFFICER KRAMER: Okay.

7 MR. THOMPSON: Mr. Kramer, if I could. If we're
8 talking about the top of page three, the impact of the three
9 PPA projects. If the staff witnesses -- let me leave it
10 there. If the staff is presenting witnesses on the
11 environmental impacts of demolition and remediation, which
12 was a -- we have no questions on that, if that helps.

13 MR. RATLIFF: Right. And I thought maybe that was
14 under a different category called Conditions Land-2 and -3.

15 MR. THOMPSON: Well, you know, I started off here
16 referencing page three and I was wrong and that's why I cut
17 myself short.

18 MR. RATLIFF: I was a little bit confused too by
19 the way it's been set forth in the schedule. But if we're
20 talking about the three PPA alternatives I think --

21 MR. THOMPSON: We do have cross.

22 MR. RATLIFF: Right, right.

23 HEARING OFFICER KRAMER: Well, I think you have
24 certainly made the case for combining the two, the
25 alternatives analysis and the PSD permit. So let me ask, if

1 those two are combined is that likely to reduce the --

2 PRESIDING MEMBER BOYD: Grid reliability.

3 MR. MCKINSEY: Grid reliability.

4 HEARING OFFICER KRAMER: I'm sorry, yes, grid
5 reliability and alternatives. Will that likely reduce the
6 total time? What do you think?

7 MR. RATLIFF: That's our hope and expectation.

8 MR. THOMPSON: I guess I don't understand why they
9 would be combined. I see grid reliability as an issue that
10 possibly would come about if an override is considered.
11 Other than that I am not so sure how it plays into the
12 alternatives analysis of the three PPAs that we were asked
13 to comment on by the Committee. I am not understanding
14 combining them, I guess.

15 PRESIDING MEMBER BOYD: Come, Mr. Thompson, you
16 have been associated with these kinds of hearings for a
17 long, long time. You must see the connection.

18 MR. RATLIFF: I don't see how they're divisible,
19 actually. And if you read our testimony from Mr. Jaske I
20 think you'll see that they are one and the same. I don't
21 know how you can talk about one without the other.

22 HEARING OFFICER KRAMER: Yes. If one does not
23 eliminate the need for the other because of reliability
24 issues then they probably cannot be alternatives, right? Is
25 that the argument?

1 MR. RATLIFF: Yes.

2 HEARING OFFICER KRAMER: Okay. Well let's look at
3 some of the other players -- topics. Overrides. There's
4 apparently -- there's the City's direct testimony and then
5 cross examination from two of the intervenors. So applicant
6 and staff, so far at least, haven't expressed any interest
7 in being in that conversation, it's just a conversation
8 among the intervenors.

9 MR. MCKINSEY: Hearing Officer Kramer, this is
10 John McKinsey for the applicant. You know, this is a topic
11 that largely could either be one of two things. It could be
12 a legal argument about whether or not there is a basis for
13 an override. In other words, whether it's been established,
14 which I think is largely the task of the Committee to
15 evaluate the decision, and whether there is a necessity for
16 it.

17 And most of that is the type of information that
18 has been heavily looked at in both the other -- the original
19 evidentiary hearings as well as the other. So we didn't
20 feel a need to add anything else into what has already been
21 presented, especially in the oral testimony and cross
22 examination that would be presented to the Committee on
23 Monday. Generally speaking, you know, the topic has been
24 very heavily vetted and very much exhausted and we didn't
25 see the need to try to go back again and walk through City

1 LORS and whether the project complies with them or not.

2 The only other piece in here is perhaps the basis
3 for an override but you're taking that topic on in things
4 like grid reliability. And so you've got another topic that
5 addresses the question of whether there's a need for the
6 project and the role that the project plays in the region.
7 But again, that information would advise the Committee as to
8 whether or not there is a basis and a justification for an
9 override. So we had difficulty with this topic as a
10 testimony topic beyond the need for an override and we think
11 that comes through in all the other questions of LORS
12 compliance and land use and other things like that.

13 MR. RATLIFF: And Mr. Kramer, likewise the staff
14 is not filing any testimony on the issue of override. We
15 have already, we think that has already been addressed. If
16 you're talking about benefits of the project I think that
17 has already been addressed in other staff testimony long
18 ago. If what the Committee wants is a statement of the
19 staff position, in that regard we can provide it, but we'll
20 provide it merely as a statement, as a summary of what our
21 view is and our take is on the project rather than
22 additional testimony providing evidence for override.

23 MR. THOMPSON: There is a difference. If you'll
24 read Mr. Therkelsen's testimony, it is based upon his
25 extensive experience here at the Commission. How the staff

1 approached override in other cases. The conversations that
2 went on, the deliberations that went on with staff. It was
3 intended to give, in his opinions and his experience, some
4 context to the override analysis.

5 I would agree with you that a legal document on
6 the requirements for override, which I think was actually
7 put in by Mr. Rouse, probably does not -- you would not sway
8 me to include strictly the legal arguments. But that's not
9 what Mr. Therkelsen does. He is not a lawyer, he is not
10 testifying as a lawyer on the legal requirements.

11 MS. SIEKMANN: Mr. Kramer, may I ask a question?

12 HEARING OFFICER KRAMER: Hold on a second. We'd
13 like -- is this directly on this, Ms. Siekmann?

14 MS. SIEKMANN: Yes it is.

15 HEARING OFFICER KRAMER: Go ahead.

16 MS. SIEKMANN: The applicant did provide testimony
17 on overrides, whether they decided to put a witness name or
18 not. So we rebutted it. And I believe that gives us the
19 opportunity to rebut what they wrote.

20 HEARING OFFICER KRAMER: No, I think that's right.

21 What we're -- our concern is we are not sure of the
22 relevance of Mr. Therkelsen's testimony as Mr. Thompson has
23 described it. If he is simply going to basically summarize
24 it then I think we'd like that time for something else. So
25 Mr. Thompson, you want to address the -- the concern would

1 be more clear --

2 A, overrides are decided very much on a case-by-
3 case basis, on the facts in a particular case; and B,
4 they're decided by the Commissioners, not by the Commission
5 staff. And so the -- you know, what the staff thinks about
6 it is relevant as argument. But I don't know that the way
7 staff came about coming to their recommendation is
8 particularly helpful for the Commissioners that have to do
9 it on their own. Applying their own values and current
10 policies, rather than historical methodologies, if you will.

11 MS. SIEKMANN: Mr. Kramer, wouldn't that be the
12 same thing -- This is Kerry Siekmann, Terramar.

13 It seems to me that that's evidence that's
14 testimonial evidence. And also, unfortunately, there has
15 been concerns by many of us as intervenors that some of the
16 language that's been put forth by staff had kind of an edge
17 to it. And so it seems to me that Mr. Therkelsen is an
18 expert on being in that position and may be offering value
19 to the whole hearing and everyone involved of when he ran
20 staff how he evaluated these things. So maybe we could get
21 a different perspective along with, you know, how these
22 things happen.

23 MR. THOMPSON: Mr. Kramer, if you were asking me
24 if we had reserved cross time for staff on this issue,
25 there's none here with regard to staff. And they have made

1 statements that we disagree with but we didn't ask for cross
2 time here, if you were asking about the minute numbers.

3 HEARING OFFICER KRAMER: Okay, yeah. Overrides,
4 in my mind, really it's a policy. How it's weighing, you
5 know, the benefits of the project against the unmitigated
6 impacts or the LORS non-compliance issues. And it's more in
7 the realm of argument.

8 So I am not necessarily saying that we -- because
9 we are not ruling yet until we get to the hearing that we
10 would exclude Mr. Therkelsen's document but I think we're
11 trying to -- but we don't want a 20 minute summary of it
12 when, you know, we can read it. And of course the other
13 parties then are free to, having read it, to ask questions
14 about it.

15 MR. THOMPSON: There has been additional material
16 filed in rebuttal after we filed our testimony. I think the
17 gist of the 20 minutes -- and if you want you can cut that
18 down to 10 because I think we can do it in that amount of
19 time. Is mostly a comment on the rebuttal that came in
20 after we filed our testimony.

21 MR. RATLIFF: And Mr. Kramer, I think it seemed to
22 me that Mr. Therkelsen's testimony was -- had two different
23 natures. One was essentially about past Commission and
24 policy practice -- Commission staff and policy practice, and
25 attitude with regard to the issue of override. And the

1 other, as I recollect from my reading of it, had to do with
2 the logic of override essentially in the context of what
3 need for -- what would be the, the reasons. The reasons or
4 I guess the absence of reasons, in his view, of the need for
5 an override in terms of Public Resources Code Section 25525.

6 And that secondary portion I think has some
7 discussion of the issue of need. Essentially it goes to the
8 issue of the no project alternative. And so we don't have
9 any objection to Mr. Therkelsen calling that -- for the City
10 calling that testimony and for Mr. Therkelsen to participate
11 on a panel on the issue of alternatives. I find his
12 testimony very interesting and there's no reason why, in our
13 view, why he shouldn't be allowed to participate on such a
14 panel to discuss the alternatives.

15 I mean, if the Committee decides they don't want
16 to hear it we are not going to object or argue with you
17 about it but we don't, we don't ourselves have any objection
18 to his participation on that issue, given the nature of his
19 testimony, particularly with regard to the no project
20 alternative.

21 HEARING OFFICER KRAMER: And currently there are
22 no witnesses listed for staff, is that, is that correct?

23 MR. RATLIFF: Well --

24 HEARING OFFICER KRAMER: On overrides.

25 MR. RATLIFF: Well, we're talking -- you have put,

1 you know, you have listed his testimony under "override."
2 And certainly his testimony does go to the issue of
3 override, which we have no witness on and which, you know,
4 we see his -- if what he has said is testimony it's more --
5 it's testimony on a policy issue, it's more of a policy
6 statement.

7 But our thought was that his testimony more in its
8 essence, or in the essence that it was interesting to us,
9 was on the issue of alternatives. So we thought he would
10 appear as an alternatives witness more likely, not as a, not
11 as a override or offering evidence --

12 I think what you stated in your order is you
13 wanted any additional evidence of override to be -- any new
14 arguments about override to be put forward. I think what
15 he's put forward is essentially a policy statement when he
16 shouldn't. But it's in the context, I think, of
17 alternatives that he's making that statement, it would seem
18 to me. I hope Mr. Thompson agrees with me on that. But if
19 so, then it seems to me the right place for him to testify
20 is really with the alternatives witnesses.

21 HEARING OFFICER KRAMER: Well, the
22 characterization was not mine but the City's. Mr. Thompson,
23 do you think he would be more effective in the alternatives
24 discussion?

25 MR. THOMPSON: I'd prefer him to be where he is

1 right now because I think that the alternatives is a portion
2 of what goes into the deliberation and consideration of
3 items that may or may not make up an override. However,
4 having said that, if it's the Committee's desire to lump
5 them together, absent something thrown at me from the back
6 of the room, I think it's probably okay.

7 PRESIDING MEMBER BOYD: I for one, my fellow board
8 members here, am not real comfortable with this being a
9 stand-alone subject. I like the discussion about rolling it
10 into the other area. And Bob Therkelsen is a respected
11 former employee and a friend and I have a lot of respect for
12 him. However, you have got -- what has to be realized, that
13 in the two capacities that are relevant to this discussion,
14 A, he was the Deputy overseeing siting, B, he was the
15 Executive Director, the role of both to the Commission is to
16 make recommendations to the Commissioners and the
17 Commission. But the Commission makes the ultimate decision
18 based on the input it receives from lots of folks and is
19 very, very familiar with the whole issue of override and its
20 legal ramification. So I for one would not throw anything
21 at Mr. Thompson but go along with his concurrence and the
22 idea that perhaps it should be part of the other subject. I
23 don't think override as a stand-alone subject belongs here.

24 ASSOCIATE MEMBER DOUGLAS: I agree with
25 Commissioner Boyd. I am much more interested in

1 Mr. Therkelsen's comments in the context of alternatives
2 than in the context of telling us how the siting division
3 once went about making override recommendations to the
4 Commission.

5 HEARING OFFICER KRAMER: Okay, so we'll move
6 Mr. Therkelsen to alternatives. Ms. Siekmann and Ms. Baker,
7 you were the only two to ask for cross examination. And you
8 pointed out that the applicant had a little bit of testimony
9 in there. So would you be accepting of moving all of your
10 time over into alternatives as well? Just combining
11 overrides --

12 MS. SIEKMANN: If you're combing the categories,
13 no problem.

14 HEARING OFFICER KRAMER: Okay. Would you need the
15 same amount of total time?

16 MS. SIEKMANN: Terramar.

17 HEARING OFFICER KRAMER: You had 15 minutes for
18 Power of Vision and 10 minutes for Terramar.

19 MS. SIEKMANN: Yeah, I mean --

20 MR. MCKINSEY: This is John McKinsey for the
21 applicant; I had a question. Were you looking for a -- it
22 wasn't clear to me who you wanted to cross examine in the
23 overrides topic. The issue would be in here. Obviously, if
24 there's somebody over in alternatives or -- and especially
25 if grid reliability morphs into that. You're going to have

1 a big panel with a whole lot of people and you might want to
2 ask the same questions. But the key is whether there's
3 going to be a person there that had, you know, the answer.
4 In other words, who it was that you wanted to ask questions
5 to on this topic?

6 MS. SIEKMANN: Well you had, you had testimony on
7 this topic.

8 MR. MCKINSEY: And that's what I was getting at,
9 it wasn't clear to me. Did you want to question Ron Rouse,
10 for instance?

11 MS. SIEKMANN: Whomever your witness is for this
12 category based on your testimony is who I would want to
13 question, yes.

14 HEARING OFFICER KRAMER: So we'll add Mr. Rouse to
15 the applicant's. So if we combine grid reliability and
16 alternatives and overrides that's about five hours right
17 now. Actually a little less than that. I apologize because
18 my loaner laptop is not allowing me to manipulate the
19 spreadsheet correctly. Okay, so we really haven't cut much
20 yet.

21 Another important discussion is Land-2 and -3,
22 where I don't think there's all that much evidence as such.
23 There's a little bit of discussion of the cost, I suppose,
24 of the tear down. Then there's some policy discussion about
25 what is appropriate as far as the burden, if any, that's put

1 on the power plant development as opposed to the, to the
2 redevelopment of the Encina site. Right now people have
3 estimated 1.7 hours and it's all in little increments. Is
4 there any room in there to reduce the time a little bit?

5 MS. SIEKMANN: Terramar would take five minutes on
6 direct.

7 HEARING OFFICER KRAMER: Okay, as opposed --

8 MR. THOMPSON: Mr. Kramer, we have, we have 20
9 minutes down there for Ms. Fountain and we can half that.

10 HEARING OFFICER KRAMER: Thank you.

11 MR. MCKINSEY: Hearing Officer Kramer, this is
12 John McKinsey for the applicant. We actually are probably
13 only just tendering Mr. Valentino for questions from the
14 Committee and for whatever cross examination the parties
15 wish to direct at him. We put down ten minutes, it could be
16 five, it could even be zero.

17 HEARING OFFICER KRAMER: I'll take it down to five
18 for estimating purposes.

19 Mr. Ratliff, staff, are they going to be actively
20 involved in this discussion or just available for comments?

21 MR. RATLIFF: Well we never considered the
22 conditions of certification to be ours. We never -- I mean,
23 we did come back and analyze them for the environmental
24 impacts but we never proposed them and we never objected to
25 them. And we don't know, frankly, we weren't able to muster

1 the expertise, if we even could have, to address in any
2 useful way, which of the parties are right on the financing
3 of the project in lieu of an obligation to tear down the
4 existing facility should it eventually close in its
5 entirety. So no, we don't have any witness or any testimony
6 on this. We're agnostic on this issue.

7 HEARING OFFICER KRAMER: Okay, so then you would
8 be just subject to cross examination.

9 MR. RATLIFF: No, we -- we don't have a witness so
10 we won't be subject to cross examination. I guess I would
11 like to have the possibility of asking questions but
12 probably won't.

13 HEARING OFFICER KRAMER: Okay, but we're talking
14 about Land-2 and -3.

15 MR. RATLIFF: Right.

16 HEARING OFFICER KRAMER: And somehow I got a list
17 of names here, it must have come from your filing.

18 MR. RATLIFF: Well, I tell you, this is where I
19 get confused. Land-2 and -3 is an issue because the
20 applicant has said it has to be either modified or removed.

21 HEARING OFFICER KRAMER: Right.

22 MR. RATLIFF: And the City wants to keep it in.
23 That's what I think of as Land-2 and -3. We did -- but if
24 you are talking about the environmental impacts of Land-2
25 and -3, yes, we very definitely have testimony on that. And

1 that is the people who are listed, Mike Monasmith, Eric
2 Knight, Alvin Greenberg, William Walters, yeah. And they,
3 they can summarize their testimony probably in no more than
4 ten minutes or thereabouts, I would think.

5 HEARING OFFICER KRAMER: Well, do they even need
6 to summarize it?

7 MR. THOMPSON: Let me take that a step further.
8 Do they even need to attend? We have no questions on the
9 environmental impacts of demolition.

10 HEARING OFFICER KRAMER: Does any other party have
11 questions about that?

12 MS. SIEKMANN: On demolition?

13 HEARING OFFICER KRAMER: Yes. In other words, are
14 there going to be environmental impacts that could be
15 problematic from the act of tearing down and clearing the
16 site?

17 MS. SIEKMANN: Yes, there are cumulative impacts,
18 Terramar feels.

19 HEARING OFFICER KRAMER: Okay.

20 MS. SIEKMANN: From the actual act of tearing it
21 down, no, I have no questions on that.

22 HEARING OFFICER KRAMER: So you don't intend to
23 ask any of the staff who did that analysis any questions?

24 MS. SIEKMANN: Not on the actual tear down. My
25 questions are, with the tear down the CECP would be the only

1 power plant there and that has not been evaluated.

2 HEARING OFFICER KRAMER: So you're saying then we
3 should reset the baselines.

4 MS. SIEKMANN: Absolutely.

5 HEARING OFFICER KRAMER: Okay. Would you agree
6 that's more of a legal argument than a --

7 MS. SIEKMANN: I believe that the, I believe that
8 the PMPD is incomplete because that evaluation hasn't been
9 made and that there are -- and I would like to point out the
10 cumulative impacts and visual impacts.

11 HEARING OFFICER KRAMER: Okay, so you would be
12 testifying to that effect.

13 MS. SIEKMANN: Yes.

14 HEARING OFFICER KRAMER: What I'm trying to get at
15 here is can we tell at least a couple of these staff that
16 they don't have to come down. And it sounds like the answer
17 would be yes, right?

18 MS. SIEKMANN: Yeah.

19 HEARING OFFICER KRAMER: Okay. Does anybody else
20 want to talk to the staff on the potential environmental
21 effects of the removal?

22 MS. SIEKMANN: And if that's the case then what I
23 would do is take five minutes off my cross and add my five
24 minutes to my -- leave the testimony at ten and the cross at
25 five.

1 HEARING OFFICER KRAMER: Who would you be
2 crossing, though?

3 MS. SIEKMANN: Well you said some of staff is
4 still going to be there. And the applicant, staff and
5 applicant.

6 HEARING OFFICER KRAMER: Well no, I was trying to
7 see if the staff needed to be there.

8 MS. SIEKMANN: Won't Mr. Monasmith be there?

9 HEARING OFFICER KRAMER: Well he'll be there
10 probably since he's the project manager but not the other
11 technical staff. They may not be.

12 MS. SIEKMANN: Well, but if -- if you feel that
13 Mr. Monasmith can answer the questions regarding what I just
14 told you that my questions would be regarding then that
15 would be fine if he just he were there. And I will be
16 asking, you know, visual impacts, cumulative impacts, with
17 the widening of the I-5. You know, that has not been
18 evaluated yet with the CECP as a stand-alone plant. If
19 Encina is torn down, visual impacts have not been done on
20 CECP. It's always been done as a smaller plant based on
21 Encina being there. The changes and impacts based on the
22 new CECP with Encina there. But it's never been analyzed as
23 a stand-alone plant for noise, for visual and for cumulative
24 with the widening of the I-5 and --

25 HEARING OFFICER KRAMER: Okay, I understand your

1 position. I don't give guarantees, first of all.

2 ASSOCIATE MEMBER DOUGLAS: Let's see if
3 Mr. Monasmith can help.

4 HEARING OFFICER KRAMER: Yes. Do you feel like
5 you can --

6 ASSOCIATE MEMBER DOUGLAS: Would you be able to
7 answer questions like, did you analyze the visual impacts of
8 this project with or without the implementation of --

9 MR. RATLIFF: Well, the testimony goes to the
10 impacts of the removal of the existing facility. It does so
11 in a more generalized way because that is not the project
12 that has been proposed, this is something different and it
13 will be subject to an EIR subsequently by the City.

14 What I seem to hear is the underlying issue is one
15 which is essentially I think a legal issue which is answered
16 by CEQA itself, is what is the baseline. And that is not
17 something for Mr. Monasmith to answer, that's something to
18 be answered in the briefs. Maybe Mr. Hogan can answer it
19 for us. It's not one that I would ask -- I would object to
20 that question being asked of Mr. Monasmith because I think
21 the answer is a legal one.

22 HEARING OFFICER KRAMER: You would object to it if
23 it were asked of any of the technical staff as well?

24 MR. RATLIFF: Absolutely.

25 MS. SIEKMANN: Kerry Siekmann, Terramar. I think

1 the FSA was based entirely on that particular type of CEQA
2 analysis done by staff. But they constantly viewed the tear
3 down of Encina as speculative and the I-5 widening as
4 speculative. So these are decisions that staff made before,
5 these CEQA decisions. So with the addition of Land-2 and -3
6 the tear down of Encina becomes more than speculative
7 because there's financial analysis going on by the
8 applicant, which is one of the CEQA requirements. And so --

9 MR. RATLIFF: If I could just add. We did not add
10 view it as speculative, we actually analyzed it, that's why
11 we did not view it as speculative. We actually analyzed the
12 I-5 widening and proposed mitigation for it and didn't treat
13 it as speculative. These things are in the existing
14 testimony of the staff.

15 HEARING OFFICER KRAMER: Okay, well --

16 MR. RATLIFF: But if the question is, what is the
17 baseline? The baseline is current conditions as set forth
18 in the CEQA guidelines.

19 HEARING OFFICER KRAMER: Okay. I think -- it
20 doesn't sound -- no guarantees but it doesn't sound as if
21 Mr. Knight, Mr. Greenberg or Mr. Walters will be needed to
22 talk about the impacts of the tear down activities. But
23 let's have them available or on call if we need to ring them
24 up on the telephone if something comes up.

25 MS. SIEKMANN: Thank you.

1 HEARING OFFICER KRAMER: The amount of time you
2 would spend with them does not justify their standing in
3 line at the airport.

4 MS. SIEKMANN: Right.

5 HEARING OFFICER KRAMER: Okay, so it's zero for
6 staff, direct. And the applicant is tendering their
7 witness, Mr. Valentino, so maybe five minutes there.
8 Ms. Fountain has come down, ten minutes. Do you think you
9 are going to need a full 20 for cross examination on Land-2
10 and -3?

11 MR. THOMPSON: At this time we do.

12 HEARING OFFICER KRAMER: Okay. And Ms. Baker,
13 still need your 20 minutes?

14 MS. BAKER: Julie Baker for Power of Vision. I
15 doubt it. But that doesn't necessarily mean if the topic
16 becomes compelling and we have further questions we get cut
17 off, it's like ten minutes and the light goes on and you're
18 hauled off the stage.

19 HEARING OFFICER KRAMER: Well I don't think
20 they'll let me bring my hook on the airplane.

21 MS. BAKER: Okay. Well, I'm happy to give you
22 time. But on the other hand if I give it up and then
23 something, you know, we get into a topic that's compelling
24 and we have lots of questions on I just want to make sure --
25 because this issue right here is critically important to

1 people in Carlsbad. So I'm happy to give you my time but
2 with the caveat that if we run a little over and there are
3 things that are relevant and we still have questions on I
4 want to be able to ask them and so does Dr. Roe.

5 HEARING OFFICER KRAMER: Okay. Well how about
6 going down to 15 then?

7 MS. BAKER: Okay. And if we're done faster then
8 that's good too, huh?

9 HEARING OFFICER KRAMER: We'll have to have some
10 kind of reward system.

11 (Laughter.)

12 MS. BAKER: What would that be?

13 HEARING OFFICER KRAMER: Little time pellets.
14 Tasty, chocolate.

15 Okay, 8:30 to 4:30 is eight hours, right? Land
16 Use, the City LORS. To what extent is there really a
17 remaining dispute here? We are just talking about new
18 testimony. We do have the changes that the City enacted
19 recently. They speak for themselves to some degree. They
20 speak volumes as far as their complexity, at least in the
21 manner of expression. Is the applicant disputing whether or
22 not there is a LORS incompatibility at this point?

23 MR. MCKINSEY: In terms of the City's recent
24 actions?

25 HEARING OFFICER KRAMER: Right.

1 MR. McKINSEY: By disputing -- I mean, the
2 applicant's position is that there is not a LORS
3 compatibility case for this project based on the City's
4 actions.

5 HEARING OFFICER KRAMER: Okay, so there is a
6 difference of opinion then.

7 MR. McKINSEY: Yeah. And so yes. I just wanted
8 to make sure you knew which way we were going. But yeah, I
9 think there's definitely a disagreement because I do believe
10 that the City's position is just the opposite. That the
11 actions they have taken during this proceeding have made the
12 project not compatible. And I think what we explained in
13 our position in terms of our witnesses' testimony is that
14 no, they're not. But, of course, you are also able to
15 override it if you feel that's the necessary action.

16 HEARING OFFICER KRAMER: Okay. So it doesn't --
17 we basically have, we have the two witnesses, Mr. Rouse. Is
18 it Rouse?

19 MR. McKINSEY: Rouse.

20 HEARING OFFICER KRAMER: Rouse and Ball and a
21 bunch of cross examination.

22 MS. BAKER: Mr. Kramer, Julie Baker for Power of
23 Vision. We could certainly cut that down to ten minutes.

24 HEARING OFFICER KRAMER: Thank you. And staff,
25 you didn't really address cross examination in your filing

1 so I didn't give you credit for any on these. Is this an
2 issue you're involved in or --

3 MR. RATLIFF: Well.

4 HEARING OFFICER KRAMER: -- not at this point?

5 MR. RATLIFF: We may have some questions. We are
6 merely seeking to understand better what the City has done.
7 But we don't really have anything that I would call cross
8 examination, nor -- well, I think that perhaps we just want
9 to hear what the City and perhaps the applicant have to say
10 about this. And maybe be able to ask some questions but
11 probably won't.

12 HEARING OFFICER KRAMER: Okay. Five minutes,
13 maybe?

14 MR. THOMPSON: We'll give the staff five of our
15 minutes.

16 HEARING OFFICER KRAMER: Thank you.

17 PRESIDING MEMBER BOYD: Cap and trade alive and
18 well.

19 (Laughter.)

20 HEARING OFFICER KRAMER: We could have gotten a
21 grant to do this.

22 Okay, well, I think we're probably still at about
23 eight and a half hours. Mr. Olson thinks we're down to
24 eight hours now. That may be the best we can do, you know,
25 with the caveat that we don't want to reread our testimony,

1 just repeat what's in the written testimony, because we'll
2 all have done -- digesting that over the weekend, I guess.

3 Also let me ask though. The current schedule does
4 not have any room for briefs. But are the parties
5 interested and desirous of being able to summarize their
6 positions in post-hearing briefs? And secondly I wonder, if
7 you are, if that will relieve you of some of the burden you
8 may feel to make all your points during the hearing itself?

9 Anybody wants to answer that, address that
10 question, go ahead. Mr. McKinsey?

11 MR. MCKINSEY: Thank you, Hearing Officer Kramer.

12 When we finished -- we did a round of briefs a year ago
13 when we completed the evidentiary hearings. One of the
14 issues that I always have with briefs is the parties end up,
15 in particular the City and the applicant, end up paying
16 their lawyers to spend a lot of money making legal argument.

17 And so notwithstanding, you know, the revenue that that
18 might represent to my law firm, I certainly don't want to
19 advocate for briefs.

20 And if we do that the issue I'm concerned over is
21 the fact that so much of this has been argued quite a bit
22 that if we did it it would need to be a particular,
23 unresolved legal issue that the Committee feels they want to
24 hear legal argument from everybody's lawyers. But
25 invariably everybody's lawyers are going to disagree on the

1 point and I am not convinced that in the end all of that is
2 going to really edify the Committee any more than they could
3 get from doing their own decision-making.

4 So we don't feel there is a need for briefing on
5 this topic but we'll respect the Committee's decision if
6 they feel they want to hear from the parties on a particular
7 legal topic.

8 MR. THOMPSON: From our perspective, Mr. Kramer,
9 we struggled over the last ten days or whatever, given the
10 indication from the Committee that you did not anticipate
11 briefs. And the reason we struggled is that we saw many of
12 these arguments as being legalistic. The sufficiency of the
13 CEQA analysis, the alternatives analysis, the override
14 analysis. And so if there is a possibility that we could
15 brief those issues I would strongly advocate that we have
16 the opportunity to do that and I think it would cut down on
17 our direct and our cross at the hearing on Monday.

18 MR. RATLIFF: I am very reluctant to say that we
19 want to brief yet again these issues, particularly since I
20 was hoping to be gone in January, at least part of it. But
21 I think staff does want to brief the issues. Not the issues
22 that we have already briefed, we don't want to go back, but
23 that we would like to file a brief, brief --

24 (Laughter.)

25 -- on the issues that are being addressed in the

1 testimony at this particular hearing.

2 HEARING OFFICER KRAMER: I think that's an
3 endangered species.

4 PRESIDING MEMBER BOYD: I was going to say, may we
5 quote you on that when we actually see it.

6 (Laughter.)

7 HEARING OFFICER KRAMER: Ms. Baker?

8 MS. BAKER: Power of Vision, and I'll speak for
9 Ms. Siekmann here, we do what you ask us to do and we'll do
10 our very best. But no, we are not looking forward to doing
11 more briefs ourselves but we're willing to.

12 MS. SIEKMANN: One suggestion is when we're all
13 done you might want to ask that question. And maybe there
14 are certain topics that need to be briefed on and others
15 that don't.

16 HEARING OFFICER KRAMER: Well we would always do
17 that. I was, I was just hoping that it might cut down the
18 time. But for those who have to pay for the services and
19 those who have to write them, it does add up.

20 And some of you have, you've slipped a fair amount
21 of argument into your filings anyway. Not everything that
22 Terramar or Power of Vision has said in their documents is
23 literally testimony. It's argument and, you know, we
24 recognize that and we treat it as what it is and consider
25 it. So in some ways you have perhaps pre-briefed some of

1 the issues.

2 And Mr. Ratliff would say that the testimony of
3 the City's CEQA witness is also in the nature of a brief, I
4 suppose, given his position.

5 So given -- Mr. Rostov and then Mr. Simpson on the
6 phone, do you have any thoughts about that?

7 MR. ROSTOV: I mean, I think we would like the
8 opportunity to brief. But I do agree it could help to have
9 the hearing tomorrow, I mean on Monday, and then see what
10 the topics are after that. Then having some opportunity to
11 address some of these issues in a coherent way afterwards
12 will be appreciated.

13 HEARING OFFICER KRAMER: Okay. So, Mr. Simpson?

14 (No response.)

15 HEARING OFFICER KRAMER: No thoughts, okay. I
16 think he may have dropped off. So we'll just hold that,
17 take that under submission and see at the end of the hearing
18 if we feel that there are topics where it would benefit the
19 Committee to receive more argument and legal analysis.

20 MR. RATLIFF: Mr. Kramer, can I ask a couple of
21 clarifications on the three PPAs. Four our witnesses you
22 have Dave Vidaver or Mike Jaske, which is correct, and you
23 have Will Walters, which is correct. Mike Monasmith is also
24 one of the witnesses on that.

25 HEARING OFFICER KRAMER: Which topic again?

1 MR. RATLIFF: The three -- the topic -- your page
2 three.

3 HEARING OFFICER KRAMER: Yes, I had made that note
4 already.

5 MR. RATLIFF: Okay, great.

6 HEARING OFFICER KRAMER: Is Mr. Vidaver, though,
7 he's not going to be with us or is that still --

8 MR. RATLIFF: Well he has not expired but --

9 (Laughter.)

10 He is coming back from vacation on Monday and was
11 unable to participate in this round, he has been gone for
12 this period. But Mr. Jaske has graciously offered to take
13 his place.

14 PRESIDING MEMBER BOYD: And he submitted the
15 recent testimony.

16 MR. RATLIFF: Yes.

17 HEARING OFFICER KRAMER: Well then I should strike
18 Mr. Vidaver's name?

19 MR. RATLIFF: Yes.

20 HEARING OFFICER KRAMER: Okay. And then let's
21 see. To be clear --

22 MS. SIEKMANN: Mr. Kramer, would Mr. Vidaver
23 possibly be available by phone?

24 MR. RATLIFF: We don't intend to offer him as a
25 witness on that day because we have a witness already, which

1 is Mr. Jaske. I don't know if he's available. He told me
2 he would be back in the office sometime on the 12th.

3 PRESIDING MEMBER BOYD: Just for your information,
4 I would say Dr. Jaske is trumping Mr. Vidaver. And I don't
5 mean that in any offense to Mr. Vidaver but in terms of
6 we've got a far more senior individual here now entered into
7 the, into the discussion. I would think he could handle all
8 the questions that any of us might have.

9 HEARING OFFICER KRAMER: Okay, so then we need to
10 set the order. What I will do is go back to my office and
11 clean up the spreadsheet and move around the topics to
12 correspond to the order we have. Make the changes that
13 we've discussed.

14 MR. RATLIFF: And so we don't waste any time on
15 Monday, because I don't want to, and in the realm of trying
16 not to waste time, the staff would move to strike
17 Mr. Hogan's testimony as testimony and would suggest that it
18 be filed as a brief. We have no objection to it being filed
19 as a brief or a public comment or a statement but not as
20 testimony. In the hope that you don't have to listen to
21 lawyers arguing about case law at the hearing in the guise
22 of testimony.

23 MR. BALL: Interesting observation but I think we
24 disagree. He's offered as a, I guess you'd say, in the
25 nature of an expert witness and it is testimony. If the

1 Committee allows briefing following the evidentiary hearings
2 we'll be happy to submit that. But that ruling hasn't,
3 hasn't been made. I guess you were taking that under
4 submission. So we object to --

5 MR. RATLIFF: But Mr. Hogan's testimony goes to no
6 identified issue of fact, it goes to the sufficiency of the
7 environmental analysis. And that is exactly what you brief
8 in briefs following the evidentiary hearings. It is
9 precisely what you present to the courts when the ruling has
10 been made. Since when do briefs become testimony simply
11 because we call someone an expert?

12 HEARING OFFICER KRAMER: So are you suggesting
13 that the Committee today convert his testimony to a brief
14 and consider it filed as a brief? Or are you suggesting
15 that if briefs are allowed then it be used as a brief at
16 that time?

17 MR. MCKINSEY: Hearing Officer Kramer, I think
18 what Mr. Ratliff is advocating, and I join him in this, is
19 that we are going to end up using time on Monday objecting
20 to his testimony on Monday. So what I think what he is
21 trying to tell you is you can save a lot of time, and I
22 think the City may be giving you an out on this as well, if
23 they are willing to remove him as a witness so that that
24 could be submitted as a legal analysis.

25 And I concur completely with Mr. Ratliff's

1 analysis. That's what that is. It's a legal argument about
2 the adequacy of the environmental analysis and I don't think
3 it belongs as testimony from witnesses at the evidentiary
4 hearing on Monday.

5 HEARING OFFICER KRAMER: So City, then if this
6 were accepted by the Committee as legal analysis as of now
7 would that meet your requirements?

8 MR. BALL: You know, I guess the issue with that
9 is of no moment. Because if his testimony comes in as a
10 brief then the Committee can weigh that. If the applicant
11 and the staff don't want to cross examine him then it would
12 be un rebutted testimony in any event. So either it comes in
13 as un rebutted testimony or it comes in as an evidentiary
14 brief or a brief following the evidence. And if none of it
15 is stricken then it really is of no moment.

16 MR. THOMPSON: The other point I would like to
17 make is that we would like Mr. Hogan to rebut some of the
18 testimony that came in by Mr. Mason yesterday. There are
19 statements in Mr. Mason's testimony about the sufficiency of
20 CEQA that -- I believe that Mr. Hogan would disagree with.

21 MR. RATLIFF: Well I don't know if you want to
22 start. I mean, in all the experience that I've had in
23 hearings at the Energy Commission I don't think we have been
24 taking lawyers' statements about the sufficiency of the
25 analysis as testimony. This has always been done as legal

1 argument and as briefs. We have no problem with this being
2 entered into the record, when offered as a brief. What we
3 do have a problem with is using hearing time and calling
4 this testimony.

5 MR. THOMPSON: We've done this many times in this
6 proceeding and other proceedings I've been in. Mr. Rouse's
7 testimony starting at page 21 is basically a legal brief on
8 the override issue, the legal requirements. We have not
9 asked that that be stricken. But maybe we should go back
10 and parse out all of the parts of testimony that deal with
11 legal issues and ask that they be stricken. It seems like
12 it would be a time-consuming and useless exercise. But, you
13 know, we've had lawyers testifying in this proceeding, a
14 number of them already.

15 MR. MCKINSEY: Hearing Officer Kramer, I think
16 lawyers can testify and we're not actually objecting to the
17 presence of his testimony. I think what we're really
18 getting at is that when a lawyer is going to speak and give
19 a legal opinion and argument about compliance, like that
20 testimony, it is just not something that is useful at an
21 evidentiary hearing that is supposed to be testimony from
22 witnesses.

23 And the only way you could do it is if you maybe
24 make him an expert witness in a particular nature of this
25 legal question of whether or not the environmental analysis

1 has been qualified. But that's something that could eat up
2 the whole day because no doubt there will be lawyers on both
3 sides of that issue that could expound forever. And I don't
4 think that having that come in orally to the Commissioners
5 on the Committee is useful and helpful in helping the
6 Committee try to advance that.

7 So we are not objecting to the presence of the
8 fact that you submitted it as testimony. The proceeding
9 allows the Committee to give weight to things appropriately.
10 What we're saying is that we are going to object to
11 Mr. Hogan appearing as a witness and giving live testimony
12 that mirrors what he provided as written testimony.

13 HEARING OFFICER KRAMER: Yes. I think the kind of
14 expert you're talking about is called a judge, right?

15 (Laughter.)

16 MS. SIEKMANN: Mr. Kramer, would Mr. Hogan be
17 allowed as a rebuttal witness?

18 HEARING OFFICER KRAMER: I guess what the
19 Committee is not interested in hearing is some -- another
20 lawyer lecturing us about the way he thinks the Committee
21 has to decide a legal question, and that's what that
22 testimony seems to be.

23 MR. BALL: Actually we disagree with that. We
24 were careful to really not make it a brief, I thought it was
25 in the nature of his expert opinion. I mean, in this very

1 proceeding we have had unrebutted testimony by several
2 lawyers. If the Committee will recall, remember we had
3 attorney Ralph Faust who testified, and we had attorney
4 Murray Kane who testified. And both were substantially
5 accepted as witnesses, they testified, and it was
6 unrebutted. I think this --

7 MR. McKINSEY: No, I would differ --

8 MR. BALL: Excuse me.

9 MR. McKINSEY: -- that they were unrebutted.

10 MR. BALL: Okay, well you can clarify that. Maybe
11 it was rebutted to some extent. But that would change,
12 really would change the nature of what we have done in this
13 hearing so far. The Committee has accepted lawyers as
14 witnesses; it's been helpful. We have tried to point out
15 the sections that we feel would be helpful and tendered
16 those to the Committee's consideration and that's what the
17 nature of Mr. Hogan's testimony was. He is a -- many people
18 in this room are very qualified as experts. But that was
19 the nature of his testimony.

20 MR. McKINSEY: But I would add this. When we did
21 the original four days of evidentiary hearings there were
22 things that I think that we tolerated to some extent because
23 we had a little more time available, you could do them. But
24 that particular topic we also tendered an attorney,
25 Mr. Rouse, as a witness.

1 And that was a topic of land use and
2 interpretation of the City's LORS. And so it led to asking
3 lawyers, very appropriately, to talk about what is the right
4 process to follow. And I think that was an exception where
5 the parties went along with that and nobody really objected
6 to it. And it did provide knowledge. And that's my point
7 about it being rebutted. There was a lot of disagreement on
8 those topics and it was mostly accomplished by lawyers.

9 But here, the topic is very different and that's
10 why I think you're getting the resistance from Mr. Ratliff
11 and I in that it's really a legal argument about the
12 adequacy of something. And it really is the kind of thing
13 that from a legal proceeding, that the hearing is not
14 intended to be oral argument before a judge. And even then
15 what a court would want is legal briefs so they get a nice,
16 clear articulation of the counter-arguments regarding that
17 legal question. And then maybe they have oral arguments.
18 But usually, as we all know, the oral arguments often don't
19 really win the day, it's those written legal briefs that
20 give the two, different legal interpretations.

21 And the issue we have is Mr. Hogan, one, using up
22 what is a very amount of precious time, and two, providing
23 one view of a legal argument and trying to essentially
24 influence the Committee to go down that path, when we think
25 there's certainly substantial arguments going the other way

1 that should be counted. And so it just doesn't seem to be
2 the right thing to try to help the Committee reach a good
3 conclusion.

4 You are correct and that's why we indicate we
5 wouldn't object to it being a legal argument because then we
6 could make a nice, written legal argument that rebuts it.
7 And that, we think, would be fair and it gives the Committee
8 a better ability to make the right decision on that legal
9 topic.

10 MR. THOMPSON: It seems to me that maybe we can,
11 maybe we can get to the end point here. We'll agree not to
12 have Mr. Hogan recap his previously filed testimony. But I
13 would suggest that we keep it in the record because it gives
14 his background and his experience. And to the extent that
15 we want to put him on the stand to rebut yesterday's
16 testimony of Mr. Mason, we wouldn't have to go through that.
17 That would decrease our time, I think, on our direct, but
18 it would leave the remainder intact.

19 HEARING OFFICER KRAMER: Thank you all for
20 comments. We are going to treat Mr. Hogan's testimony and
21 accept it as a brief as of now. So if we don't ever have
22 another round of briefing his brief will be in there to
23 inform us. If we do need to pull out his CV, if there's a
24 question about his expertise as a rebuttal witness on other
25 topics, we can do that of course. We'll wait and see if you

1 need to use them.

2 MR. THOMPSON: I move to strike Mr. Rouse's
3 testimony starting at page 21 to 25 of the filing of
4 November 18. It is a legal brief on the principles of
5 overrides, citing legal cases. He has no experience that I
6 can tell at the Commission or prosecuting cases in front of
7 the Commission. It's in the nature of a brief and I would
8 ask that it be stricken.

9 HEARING OFFICER KRAMER: Give me the pages again.

10 MR. THOMPSON: Twenty-one, 21 to 25.

11 MR. RATLIFF: Mr. Kramer, if it's useful, I mean,
12 as Mr. Ball pointed out, other witnesses who are lawyers
13 have testified in this proceeding and neither staff nor the
14 applicant have objected to them doing so. I think though --
15 but I think it's an important illustration of the
16 difference. Where the City put on an attorney who was a
17 witness on the Coastal Act, I think it was very different
18 than -- in terms of the interpretations of the Coastal Act
19 and his view of how the Coastal Act should be implemented.
20 We didn't object to that. It wasn't unrebutted but we
21 didn't object to that.

22 Likewise when the City put on an attorney who was
23 an expert on the City's redevelopment law and its
24 application of the redevelopment law we didn't object to
25 that because these are areas where I think it was useful to

1 have an expert who was operating in those areas to give an
2 opinion about those issues. And we didn't object to that at
3 all.

4 But when you get to the issue of CEQA legal
5 sufficiency of the Energy Commission's analysis, well
6 there's a whole lot of experts on that. And you don't
7 really need one to come in and tell you, you know, basically
8 make his legal arguments that he is going to be making to a
9 court, and have him testify to it. It's just a waste of
10 time and it's not really, I think, within the purview of
11 what we would expect a witness to contribute in any
12 constructive way.

13 MR. BALL: Since we're taking a little --

14 PRESIDING MEMBER BOYD: Letting the lawyers have
15 at it.

16 MR. BALL: Yeah. But I see that as a distinction
17 without a difference. I mean, it's -- it really is. If
18 it's the Coastal Act or if it's redevelopment law or if it's
19 CEQA law, all the laws apply in this proceeding with equal
20 weight. And so I don't see why you would disqualify one
21 witness who testifies as an expert as opposed to the others,
22 just because staff didn't object. It doesn't make much
23 sense to me.

24 ASSOCIATE MEMBER DOUGLAS: I think what is not
25 necessarily coming through clearly although parties are

1 trying to say this is that it's not whether or not somebody
2 is a lawyer and attempting to testify as a witness, that's
3 not what matters. What matters is whether their testimony
4 is helping the Commission prove, disprove, understand a
5 question of fact, versus telling the Commission how we
6 should apply law to the facts before us.

7 And so the issue I have with Mr. Hogan's testimony
8 is I see the latter, not the former. I don't see in there
9 questions of fact that it helps me understand. It doesn't
10 help me understand the City's land use laws, it doesn't help
11 me understand the context in which the Commission needs to
12 understand the LORS. It is trying to tell me how to
13 interpret CEQA. And that's helpful as a brief but I don't
14 personally see a role for that as testimony. So I put that
15 out there to all the parties to agree or rebut as you would
16 like at this point.

17 MR. MCKINSEY: Commissioner Douglas, I completely
18 agree. And I would note that, again, we are not actually
19 attempting to strike the testimony coming into the record,
20 which appears to be the motion that's before you is to
21 strike something. That is not our intent. Our intent is
22 primarily to help you as Commissioners do your job, and
23 particularly understanding the time constraints that we're
24 going to have on Monday.

25 MR. BALL: Well it might be the most important 1.1

1 hours of the day. You know, if we're going to go back and
2 try and parse the record and change what testimony has been
3 offered as to say, well this is a brief. I guess we can do
4 that but we'll have to go back and search the entire record.
5 And if this hearing is a search for the truth as it is, then
6 there has to be substantial evidence to support the
7 Committee's recommendation. And eventually there has to be
8 substantial evidence to support the full Commission's
9 decision.

10 And Mr. Hogan has testified that -- as an expert
11 witness, that there is some evidence missing. The Committee
12 could use that as an opportunity to correct -- he has given
13 you his expert opinion as to what evidence is missing.
14 That's the last thing it seems to me the Committee wants is
15 to go forward and license a plant without substantial
16 evidence to base its decision on. So that was really the
17 nature of his testimony.

18 It's not, it's not a fatal flaw yet but it's a
19 warning and a cautionary tale, I guess, to the Committee
20 that maybe it does need some evidence that it didn't accept
21 so far.

22 ASSOCIATE MEMBER DOUGLAS: So if the purpose of
23 Mr. Hogan's, I'm going to call it a brief, is to assist the
24 Commission or the Committee in understanding whether or not
25 the record is complete, whether or not we are able to make

1 certain findings, then whether we call it testimony or call
2 it a brief, doesn't matter, right? The purpose is being
3 served by Mr. Hogan providing this information to us.

4 MR. BALL: Yes, Commissioner Douglas, that was my,
5 my earlier response is that if the Committee accepts it as
6 testimony or accepts the testimony as a brief, the issue is
7 of no moment because the Committee then has benefited from
8 the -- either the brief or the testimony.

9 I think my colleague wants me to say that there
10 may be some rebuttal that is necessary for him after,
11 Mr. Hogan that is, after reading the testimony that was
12 submitted yesterday, rebuttal testimony, rebuttal of
13 Mr. Mason.

14 ASSOCIATE MEMBER DOUGLAS: So Mr. Hogan might like
15 to elaborate on his legal arguments based on new information
16 in the case? And that would be fine. That would be what, a
17 new brief or an amendment to the brief? An addendum would
18 do.

19 MR. BALL: Well, I don't know if it would be in
20 the nature of a legal brief or if it would really be
21 rebuttal testimony to the other testimony. Because if it's
22 in pari materia, that is if it's the -- if it's a response
23 to Mr. Mason's testimony, then it is testimony, not
24 argument. So to the extent that the Committee doesn't --
25 feels that is just argument we'll be happy to submit that as

1 argument. But if it is evidence in response to the rebuttal
2 testimony we would rather have that as an opportunity. So
3 we would like to bring him at least as a rebuttal witness.

4 ASSOCIATE MEMBER DOUGLAS: Are there facts that
5 you think that the record does not yet contain that
6 Mr. Hogan is going to bring us, or as you're proposing that
7 he bring us?

8 MR. BALL: Actually I haven't talked to Mr. Hogan
9 since the rebuttal testimony was submitted so I can't answer
10 that.

11 HEARING OFFICER KRAMER: As far as your motion to
12 strike Mr. Rouse's. There he, you're right, he is
13 describing the law, but it appears to be to set up the
14 context for then summarizing what he believes are the
15 benefits of the project that would justify an override so I
16 don't really consider that as legal advice but just a good
17 narrative flow to explain or put his reasons in context. So
18 we deny the motion.

19 As far as the order of the topics go. The grid
20 issues combined with alternatives rising from the PPAs or
21 what's so succinctly called -- stated here, the three new
22 San Diego PPA projects, those three would be combined and go
23 first.

24 And then I'm suggesting, and we can talk just for
25 a moment about the last three. But Land-2 and -3 are, I

1 think they are of great interest to the community, also to
2 the Committee. We are really looking for some help to
3 understand the -- you know, fully understand the issue and
4 some creative ideas about how to address both the concerns
5 of the community and the applicant. It's, as I said
6 earlier, probably less about evidence than about exchanging
7 ideas. And that will inform basically policy choices made
8 by the Committee.

9 And then after that the PSD and then finally the
10 City LORS. At least in my personal opinion, the City LORS
11 are probably the most compressible, since they are by and
12 large applying law that the City has written down, to very
13 well-known facts in the case of things like height
14 restrictions. So I think it makes sense to have them at the
15 end. Let me see if we addressed the one concern.

16 MS. BAKER: Mr. Kramer, Julie Baker, excuse me.
17 Would it be possible maybe to switch, make PSD number three.
18 I'm sorry, PSD number two and Lands 2 and 3 -- since Lands
19 2 and 3 and City LORS are a bit of related topics.

20 HEARING OFFICER KRAMER: Well, okay, in the sense
21 that Land-2 and -3 address a City LORS requirement. Yeah.
22 I think all --

23 MS. BAKER: Well, and also too for members of the
24 public that may be interested.

25 HEARING OFFICER KRAMER: Okay.

1 MS. BAKER: You know, the citizens are going to be
2 interested in those topics. I can't promise you people will
3 be there but those are the kinds of topics that people who
4 live in the community will be most interested in perhaps
5 hearing about.

6 HEARING OFFICER KRAMER: Any other party have any
7 concern about that? I see what we have not dealt with here,
8 though, is Mr. Mason. It was Mr. Mason that wanted,
9 couldn't be there before 1:00 p.m., correct?

10 MR. MCKINSEY: Correct, Hearing Officer Kramer.
11 And I've got two ways around that. One, we may not need to
12 tender him as a witness, particularly when we end up in a
13 large panel. I was adding it up and there's a lot of people
14 already in that group. But also I may be able to get him by
15 phone. So that may resolve the issue as well is that he may
16 be able to appear by phone.

17 HEARING OFFICER KRAMER: Okay. We're going to
18 have the same audio setup so we can do WebEx. Okay, so then
19 grid --

20 MR. ROSTOV: May I raise one question, Hearing
21 Officer Kramer?

22 HEARING OFFICER KRAMER: Sure

23 MR. ROSTOV: Sorry for interrupting. On the three
24 PPAs it also says, effect on cumulative impacts. I just
25 want to make sure that's not lost when we're combining the

1 seated panels, grid and alternatives.

2 HEARING OFFICER KRAMER: No, I am just describing
3 them in a shorthand way.

4 MR. ROSTOV: Okay.

5 HEARING OFFICER KRAMER: So grid, alternatives,
6 PPAs, overrides together. With a mind to making sure that
7 we can release the ISO witnesses by noon. Then followed by
8 PSD, then Land-2 and -3 and then the City LORS.

9 We will try to start right at 8:30. Deal with any
10 housekeeping items right away. Let's see. I know
11 Mr. Ratliff, myself, enough of the Committee to do business
12 will be there the previous evening. Commissioner Douglas is
13 flying down in the morning so we -- let me just ask her.
14 Should we start if you're delayed for some reason?

15 ASSOCIATE MEMBER DOUGLAS: I will communicate with
16 you and make sure that you know that the plane has gotten
17 off on time and so on. I would like you to go ahead and
18 start, assuming that I don't get there. I should be able to
19 get there because it's the first flight out of Sacramento.

20 HEARING OFFICER KRAMER: Okay. And let's see. It
21 occurs to me we're going to want to try to keep meal breaks
22 really tight to save time. Mr. McKinsey, for planning
23 purposes, is the applicant going to have -- what is the
24 applicant going to have there, say midday, if anything?

25 MR. MCKINSEY: At this time we haven't arranged

1 for any preplanned catering for this event. One of the
2 issues as you know we grappled with, is this is the third
3 time that we gone through a round of hearings at the
4 facility and we've worked really hard on trying to keep the
5 expense of the hotel down.

6 And one of the problems is where we really can
7 spend a tremendous amount of money is on food because every
8 little piece of anything costs a tremendous amount of money.

9 And we are not even allowed to bring in outside catering
10 because it's a hotel facility. So right now we don't have
11 any planned food. I know you probably have the
12 coffee/water/tea setup but that's it.

13 I was discussing that with Mr. Piantka this
14 morning just in terms of, you know, logistically is there a
15 way we could get the hotel to streamline a food service
16 during the breaks, for instance, as a way for people to --
17 because, you know, they have that one restaurant and they
18 might be able to set up something where people could get
19 food from a little buffet or something quickly. Maybe have
20 a register there where we could pay for it or something.
21 But at this time we don't have any other food provisions in
22 place.

23 HEARING OFFICER KRAMER: Okay. And like I said,
24 we were hoping to break for dinner at 4:30. I don't know if
25 that's going to happen but that was the hope. And that

1 would allow people an hour to go get a meal there at the
2 hotel or somewhere else. I just asked so that people can
3 plan. You know, bring some snacks with them if they want or
4 -- but you think you'll have water and coffee at least?

5 MR. MCKINSEY: That's correct.

6 HEARING OFFICER KRAMER: Okay. Okay. We have a
7 public comment portion on our agenda. Let me ask the
8 parties, were there any other issues we need to resolve
9 today, at least address?

10 MR. MCKINSEY: I had a question that isn't about
11 this but it's about Wednesday the 14th. I thought it would
12 be helpful if the Committee could explain perhaps more than
13 they could just in the words in the hearing order about what
14 their intent is that day. I know you've encouraged the
15 parties to simply WebEx in. I don't know, given all the
16 history of that, that you may still have a roomful of people
17 here on the 14th eager to comment and opine. But it wasn't
18 clear to me if the Committee intended to interact or if this
19 is simply the placeholders to allow you to do a closed
20 session?

21 HEARING OFFICER KRAMER: You're correct, it is
22 basically a placeholder to allow a closed session. But
23 every time a Committee has a meeting, under the Bagley-Keene
24 law we are to allow, have an item on the agenda for public
25 comment. But we are not intending to take new evidence.

1 If, God forbid, we weren't able to complete the testimony on
2 Monday we might continue that hearing to another time, it
3 might even be on that Wednesday. But we would do that with
4 a continuance notice.

5 As it is now that meeting is simply we come, we
6 open up the meeting, then we take public comment so the
7 public doesn't have to wait, and then we go into closed
8 session. Come out of the closed session just to announce
9 that it's completed and then we're done. So I would
10 encourage everyone from San Diego to not spend any money or
11 time traveling up here to watch that. I think it's probably
12 the definition of boring, for the people who aren't on the
13 Committee. But thanks for bringing that up, Mr. McKinsey.

14 MS. SIEKMANN: Mr. Kramer, may I ask, Kerry
15 Siekmann, Terramar. What's the closed meeting about?

16 HEARING OFFICER KRAMER: Oh, deliberating.

17 MS. SIEKMANN: Oh, so will you have a decision
18 that day?

19 HEARING OFFICER KRAMER: Oh no, no.

20 MS. SIEKMANN: Okay.

21 HEARING OFFICER KRAMER: No, no, no.

22 ASSOCIATE MEMBER DOUGLAS: No, it is our
23 opportunity to talk about the evidence that we've heard and
24 to give the Hearing Officer direction on how we -- you know,
25 generally how to approach issues. But there's a lot of work

1 after that.

2 HEARING OFFICER KRAMER: Now if there were some
3 motions pending about -- for instance, if you all at the end
4 of the hearing had a big disagreement about whether to do
5 briefs or not and we had to head out to the airport, you
6 know, we might deliberate on something like that and then
7 announce the result at the end. But probably there will be
8 nothing to report. Because any decision you're going to
9 first see electronically in your mailbox.

10 So this is the time for public comment about any
11 item that is on the agenda. And we will limit comments to
12 three minutes. Does anybody in the room wish to make a
13 public comment?

14 Anybody on the telephone?

15 Okay, thank you. Hearing none we will -- did you
16 want to make any closing comments?

17 PRESIDING MEMBER BOYD: Just thanks to everybody
18 for being here and thanks for trying to work this down to a
19 somewhat workable schedule. We'll see you Monday.

20 ASSOCIATE MEMBER DOUGLAS: I'd like to add my
21 appreciation and we'll look forward to seeing you on Monday.

22 HEARING OFFICER KRAMER: Okay, we're adjourned.

23 (Whereupon, at 12:18 p.m. the
24 Prehearing Conference was adjourned.)

25 --oOo--

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 Prehearing Conference; that it was thereafter transcribed.

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 the outcome of said conference.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of December, 2011.

PETER PETTY, CER**D-493

CERTIFICATE OF TRANSCRIBER

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

RAMONA COTA, CERT**478

December 16, 2011