

PREHEARING CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification of) Docket No.
the Los Esteros Critical Energy) 01-AFC-12
Facility)
_____)

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

MONDAY, FEBRUARY 25, 2002
9:10 a.m.

Reported by:
Peter Petty
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William Keese, Presiding Member

HEARING OFFICER, ADVISORS PRESENT

Major Williams, Hearing Officer

Michael Smith, Advisor to Chairman Keese

James Boyd, Commissioner

STAFF AND CONSULTANTS PRESENT

Robert Worl, Project Manager

Dick Ratliff, Staff Attorney

PUBLIC ADVISER

Roberta Mendonca

APPLICANT

Jane E. Luckhardt, Attorney
Downey, Brand, Seymour and Rohwer

Todd Stewart, Project Manager
Calpine C*Power

Jerry P. Salamy, Air Quality Engineer
CH2MHILL

INTERVENORS

William Garbett
T.H.E.P.U.B.L.I.C.

John D. Bakker, Attorney
Meyers, Nave, Riback, Silver and Wilson
City of Milpitas

Gayatri Margaret Schilberg, Senior Economist
JBS Energy, Inc.
representing Coalition of Ratepayer and
Environmental Groups

ALSO PRESENT

Dick Wocasek, Air Quality Engineer
Bay Area Air Quality Management District

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P R O C E E D I N G S

9:10 a.m.

PRESIDING MEMBER KEESE: Good morning.

This is a prehearing conference on the application for certification of the Los Esteros Critical Energy Facility. And we're all here now.

Major Williams is our Hearing Officer and will be conducting it. I'm Bill Keese, and I'm the lead on this Los Esteros siting project. Mike Smith, my Advisor, is on my right.

Mr. Jim Boyd is on the left. Mr. Boyd is newly appointed to the Commission as of two weeks ago. And it is anticipated that at a Commission meeting on Wednesday, Mr. Boyd may be appointed Second on this Committee. Fortunately, Mr. Boyd has indicated his willingness to be appointed Second on this Committee.

COMMISSIONER BOYD: That isn't guaranteed --

(Laughter.)

PRESIDING MEMBER KEESE: The Commission's Public Adviser, Roberta Mendonca, is present. And if there's any other -- I know Mr. Garbett has spoken with her -- if there's any other member of the public who wishes to speak,

1 Roberta is here.

2 Let's go down the list of parties and
3 participants, and start with the applicant, Ms.
4 Luckhardt.

5 MS. LUCKHARDT: Hi, my name is Jane
6 Luckhardt. I'm from the lawfirm of Downey, Brand,
7 Seymour and Rohwer representing Calpine C* here
8 today.

9 On my left is Todd Stewart from Calpine.
10 On my right is Jerry Salamy, the Environmental
11 Manager from CH2MHILL.

12 PRESIDING MEMBER KEESE: Thank you. Mr.
13 Worl for staff.

14 MR. WORL: My name is Robert Worl; I'm
15 the Project Manager for the Energy Commission. On
16 my right is Dick Ratliff, the Counsel. And I
17 guess the intervenors introduce themselves?

18 PRESIDING MEMBER KEESE: Yes. City of
19 San Jose? Do we have a representative from the
20 City of San Jose?

21 Bay Area Air Quality Management
22 District.

23 MR. WOCASEK: Dick Wocasek.

24 PRESIDING MEMBER KEESE: For the record,
25 can you speak to that microphone, please.

1 MR. WOCASEK: Dick Wocasek for the Bay
2 Area Air Quality.

3 HEARING OFFICER WILLIAMS: Sir, for the
4 reporter, could you also spell your name, please?
5 And if you have a business card --

6 MR. WOCASEK: I can give him a card.

7 PRESIDING MEMBER KEESE: All right, are
8 there any other agencies represented here today?

9 Now, for the intervenors we have the
10 City of Milpitas.

11 MR. BAKKER: Yeah, I'm John Bakker.
12 Good morning. I'm from the City of Milpitas, City
13 Attorney's Office, and the lawfirm of Meyers,
14 Nave, Riback, Silver and Wilson.

15 PRESIDING MEMBER KEESE: All right. And
16 for CURE, California Unions? The Coalition of
17 Ratepayer and Environmental Groups?

18 MS. SCHILBERG: I'm Gayatri Schilberg
19 from JBS Energy representing the Coalition.

20 PRESIDING MEMBER KEESE: Okay. And from
21 T.H.E.P.U.B.L.I.C.

22 MR. GARBETT: William J. Garbett
23 representing T.H.E.P.U.B.L.I.C.

24 PRESIDING MEMBER KEESE: Thank you.
25 Anybody else intending to speak to this issue?

1 Seeing none.

2 On September 25th of last year the full
3 Commission determined that the applicant had made
4 its AFC sufficiently informative and complete to
5 commence the expedited review process set forth in
6 Public Resources Code section 25552.

7 On November 15, 2001, the Committee
8 extended the -- these acronyms surprise me
9 sometimes -- the LECEF schedule to accommodate
10 required discovery and reports from sister
11 agencies.

12 Staff filed its staff assessment on
13 December 31, 2001, and a supplement on February 6,
14 2002.

15 Calpine filed its AFC under our four-
16 month process anticipating completing the project
17 construction and production initiated during the
18 summer of 2002.

19 Section 25552 requires the Energy
20 Commission to expedite to the extent feasible the
21 processing of AFCs for projects such as LECEF that
22 will come online by December 31, 2002.

23 Qualification and licensure for the
24 four-month process contemplated by section 25552
25 requires an AFC to demonstrate that the simple

1 cycle thermal power plant and related facilities
2 will meet nine standards.

3 Ultimately this Committee will make
4 findings relevant to the whether the foregoing
5 nine requirements have been met.

6 Intervenor, the City of Milpitas, has
7 interposed a petition to have the project removed
8 from the four-month process based upon its
9 position that the project will have a significant
10 impact on visual resources. Does that continue to
11 be your position?

12 MR. BAKKER: Yes.

13 (Pause.)

14 PRESIDING MEMBER KEESE: We're trying to
15 decide how to handle this issue. This project has
16 not quite met the four-month process. So are you
17 suggesting that the Committee should not continue
18 to expedite this --

19 MR. BAKKER: Could this project be
20 approved in the 12-month process, as a single
21 cycle facility?

22 PRESIDING MEMBER KEESE: The 12-month
23 process does not require the taking of 12 months.
24 The 12-month process has certain requirements --

25 MR. BAKKER: Well, I think my

1 understanding was that --

2 PRESIDING MEMBER KEESE: We've been
3 attempting to handle this project in the four-
4 month process, which we haven't succeeded in
5 keeping the time deadlines. But we're quite aways
6 down the road on this one. So, what is it that
7 you are asking for, and then I'll ask applicant to
8 respond.

9 MR. BAKKER: My understanding, and
10 correct me if I'm wrong, is that the Commission
11 does not approve single cycle facilities in the
12 12-month process. It's only pursuant to the
13 expedited process that single cycle facilities are
14 approved. Is that not correct?

15 PRESIDING MEMBER KEESE: Staff.

16 MR. RATLIFF: No, Commissioner, the 12-
17 month process can approve either single cycle or
18 combined cycle.

19 PRESIDING MEMBER KEESE: Anything.

20 Yeah, that's not --

21 MR. BAKKER: Okay. So, given that -- I
22 mean I'd like the Commission to make a decision on
23 the -- for the Committee to make a decision on the
24 motion, but I would agree that given the time,
25 we're so far along here. We've got a staff

1 assessment and a supplement. It's moot.

2 PRESIDING MEMBER KEESE: All right,
3 that's fine. The Committee is probably prepared
4 to make a ruling on that motion. Does staff have
5 anything else to add?

6 MR. RATLIFF: No.

7 PRESIDING MEMBER KEESE: Applicant?

8 MS. LUCKHARDT: No.

9 PRESIDING MEMBER KEESE: Okay. All
10 right, Major, do you want to --

11 HEARING OFFICER WILLIAMS: I'll just
12 pick up here. A couple of housekeeping matters, I
13 think I'll do first.

14 And CURE's not present; and they didn't
15 file a prehearing conference statement.

16 Mr. Garbett, I saw some indication that
17 you were going to file something a little later
18 because you hadn't received --

19 MR. GARBETT: Yes. We had planned to
20 file something right up to the moment of the
21 hearing. What happens is there became so many
22 issues controversial to our group that basically
23 we couldn't get together in a timely manner to get
24 anything to you.

25 What happens is this here last week or

1 two has been extremely compressed, because you did
2 have land use hearings before the City of San Jose
3 Planning Commission; the City Council, and then
4 the Planning Director's hearing after that.

5 And it becomes a more complex issue
6 because the City of San Jose now has two approved
7 land use developments on the same site, or
8 essentially the same site, with different, you
9 might say, conclusions or decisions. So both of
10 them are applicable.

11 The problem comes with the California
12 Energy Commission because you want to go along
13 with LORS, but what is LORS? And the bone of
14 contention that we see in the picture is the
15 Dataport issue. And does the particular
16 Commission have jurisdiction to base a rule on the
17 LORS that include the Dataport as part of the
18 project.

19 Now, the City has expressed the fact
20 that they are not going to require any permits
21 whatsoever because all the permits are going to
22 flow from the California Energy Commission for the
23 Dataport project, which includes the Los Esteros
24 Power Plant. And for this it becomes a extremely
25 complex issue.

1 There are other issues that were
2 outstanding, for instance the brief by the City of
3 Milpitas regarding visual resources.
4 Unfortunately, we got served with that particular
5 motion, to put a response to it, the day after the
6 response was due. I think the U.S. mail has been
7 one of our problems here since September 11th. It
8 is not the only problem in the service process
9 that we have now.

10 HEARING OFFICER WILLIAMS: Well, let's
11 do this. The chart that I passed out earlier,
12 that you have, basically sets forth the parties'
13 issues to this point. If you could at least give
14 us some indication of what your issues are going
15 to be, maybe just mark that chart up. And at
16 least we'll have that.

17 The Committee anticipates hearings on
18 March 11th through the 13th. We'll try to get
19 this done as quickly as possible, but we have
20 scheduled three days of hearings down in San Jose.

21 And, of course, we're going to require
22 prehearing declarations and statements of issues.
23 So to the extent that you could get started on
24 that, with the chart before you, it would
25 certainly be helpful because those filings are

1 going to be required to come in, I think, sometime
2 in early March.

3 MR. GARBETT: I am sure faster than the
4 mail can get them to you. Maybe I could go and
5 make our point where T.H.E.P.U.B.L.I.C. is
6 specifically interested, and it overlaps a couple
7 areas.

8 But basically we're concerned about the
9 visual in regards to the Dataport, and we believe
10 that all references to Dataport should be stricken
11 from the documents because it is a project not in
12 evidence. And for that reason.

13 And along with the Dataport project,
14 there are a couple other things that need to be
15 stricken out of the various filings from the
16 applicant. We regard the Metcalf Energy process
17 and any of the data used from there in the form of
18 conclusions from the Metcalf data being used as a
19 priori for this project, we believe should be
20 stricken. Because there's still litigation on
21 Metcalf that is ongoing.

22 Some of the raw data we do not dispute,
23 and the use of that in providing the conclusions
24 for Los Esteros is not.

25 We're concerned particularly with the

1 air issues. For instance, the PM2.5 emissions
2 especially. We are concerned with the use of
3 recycled water, the public health hazards, the
4 actual site, itself, and the hazmat there
5 concerning the residual pesticides, worker safety
6 and the fact that one of the wells there was used
7 as a disposal site before it was closed.

8 HEARING OFFICER WILLIAMS: Thank you,
9 that's very helpful.

10 Again, we've got evidentiary hearings
11 tentatively scheduled for March 11th through the
12 13th. Of course, the Committee wishes to hear
13 from the parties on how the evidence will be
14 presented.

15 We anticipate that testimony may be
16 submitted by declaration with the proviso that
17 witnesses are subject to cross-examination,
18 unless, of course, we can get a stipulation in
19 those area that are uncontested.

20 If a party intends to cross-examine
21 witnesses on any given topic, you must indicate
22 your intent today so that the witness can plan to
23 attend the hearing.

24 If a party challenges the testimony of
25 another party, we expect the challenging party to

1 indicate the basis of your objections. Identify
2 your witnesses; and whether the topic should be
3 scheduled for early or late in the process of
4 evidentiary hearings.

5 The Committee understands that the City
6 of San Jose has taken its land use actions
7 approving the necessary zoning for Los Esteros.
8 That is correct, I believe?

9 MS. LUCKHARDT: Yes, that is correct.

10 HEARING OFFICER WILLIAMS: Thus far,
11 without Mr. Garbett's additions, the Committee had
12 identified 11 topics that appear to be
13 uncontested. Those were, again aside from Mr.
14 Garbett's objections stated today, those were
15 project description, compliance and closure,
16 facility design, power plant reliability,
17 transmission line safety and nuisance, hazmat,
18 cultural resources, geology and paleontology, soil
19 and water resources, waste management and traffic
20 and transportation.

21 Now, I think Mr. Garbett had raised
22 hazmat as a potential area of concern. And I
23 think that's the only one that --

24 MR. BAKKER: If I may. I think, I don't
25 know if I neglected to focus on this issue, but

1 the project description, I think Milpitas has an
2 issue with the project description, and perhaps
3 maybe that's not an uncontested issue.

4 I don't know if I was planning on
5 dealing with this in visual impacts or elsewhere
6 in our testimony. But one of our focuses
7 throughout this proceeding has been on the
8 consideration of the U.S. Dataport project as part
9 of this project that the Commission is licensing.

10 So, if that's a project description
11 issue, I would like to have the project
12 description remain a contested item.

13 HEARING OFFICER WILLIAMS: I think what
14 the Committee did in looking at your prehearing
15 conference statement is that we decided to lump
16 that under transmission system engineering, in
17 light of the fact that -- well, actually it was
18 the Coalition's prehearing conference statement
19 that indicated an issue with the project
20 scheduling. And that was in the context of, we
21 put that in the context of transmission system
22 engineering.

23 MR. BAKKER: I guess the issue I'm
24 raising is slightly different. Some of the
25 analysis that's been done for this project has

1 included -- has assumed that the U.S. Dataport
2 project would be completed and somehow would
3 mitigate the impacts of the power plant project.

4 Well, Milpitas has taken a position that
5 this project should be viewed as a stand-alone
6 project, because once it's approved Calpine would
7 be able to go forward with its power plant
8 project, notwithstanding whether the U.S. Dataport
9 project is ever built

10 So that's the only focus in the project
11 description that Milpitas would have. And I may
12 have neglected to put a discussion of the project
13 description in our prehearing conference
14 statement.

15 PRESIDING MEMBER KEESE: Mr. Garbett
16 raised the issue in --

17 MR. BAKKER: I think he did raise a
18 similar issue, yeah.

19 PRESIDING MEMBER KEESE: -- somewhat a
20 similar way, in asking that we strike all
21 reference to U.S. Dataport.

22 MS. SCHILBERG: The Coalition has a
23 similar issue in that the definition of the
24 project has been a big confusing, because in many
25 cases the existence of Dataport is used as -- or

1 the foundation of the project is to mitigate U.S.
2 Dataport, yet the license is not contingent on the
3 materialization of U.S. Dataport.

4 So the Coalition also has a project
5 description conceptual issue that I think does
6 need to be discussed. And so we would support
7 leaving that topic on the --

8 PRESIDING MEMBER KEESE: Somewhere.

9 MS. SCHILBERG: Yes.

10 PRESIDING MEMBER KEESE: Right.

11 MR. RATLIFF: Commissioners, if I may?

12 PRESIDING MEMBER KEESE: Yes, staff.

13 MR. RATLIFF: Staff has no objection to
14 having a witness on project description. I can't
15 speak for the applicant.

16 I would like to clarify that we have, to
17 the extent that we thought it was appropriate,
18 analyzed in our analysis the project both with and
19 without Dataport because of the potential that the
20 project might be built and that Dataport might be
21 delayed.

22 So that is what we've attempted to do in
23 our analysis.

24 PRESIDING MEMBER KEESE: And you think
25 that the project description might be an

1 appropriate place to deal with this?

2 MR. RATLIFF: Well, we can talk about it
3 then, yes. What I wanted to go on to say is that
4 although staff has no objection to bringing any
5 witnesses over which there are identified factual
6 issues, it is our very strong preference, given
7 the constraints on Commissioner time and staff
8 time, when we have 20 siting cases, to only take
9 those witnesses to San Jose in those areas where
10 there are identified issues of fact that need to
11 be adjudicated, and not just sort of anyone who
12 just, you know, anyone who just might be vaguely
13 identified -- any area that might be vaguely
14 identified for adjudication.

15 We would like to have with specificity
16 the identification of those issues which are at
17 issue for the purposes of the hearing. We think
18 that to do otherwise will lead to a waste of time
19 and resources.

20 PRESIDING MEMBER KEESE: That's what
21 trouble some somewhat about putting this under
22 project description, because project description
23 usually gets by because that's the project.

24 And I'm not sure there are facts that
25 are in question on which witnesses -- I mean I'm

1 just not sure what witnesses would say. We --

2 MR. RATLIFF: I share a similar doubt,
3 and I'm not sure that that's true in any of the
4 other areas. We know that --

5 PRESIDING MEMBER KEESE: In many of the
6 other areas we are going to be dealing with
7 factual issues. In this one, I think the facts
8 are essentially close to being stipulated. We
9 know what's going on with U.S. Dataport; we know
10 what's going on with this project.

11 There's an argument being raised that we
12 should not take U.S. Dataport into consideration
13 in our deliberations. Is that --

14 MR. GARBETT: Basically what happens is,
15 as far as proceeding ahead with the licensing of
16 Los Esteros as a power plant, that's what we're
17 here for today.

18 The issue of Dataport has been brought
19 up as is Dataport a stalking horse to bring this
20 thing in, to go and use the color and authority of
21 the state and of the Energy Commission to
22 basically cover up all the construction for the
23 U.S. Dataport.

24 If you have a national defense issue let
25 the National Defense Department go and provide any

1 extension there. But keep the state and the
2 Energy Commission out of the middle on that.
3 Let's proceed with the power plant.

4 PRESIDING MEMBER KEESE: Okay, is there
5 any argument that there's a factual issue here?

6 MR. GARBETT: I don't know whether there
7 is a factual issue --

8 PRESIDING MEMBER KEESE: Let's hear from
9 the Coalition.

10 MR. GARBETT: -- project would be with
11 the Dataport --

12 MS. SCHILBERG: The Coalition has a
13 factual query about the actual online date and
14 when Calpine is really planning to come online
15 with the power project. And to make sure that
16 that information is the same as they've been
17 telling their investors and other people.

18 And I need to know exactly what the true
19 online date is planned to be.

20 PRESIDING MEMBER KEESE: I think that's
21 fair.

22 MS. LUCKHARDT: Yes, --

23 COMMISSIONER BOYD: Mr. Chairman.

24 PRESIDING MEMBER KEESE: Mr. Boyd.

25 COMMISSIONER BOYD: Forgive my newness

1 to this case, although I have some familiarity
2 with the background. And I want to double check
3 what I thought I heard staff comment, that in
4 effect -- because I hear a concern, if I'm correct
5 in interpreting it a concern, that the project
6 description is hooked together with the Dataport
7 project. And there's a concern on the part of
8 some parties that that is a concern, it may be a
9 concern. And my own interpretation what they're
10 saying is that it will provide cover for a project
11 they'd like to perhaps see separated and debated o
12 its own merits.

13 But I heard the staff say, I think, that
14 the energy project can stand alone. And that the
15 analysis was predicated on, or was done including
16 the fact that the energy project stands alone.

17 So, I'm wondering a little bit if that's
18 true, what the pros and cons or consequences are
19 of clearly separating one project from the other.

20 First, I'd like to know if I heard the
21 staff right.

22 MR. RATLIFF: You heard us correctly.
23 We analyzed it both ways for those areas where it
24 mattered. The reason being that Dataport does not
25 currently exist. The information that we heard in

1 San Jose was that they think it will probably
2 begin construction this year. We have no reason
3 to know otherwise.

4 But, nevertheless, we have analyzed it,
5 for instance, for visual resources and for
6 biological resources, and in other critical areas
7 as if it were a stand-alone facility.

8 We don't suggest that the Commission may
9 want to put on blinders for that, but I think you
10 should look at it both ways. And that's the way
11 we looked at it.

12 COMMISSIONER BOYD: And I would think
13 that that's a good way to look at it, as long as
14 it's not presumed that approval of the energy
15 project is also some kind of state approval of
16 Dataport, as it relates to the locals'
17 responsibility for that project.

18 And if that's clear, then it sounds to
19 me like a lot of testimony and angst could be
20 prevented in the hearings for the energy project
21 if there at least was an understanding that one
22 approval does not presume the other, or dictate
23 the other, so on and so forth. But, I'm the new
24 guy on the block, so I'm trying to learn here.

25 MS. LUCKHARDT: Yeah, no, that's

1 correct. We are here to get approval of the power
2 project. And the Dataport project is under the
3 jurisdiction of the City of San Jose.

4 But we feel it's very prudent to analyze
5 it how staff has analyzed it, both with and
6 without. And if you analyze the power project
7 without Dataport at all, then I think you would
8 fail the cumulative impacts analysis at the least.

9 So, I think the way that staff has
10 presented it is very prudent, and allows all
11 parties to see it in both lights, both with
12 Dataport and without.

13 PRESIDING MEMBER KEESE: I think that
14 should be enough of a clarification. We'll take
15 the issue up under that title. However, we will
16 not expect extensive testimony. The facts speak
17 for themselves on this one, and we will have
18 debate. Is that acceptable?

19 HEARING OFFICER WILLIAMS: Staff, it may
20 be a good idea for you to address that in your
21 declaration. You should probably file a
22 declaration on project description. If your
23 summary accurately addresses that whole issue we
24 might be able to --

25 MR. RATLIFF: Well, I think you'll have

1 witnesses at the hearing who can sufficiently
2 address it. In fact, I think it's a rather simple
3 issue. We can't guarantee the timing of the
4 Dataport project. And if Dataport is delayed then
5 I --

6 PRESIDING MEMBER KEESE: And this
7 Committee should not make a decision that's
8 contingent on -- nobody wants a decision
9 contingent upon the Dataport project.

10 MR. RATLIFF: I think you should
11 probably hear from Dataport, themselves, as to
12 what their schedule is. I think that makes more
13 sense since we can't really speak for them, and I
14 don't know that the applicant can, either.

15 But it would be desirable, I think, to
16 hear from them as to what their intentions --

17 MR. GARBETT: I would object to that.

18 PRESIDING MEMBER KEESE: Pardon?

19 MR. GARBETT: I would object to hearing
20 from Dataport because these are facts not yet in
21 evidence, and shall we say, this is a bone of
22 contention about --

23 MR. RATLIFF: That's the purpose of
24 hearing from them, is to get those facts in
25 evidence.

1 MR. BAKKER: I think that's a good idea,
2 as well. I wonder who should call the Dataport as
3 a witness, the applicant? Milpitas? Staff?

4 MS. LUCKHARDT: And the point of calling
5 them as a witness would be to?

6 MR. BAKKER: Just simply to ask them
7 when they anticipate being online, I think.

8 PRESIDING MEMBER KEESE: What's the
9 status of their project.

10 MS. LUCKHARDT: And you want to do that
11 through a testimony situation? We don't represent
12 Dataport, and so I'm trying to figure out how and
13 if they would be willing to go under --

14 PRESIDING MEMBER KEESE: Well, let's
15 have staff ask them.

16 MR. RATLIFF: We'll request that they
17 attend.

18 HEARING OFFICER WILLIAMS: Thank you.

19 MR. GARBETT: Could I make a
20 clarification?

21 PRESIDING MEMBER KEESE: Mr. Garbett.

22 MR. GARBETT: In the City of San Jose,
23 in the applicant's planning file, there were a
24 number of documents on dual letterheads of Calpine
25 and Dataport, not C*Power, but Calpine and

1 Dataport on dual letterheads on the same
2 paperwork, cosigned by those parties.

3 And the question is what's going on in
4 the City as compared to the Energy Commission.
5 The number of forgeries or falsifications with the
6 City documents that have been made, particularly
7 right on down to the City Council hearings when
8 they had a coverup on duplicating some papers, or
9 shall we say, re-treading them rather well,
10 changing dates and substances to some degree. And
11 then letting some of them leak out in the actual.

12 Until we get the signed-off documents
13 from the City, and usually there's just about two
14 weeks inertia that it takes to get all the
15 signatures on them, and accumulate what they call
16 a final packet, we don't know what the City has up
17 their sleeve on this totally.

18 PRESIDING MEMBER KEESE: Now, are you
19 talking about on the Los Esteros project, or are
20 you talking about --

21 MR. GARBETT: The Los --

22 PRESIDING MEMBER KEESE: -- Dataport?

23 MR. GARBETT: The Los Esteros project,
24 and their approval that went before the City
25 Council most recently.

1 And because the files are commingled, in
2 fact in the City there was nothing that indicated
3 any C*Power at all in the applicant's file in the
4 planning department. And it's Calpine C*Power is
5 the applicant with the Commission, and therefore,
6 it's, shall we say, different parties involved,
7 and therefore the identity of the parties is one
8 of those things. And shall we say, finding the
9 alter egos and piercing the corporate veil may be
10 one of the things that may be necessary.

11 PRESIDING MEMBER KEESE: Thank you.

12 HEARING OFFICER WILLIAMS: Thank you.

13 Okay, so then it looks as if we will have nine
14 uncontested areas or topics: compliance and
15 closure, facility design, power plant reliability,
16 transmission line safety and nuisance, cultural,
17 geology, waste, traffic.

18 In those areas, then, what we'll need to
19 do if we're going to handle those by declaration
20 alone, is get a stipulation from the parties that
21 there are no disputed issues. And, of course, the
22 parties will waive cross-examination.

23 MR. RATLIFF: Staff would request that
24 you go at it from another direction entirely.

25 Instead of saying that we have to get parties to

1 stipulate that there are no issues, we think that
2 shoe should be on the other foot.

3 Those parties that have issues should
4 identify them now so that we will know exactly
5 what factual issues we're going to adjudicate.
6 Because we --

7 HEARING OFFICER WILLIAMS: Well, there
8 are no issues in these areas right now.

9 MR. RATLIFF: We think that they may not
10 be issues in other areas, as well. And we're
11 waiting to see exactly what issues are desired to
12 be adjudicated at hearing. We thought that was
13 the purpose of this conference was to find out
14 where, for instance, there are issues of fact that
15 we need to adjudicate in air quality or
16 socioeconomics, or public health or efficiency.

17 We don't know what those issues are. We
18 think that they should identify those issues so
19 there is some justification for taking witnesses
20 to San Jose for hearing.

21 HEARING OFFICER WILLIAMS: So your
22 proposal is that we go down this chart, topic by
23 topic?

24 MR. RATLIFF: Yes, that would be our
25 preference.

1 PRESIDING MEMBER KEESE: Sounds good.
2 Shall we start with air quality? Pick an easy
3 one. Both the City of Milpitas and the Coalition
4 have indicated issues. What --

5 MS. SCHILBERG: I'll speak for the
6 Coalition, one --

7 PRESIDING MEMBER KEESE: Factual.

8 MS. SCHILBERG: -- one of the issues we
9 want to look at is construction emissions, because
10 I believe the staff assessment was based on a 12-
11 month construction period, whereas if -- well,
12 again this all hinges on what the online date.
13 But assuming it's say, September, that would mean
14 a much collapsed construction schedule, faster
15 around-the-clock construction and around-the-clock
16 emissions which means the daily emissions would be
17 different from what are in staff's assessment.

18 HEARING OFFICER WILLIAMS: Milpitas?

19 MR. BAKKER: Milpitas' only issue on air
20 quality is whether some of the mitigation measures
21 for the project, which are regionwide mitigation
22 measures, adequately protect against the local
23 impacts of the project as far as air quality
24 emissions, and in particular on the residents of
25 Milpitas.

1 HEARING OFFICER WILLIAMS: Mr. Garbett.

2 MR. GARBETT: Okay. On the air quality
3 we're concerned with what you might call the
4 public health once again, and the water is one of
5 those issues in there that goes on with that use
6 of recycled water. And also the PM2.5 emissions
7 as opposed to, you might say, the PM10.

8 PM2.5 we think should be mitigated in a
9 way that is probably not done, and some of that
10 may have to wait till cogeneration goes on. So,
11 we'll extend that out as during the hearing
12 process on this.

13 PRESIDING MEMBER KEESE: So the factual
14 question that you're --

15 MR. GARBETT: And the factual questions
16 is also on the Bay Area Air Quality Management
17 District. We had asked for a hearing before the
18 permit was issued on that. That was not done.
19 And we are going to pursue that legally, if
20 necessary.

21 The issues in there regarding the
22 mitigation as to exactly what is done. We're also
23 concerned with what you call ionic balance of the
24 air.

25 COMMISSIONER BOYD: Excuse me, ionic

1 balance?

2 MR. GARBETT: Ionic balance. Many smoke
3 detectors, for instance, are based upon
4 ionization, and in fact if you have an excess of
5 either positive or negative ions does affect the
6 psychological health of people as well as other
7 factors.

8 How do we restore ionic balance.

9 HEARING OFFICER WILLIAMS: Staff, do you
10 have any comment?

11 MR. RATLIFF: Well, I don't think we
12 have any testimony on ionic balance, but I wasn't
13 quite sure whether these were air quality issues
14 or public health issues. I take it they were
15 public health issues --

16 MR. GARBETT: Actually it overlaps in
17 both of those.

18 HEARING OFFICER WILLIAMS: Applicant,
19 you didn't indicate in your prehearing conference
20 statement who your public health witness is. Who
21 is that?

22 MS. LUCKHARDT: Gary Rubenstein will do
23 air --

24 PRESIDING MEMBER KEESE: And he'll be
25 doing air, too?

1 MS. LUCKHARDT: I guess he'll also do
2 public health, as well.

3 HEARING OFFICER WILLIAMS: Okay.

4 MR. RATLIFF: We have a water quality
5 witness -- I mean water resources witness. What I
6 heard, Mr. Garbett, in your statement was that
7 your concern was water quality, at least in part?

8 PRESIDING MEMBER KEESE: He had a
9 question about -- let me ask him to clarify that.
10 You had a question about the use of recycled
11 water?

12 MR. GARBETT: Yes, definitely.

13 PRESIDING MEMBER KEESE: And what is the
14 question?

15 MR. GARBETT: And this goes back into
16 what you might call alternatives for the project,
17 and how things have been done in regards to that.
18 It has been brought up to the City and it will be
19 pursued further.

20 PRESIDING MEMBER KEESE: You have a
21 factual question about the health impact of the
22 use of recycled water?

23 MR. GARBETT: The health impact and the
24 use of it, as opposed to the well water that was
25 available when the applicant had applied.

1 MR. RATLIFF: Commissioner, I don't
2 understand. This is a simple cycle facility.
3 It's water --

4 MR. GARBETT: I understand that.

5 MR. RATLIFF: -- use is --

6 MR. GARBETT: It is reasonably small.

7 MR. RATLIFF: I don't -- I don't
8 understand the nature --

9 PRESIDING MEMBER KEESE: Yes, I'm having
10 difficulty seeing the connection here.

11 COMMISSIONER BOYD: Well, I'm hearing,
12 Mr. Chairman, perhaps for the first time in my
13 experience a question about the public health
14 consequence of utilizing reclaimed water. Is
15 that, in a nutshell, what you were saying?

16 MR. GARBETT: That's basically what it
17 amounts to.

18 COMMISSIONER BOYD: Particularly in
19 light of the fact that there was allegedly clean
20 wellwater available on site that could be used?

21 MR. GARBETT: And there still is.

22 COMMISSIONER BOYD: And it's the flip
23 side of those concerns that are expressed in this
24 day and age about preserving the best quality
25 water for potable uses, and maximizing the use of

1 reclaimed water.

2 But it's a fair question; it deserves
3 being addressed, about whether there are any
4 public health consequences related to the use of
5 reclaimed water in this particular type of
6 setting.

7 MR. GARBETT: Let me just phrase: In
8 the use of recycled water, as far as using it for
9 many purposes, as long as there is flooding of the
10 water we go along with the program that it's
11 probably quite safe to use.

12 It's when you put it in the air,
13 airborne aerosol sprays, be it even sprinkling for
14 irrigation rather than flooding for irrigation, we
15 believe there is public health problem with that.

16 The recent anthrax scare, shall we say,
17 may go and bring some of that to light. But there
18 is more serious issues with using recycled water
19 that's --

20 PRESIDING MEMBER KEESE: Okay, I -- go
21 ahead.

22 MR. SMITH: Mr. Garbett, just so we're
23 clear. The consumptive use of water on the
24 project is twofold. Direct injection for NOx
25 control and -- well, actually, yeah, direct

1 injection, but then part of the water is run
2 through a small cooling tower to cool the water
3 before, to chill it down for inlet purposes, which
4 gets to the NOx control and increased output from
5 the simple cycle.

6 That's the source of the airborne -- the
7 air quality issue that you're talking about. Any
8 emissions coming from the cooling tower, itself.

9 MR. GARBETT: The cooling towers is the
10 primary concern that we have. The direct
11 injection in there does not, you might say, go and
12 preclude any health problems, even though it may
13 go through the turbines, themselves.

14 I think you know anthrax, for instance,
15 is one of those things that you can, you know, put
16 it through fire, 5000 degrees, and it still
17 survives, unfortunately. And there are many other
18 things that may do it. That is not our primary
19 concern.

20 The cooling towers --

21 MR. SMITH: The cooling tower is the
22 primary --

23 MR. GARBETT: -- of any kind is what we
24 are concerned with. As an alternative any dry
25 cooling of the same nature --

1 PRESIDING MEMBER KEESE: And so what
2 you're going to ask is you're going to ask the
3 question is there any health risk, and staff and
4 applicant will answer it.

5 MR. GARBETT: Well, --

6 PRESIDING MEMBER KEESE: Is that what
7 you're --

8 MR. GARBETT: -- let's just say I have,
9 throughout the Metcalf project we were not
10 satisfied with the answers that we received. And
11 just anticipating the same answers will be
12 provided to us once again, we're going to object
13 to that.

14 PRESIDING MEMBER KEESE: But you're not
15 offering any expert witnesses who are going to
16 indicate there's a problem there?

17 MR. GARBETT: Well, I can serve as an
18 expert witness, if necessary. I was involved in
19 germ warfare in the military, and I do know the
20 hazards.

21 HEARING OFFICER WILLIAMS: Well, Mr.
22 Garbett, if you do anticipate having to testify,
23 you're going to have to file your r, sum, --

24 MR. GARBETT: As far as my --

25 HEARING OFFICER WILLIAMS: -- detailing

1 your experience --

2 MR. GARBETT: As far as my credentials
3 in this area, --

4 PRESIDING MEMBER KEESE: No, no, what
5 we're --

6 MR. GARBETT: -- I don't know what I'm
7 legally permitted to do --

8 PRESIDING MEMBER KEESE: That's fine.

9 MR. GARBETT: -- under security statutes
10 of what --

11 PRESIDING MEMBER KEESE: Okay, but --

12 MR. GARBETT: -- I've done and not done.

13 COMMISSIONER BOYD: Mr. Chairman, --

14 PRESIDING MEMBER KEESE: -- well, we're
15 certainly not going to deal with anthrax, --

16 MR. GARBETT: Well, anthrax --

17 PRESIDING MEMBER KEESE: -- but, --

18 MR. GARBETT: -- is a concern. It is
19 not the major concern.

20 PRESIDING MEMBER KEESE: Well, it's not
21 an issue in this case.

22 MS. LUCKHARDT: If we need to address
23 water public health from reclaimed water use we'll
24 need to call Dave Richardson -- he's listed under
25 water resources -- to testify on that under public

1 health, as well. The original issues that he
2 identified, Mr. Garbett identified, were more air
3 quality related, so we may need both Gary and Dave
4 Richardson to address any concerns he may have.

5 COMMISSIONER BOYD: Well, yeah, I hear
6 three concerns now, and I wanted to clarify that
7 we're not talking about a security threat issue
8 here, are we? Because that's a different issue.
9 I mean --

10 MR. GARBETT: First of all the security
11 issues might evolve with much of my background,
12 okay. I don't -- I'm trying to go and tread
13 lightly where on any r, sum, it would be very brief
14 and so forth.

15 COMMISSIONER BOYD: But your issue
16 relevant to this case hopefully is not the fact
17 that somebody might use this as a -- this water
18 supply source as a vehicle for some form of
19 threat, i.e., the use of anthrax. I mean that
20 would apply to any and all uses of water, and to
21 me is a totally separable question.

22 If your concern is the quality of the
23 water, what the constituents of the reclaimed
24 water are, and their public health consequences
25 when released to the atmosphere through this

1 cooling tower that's been discussed, that's a
2 valid question that I thought people could answer.

3 If you're going to get into use of that
4 water as a medium for security threat purposes in
5 this day and age, that opens a whole different
6 chapter that I've never heard put on the table
7 here.

8 And so the discussion of your
9 credentials is not all that relevant for those
10 reasons.

11 MR. GARBETT: Okay, I am not trying to
12 go and make it a national security issue in any
13 way, shape or form.

14 COMMISSIONER BOYD: I just wanted the
15 record to show that --

16 MR. GARBETT: However, my past military
17 experience may be some of those. But the question
18 that I have right now is that there is litigation
19 pending on the Metcalf Power Plant as to the
20 quality of the recycled water, because the City of
21 San Jose has not met their mark.

22 HEARING OFFICER WILLIAMS: Well, we'll
23 just need something --

24 MR. GARBETT: And that is in litigation
25 now. And so the question has been asked, it just

1 hasn't been answered.

2 PRESIDING MEMBER KEESE: The confusion
3 here is that you're talking about reclaimed water
4 and the air impacts of it. So, we've got to
5 figure out which, whether we take it under water
6 or air.

7 MS. LUCKHARDT: Yeah, we could have a
8 panel and have them answer whatever -

9 PRESIDING MEMBER KEESE: All right. I
10 think that takes care of air.

11 And I don't know that we have to discuss
12 times here, but I would believe each of these are
13 reasonably brief issues.

14 MR. GARBETT: Correct.

15 PRESIDING MEMBER KEESE: We'll get the
16 answer to the daily emissions, and we'll get the
17 answer to the mitigation impacts and whether
18 they're regional or local.

19 All right, in alternatives. It's again
20 the City of Milpitas and the Coalition.

21 MR. BAKKER: I'd just note for the
22 record that the chart that we have shows William
23 Marcus is the Milpitas witness. I believe that's
24 actually a Coalition witness.

25 PRESIDING MEMBER KEESE: Okay.

1 MS. SCHILBERG: So the Coalition would
2 like to present a witness on the alternatives
3 analysis. We believe that if this project is
4 considered to be only an electricity project, that
5 the alternatives analysis has not been complete.

6 And if this is to be considered
7 mitigation for U.S. Dataport, then the project
8 should be permitted contingent on U.S. Dataport.
9 And we propose to present a witness to go through
10 the alternatives and the advantages of our
11 proposal.

12 HEARING OFFICER WILLIAMS: Staff.

13 MR. RATLIFF: We have no objection to
14 that.

15 MR. GARBETT: One point that we'd like
16 to bring out on the alternatives, and as far as
17 a --

18 PRESIDING MEMBER KEESE: You have a
19 question you're going to ask, I think, is what
20 you're saying.

21 MR. GARBETT: Okay, I'll just make a
22 statement as to what we would present.

23 PRESIDING MEMBER KEESE: Okay.

24 MR. GARBETT: Is in the Northeast San
25 Jose Reinforcement Project EIR done by the Public

1 Utilities Commission, the need for the project is
2 basically questioned there because it does offer
3 an alternative with just intertying to Highline
4 interties with an interconnect as to negating any
5 necessary power need for the Los Esteros
6 substation, which basically goes and reflects upon
7 the need for this project, also.

8 PRESIDING MEMBER KEESE: I don't think
9 there's any use debating it. I think you're quite
10 aware of the Commission's responsibilities and
11 role in deciding whether a new power plant is
12 needed. And that may have been a discussion 10 or
13 15 or 20 years ago. It's essentially not a
14 discussion today. If somebody wants to build a
15 power plant, it's needed.

16 So, alternatives is fine. But need is
17 not going to go very far.

18 Biological resources. We have the City
19 and the Coalition again.

20 MS. SCHILBERG: Basically the Coalition
21 was going to draw attention to several biological
22 impacts identified in the staff assessment which
23 would be ameliorated if the project were
24 contingent on U.S. Dataport.

25 PRESIDING MEMBER KEESE: This will be

1 Mr. Marcus again?

2 MS. SCHILBERG: No, this was proposed to
3 be cross-examination.

4 PRESIDING MEMBER KEESE: Okay.

5 MS. SCHILBERG: It was to demonstrate a
6 point and an advantage of our proposal as opposed
7 to the applicant's, the way it has been proposed
8 by the applicant. I wouldn't necessarily say it's
9 a factual dispute. It's more a policy conclusion.

10 PRESIDING MEMBER KEESE: Okay.

11 MR. RATLIFF: I would only ask if they
12 need our witness for that purpose, or do they want
13 to make it as a statement or --

14 PRESIDING MEMBER KEESE: I heard this
15 was a policy discussion on the relationship
16 between Dataport and the project.

17 MS. SCHILBERG: It's essentially --

18 PRESIDING MEMBER KEESE: And whether the
19 staff's biological assessment deals with that
20 independently or they're contingent.

21 MS. SCHILBERG: It's kind of the cross-
22 examination question have you studied it without
23 Dataport at all. And if the project were
24 contingent on Dataport, wouldn't it be true that
25 your lack -- these adverse impacts are no longer

1 there. Basically to put that on the record.

2 MR. RATLIFF: I'm sorry, the latter was
3 if Dataport were not there --

4 MS. SCHILBERG: No. If the project were
5 contingent on Dataport isn't it true that the
6 adverse impacts that you identified would be
7 lessened, or nonexistent.

8 So how to get that on the record.

9 MR. RATLIFF: Well, the staff analyzed
10 it both with the Dataport and without.

11 PRESIDING MEMBER KEESE: So you should
12 be able to answer that question?

13 MR. RATLIFF: Yeah.

14 MR. BAKKER: I think we do have one
15 issue, and that is with regard to the burrowing
16 owl mitigation, my understanding is that the
17 mitigation would require the applicant to provide
18 some habitat elsewhere in the region, but that
19 that's inconsistent with San Jose's previous
20 practice, which is to require habitat be provided
21 in the local area.

22 But apparently there isn't any habitat
23 in the local region. I don't know if this is
24 really a factual issue, however. It may just be
25 something we can comment on. I'm not sure that we

1 need a witness for this particular issue. It
2 seems more like a legal issue.

3 PRESIDING MEMBER KEESE: It wouldn't
4 bother this Committee one iota if you discuss it
5 with staff and settle it before we got to the
6 hearing, if this can be --

7 MR. BAKKER: Okay, well, --

8 PRESIDING MEMBER KEESE: It sounds to
9 me, it sounds --

10 MR. BAKKER: -- we can try that.

11 PRESIDING MEMBER KEESE: It sounds to me
12 like it might be something on which you can get
13 resolution.

14 MS. SCHILBERG: Well, this brings up one
15 of the difficulties with the four-month AFC. My
16 understanding is there's no brief in this process.
17 So, we're -- at what opportunity do we have to say
18 we identify this issue and that issue, and this is
19 the reason why we think it should be our way.

20 Because there's no way to identify that
21 for the record.

22 PRESIDING MEMBER KEESE: Why don't we
23 have Major sort of tell you what we have in mind.

24 HEARING OFFICER WILLIAMS: I think that
25 what the Committee was anticipating was that we

1 would get prefiled testimony, of course, from the
2 applicant early March.

3 Then the parties would have an
4 opportunity to address the prefiled testimony.
5 And indicate what specific issues the parties had
6 with regard to that testimony.

7 But this is a little different, I think,
8 because what we're doing now is specifying what
9 issues, in terms of cross-examination, that you
10 may have with staff's presentation. And staff's
11 presentation is essentially already contained in
12 the staff assessment.

13 So, to the extent that we need to reach
14 an agreement on which of staff's witnesses are
15 going to be present on March 11th, we probably
16 only have that opportunity to work that out today,
17 is how I see it.

18 So, unless, you know, we can reach some
19 kind of agreement today, then staff will have to
20 present those witnesses on March 11th.

21 MR. RATLIFF: I think the easiest way to
22 resolve this issue is just to say we will bring a
23 witness on biological resources to the hearing to
24 answer any questions about burrowing owl
25 mitigation, with or without --

1 HEARING OFFICER WILLIAMS: I think
2 that's the only way --

3 MR. RATLIFF: -- the Dataport project.

4 HEARING OFFICER WILLIAMS: -- we can
5 deal with it. Right.

6 PRESIDING MEMBER KEESE: Okay.

7 MS. LUCKHARDT: And just for your
8 information, as well, all of our testimony and
9 everything that we've listed in our exhibit list
10 has already been filed.

11 So, although we will combine it for the
12 purposes of hearings and put an individual or
13 individuals to sponsor that testimony, at this
14 point I'm not anticipating filing additional
15 testimony on top of the information we've already
16 filed.

17 And I would have folks summarize to
18 address the issues raised by -- have our witnesses
19 summarize the testimony that's already been filed
20 to address the issues raised by people here today.

21 HEARING OFFICER WILLIAMS: Okay.

22 PRESIDING MEMBER KEESE: All right.

23 MR. BAKKER: I'm sorry, just briefly.
24 The testimony that the applicant will be using is
25 the AFC, and the data responses?

1 MS. LUCKHARDT: And various other
2 documents that we have filed in this proceeding
3 that are included in our exhibit list.

4 MR. BAKKER: Okay.

5 MS. LUCKHARDT: And that's what we're
6 planning on doing at this point. We haven't seen
7 anyone else's testimony other than staff. To this
8 point we are pretty much in agreement with staff
9 on all issues.

10 So we won't be providing testimony in
11 response to staff. We don't anticipate that.
12 Without seeing intervenors' testimony beforehand
13 we can't respond to that, either.

14 So, we will be filing the information
15 that we've already filed in the record.

16 HEARING OFFICER WILLIAMS: Well, with
17 regard to the intervenors' testimony, the
18 intervenors will have to file prefiled testimony,
19 you understand that? For the two witnesses, one
20 each, from the City and one from the Coalition.

21 Mr. Garbett, you will also need to file
22 any testimony that you anticipate making, along
23 with your qualifications. Is that clear?

24 MR. GARBETT: Maybe I can give you a
25 clue as to our interest in the biological. It is

1 that the proximity of the Don Edwards Natural
2 Wildlife Preserve, and the closure of NASA Ames at
3 Moffat Field on a migration path, and the loss of
4 the feeding grounds that basically traditionally
5 this site was.

6 And also the fact that their open space
7 authority has, quote, "looked", including any
8 condemnation proceedings at this particular site
9 for an extension of open space. And they do have
10 condemnation ability.

11 HEARING OFFICER WILLIAMS: Who has that
12 condemnation ability?

13 MR. GARBETT: Under state law the open
14 space authorities do have that. And it is a
15 matter of one-upmanship, if necessary. I don't
16 think I anticipate this happening, but --

17 PRESIDING MEMBER KEESE: You anticipate
18 it happening before this event? I mean you're
19 arguing we can't look at Dataport because it isn't
20 on the ground. Are you -- how do you -- let's be
21 consistent.

22 MR. GARBETT: By March 11th we'll have
23 some clue. I'll put it this way, we have an
24 election --

25 PRESIDING MEMBER KEESE: All right, and

1 essentially you intend to ask some questions?

2 MR. GARBETT: That would be it. It
3 would be brief, along --

4 PRESIDING MEMBER KEESE: Yeah.

5 MR. GARBETT: -- that's the nature --

6 PRESIDING MEMBER KEESE: Okay.

7 MR. GARBETT: -- of our questions or
8 interest here.

9 PRESIDING MEMBER KEESE: Okay.

10 MR. GARBETT: I think we indicated that
11 in a workshop previously to some degree.

12 PRESIDING MEMBER KEESE: All right.

13 Compliance and closure is okay. Cultural
14 resources is okay.

15 MR. GARBETT: The compliance, the only
16 thing I have about that is the construction before
17 the fact.

18 HEARING OFFICER WILLIAMS: I propose
19 that we take up all those type issues under
20 project engineering.

21 MR. GARBETT: Okay.

22 PRESIDING MEMBER KEESE: Cultural
23 resources okay. Facility design is okay. Geology
24 and paleontology and hazmat.

25 MR. GARBETT: The hazmat is a concern.

1 PRESIDING MEMBER KEESE: Okay, what's --

2 MR. GARBETT: That was closure of the
3 wells that has been done, the dumping in the
4 wells. And also the particular disturbance of the
5 pesticide residues and the hazards to worker
6 safety that's already been there.

7 So, either things that have happened
8 that, quote, might trigger even a Superfund thing.
9 I rather doubt it, but.

10 PRESIDING MEMBER KEESE: Staff.

11 MR. RATLIFF: No objection, we'll bring
12 a witness for hazardous materials.

13 PRESIDING MEMBER KEESE: Okay.

14 MR. GARBETT: Ours is more a complaint,
15 you might say, later on when you do have
16 compliance conditions based upon prior conditions.

17 PRESIDING MEMBER KEESE: So you're
18 talking about compliance.

19 MR. GARBETT: Yes. And this is the
20 compliance portion is certain conditions that
21 you're writing as conditions of the project that
22 we get after the fact. But in some case, after
23 the fact all of a sudden we find it had been
24 broken before the fact. That may trigger some --
25 that's what I'm trying to relate in that regards,

1 hazmat.

2 PRESIDING MEMBER KEESE: Well, I'm
3 trying to figure out if we do need a witness on
4 hazardous materials, that's what I'm trying to
5 figure out. Whether staff needs to bring somebody
6 on hazardous materials.

7 MR. RATLIFF: If we can schedule it
8 close to public health that's the same witness, so
9 we can have the same witness address both issues.

10 PRESIDING MEMBER KEESE: Okay. All
11 right.

12 MR. BAKKER: I have a quick issue on
13 hazmat. I'm not sure if this is actually a hazmat
14 issue, perhaps somebody can help me out here.

15 I believe there's a condition somewhere
16 in the conditions of certification that requires
17 the applicant to give some training to the fire
18 department in San Jose with regard to potential
19 hazardous materials spills.

20 It's been brought to my attention that
21 the City of Milpitas may be the closest fire
22 department. And under its obligations under the
23 mutual aid, it would be required to respond to any
24 spill at this facility.

25 We would just suggest that Milpitas be

1 given the same training that the City of San Jose
2 would be given, such that they are capable of
3 responding to something like this.

4 I would assume this is something we
5 could work out with the applicant, but I just
6 wanted to raise it here.

7 MR. STEWART: If I could respond. All
8 operating facilities provide training to the fire
9 department so that they know what's onsite and how
10 they may respond. And we fully intend to include
11 Milpitas under that reciprocity agreement with San
12 Jose. So, Milpitas will receive the same training
13 that the San Jose Fire Department receives, if
14 that answers the question.

15 PRESIDING MEMBER KEESE: Okay, --

16 MR. BAKKER: I believe it does. I just
17 don't know, I thought that was a condition, and
18 I'm not sure if you remember if there was or not.
19 And I believe the condition said San Jose Fire
20 Department. And I would just like to make sure
21 that it says something like, you know, both
22 agencies, or the agencies most likely to respond,
23 the companies most likely to respond.

24 MR. STEWART: As the applicant we
25 certainly -- Milpitas is going to be one of the

1 potential responders. We don't want to leave them
2 in the dark as to what they would be responding
3 to.

4 MR. BAKKER: Okay.

5 MR. GARBETT: -- Santa Clara would also
6 be a tertiary responder.

7 MR. BAKKER: Thank you.

8 PRESIDING MEMBER KEESE: Okay. Land
9 use. The City of Milpitas.

10 MR. BAKKER: The City of Milpitas has
11 raised a number of issues on land use and some
12 comments previously. I think we still feel that
13 those aren't adequately addressed. So, I don't
14 know if we have to go through each issue or
15 whether we should just have a land use witness
16 present and we can raise those issues with the
17 witness.

18 MS. LUCKHARDT: And these would be
19 similar to the issues like comments on the staff
20 assessment?

21 MR. BAKKER: Right. We made these
22 comments in writing previously. Some of them were
23 addressed adequately and others weren't. And
24 several of them relate directly to visual impacts.
25 So I think it would be a good idea to have a land

1 use person there and we can just address those
2 issues.

3 HEARING OFFICER WILLIAMS: Staff.

4 MR. RATLIFF: We'll have our land use
5 witness there.

6 PRESIDING MEMBER KEESE: Okay. So the
7 same indication from applicant. Noise.

8 MR. BAKKER: I'm not sure that we need a
9 witness on noise. If we have any issues we can
10 just provide some comments, or commentary on this
11 particular issue.

12 I'm not sure that we have any factual
13 issues on noise.

14 PRESIDING MEMBER KEESE: Okay.

15 MS. LUCKHARDT: So does that mean that
16 we're not bringing witnesses on noise?

17 PRESIDING MEMBER KEESE: Not bringing
18 witnesses on noise. They're going to make some
19 comments. Putting out very limited time on that
20 one.

21 Power plant efficiency.

22 MS. SCHILBERG: The Coalition noticed a
23 discrepancy between the heat rate in the
24 description, the heat rate in the contract, and
25 the air quality permit. So, we're just wanting to

1 know, to make sure that there's consistency in all
2 the different analyses. And if not, what should
3 be done there.

4 MS. LUCKHARDT: Okay, so you want some
5 sort of clarification on the heat rate. We can
6 have somebody do that.

7 MS. SCHILBERG: I think the staff also,
8 some of the discrepancies exist in the staff
9 assessment, also, so --

10 MR. RATLIFF: The discrepancy is between
11 the staff assessment description of the heat rate
12 and the air quality permit --

13 MS. SCHILBERG: And the --

14 MR. RATLIFF: -- Was that --

15 MS. SCHILBERG: -- DWR contract.

16 MR. RATLIFF: Is there a heat rate
17 expressed in the air quality permit?

18 MS. SCHILBERG: I believe it was 10-5.

19 MR. RATLIFF: Ten?

20 MS. SCHILBERG: 10,500.

21 PRESIDING MEMBER KEESE: And then the
22 DWR contract has --

23 MS. SCHILBERG: Is 10,500, too.

24 MR. RATLIFF: If we can find a way to
25 explain those discrepancies, in other words if we

1 go back and find out why there is a different heat
2 rate in those three places, would we have to have
3 a witness to explain that? Because I have a
4 feeling we're going to take a person to San Jose
5 just for that purpose, otherwise.

6 MS. SCHILBERG: Right. If you could
7 write something up that -- if you could have --

8 MR. RATLIFF: Okay.

9 MS. SCHILBERG: -- something written
10 that we could refer to, I think that would be
11 adequate.

12 MR. RATLIFF: Okay. Then we'll do that.
13 We'll put something in writing and we'll docket it
14 this week on that.

15 PRESIDING MEMBER KEESE: Okay.

16 MS. LUCKHARDT: Okay, we can do the
17 same, if that would be --

18 PRESIDING MEMBER KEESE: Pardon?

19 MS. LUCKHARDT: We could do the same if
20 that would be preferable.

21 PRESIDING MEMBER KEESE: That would be
22 preferable.

23 MS. SCHILBERG: I would assume that we
24 wouldn't need any cross, but -- I guess once we
25 see the document then we could see if any cross is

1 needed, but if --

2 MR. RATLIFF: Okay. That's agreeable to
3 us. If there's a problem with the description
4 then you let us know and then we'll bring a
5 witness to San Jose.

6 PRESIDING MEMBER KEESE: Okay, power
7 plant reliability is okay. And I think project
8 description, except as we've discussed it.

9 HEARING OFFICER WILLIAMS: I think
10 we've --

11 PRESIDING MEMBER KEESE: Which --

12 MS. SCHILBERG: Well, I do have some
13 questions about the whole project scheduling and
14 all the things that are -- various scheduling
15 issues. Would we put it under project
16 description?

17 They're separate from the issues that I
18 thought for under the transmission -- well, --

19 MS. LUCKHARDT: Our witness on that
20 would be Todd Stewart, who will be there the whole
21 time, so wherever --

22 PRESIDING MEMBER KEESE: That shouldn't
23 be a problem. Let's just leave it, there's going
24 to be a few questions in that area. They loosely,
25 they very loosely belong perhaps in -- they belong

1 somewhere, project description may not be exactly
2 where they belong, but we'll just handle them
3 there.

4 Public health.

5 MR. BAKKER: My understanding is that
6 that staff will be bringing the public health
7 witness?

8 MR. RATLIFF: For recycled water issues
9 that were discussed earlier, and --

10 MR. BAKKER: Okay.

11 MR. RATLIFF: -- if there's more I guess
12 it would be useful to us to know what it is.

13 MR. BAKKER: Right. Okay. Milpitas is
14 concerned about this project's effect on its
15 residents. The project is -- Milpitas is downwind
16 from the project. We haven't focused too much on
17 this particular issue. And I'm not certain that
18 there would be any cross-examination on this
19 issue.

20 But my understanding is that public
21 health is the issue that deals with the effect on
22 residents of air quality issues.

23 MR. RATLIFF: Generally speaking, public
24 health usually discusses toxics, toxic air
25 contaminants that have been identified and are

1 listed, but noncriteria pollutants, which are the
2 province of air quality.

3 And I suspect what you're interested in
4 is criteria air pollutants.

5 MR. BAKKER: Okay.

6 MR. RATLIFF: We're already bringing the
7 air quality witness, but we're going to have both
8 of them there, at least for part of the time, so.

9 MR. BAKKER: Okay.

10 MS. SCHILBERG: The Coalition had also
11 identified in our supplemental statement a public
12 health impacts issue that we wanted to do some
13 cross of the staff on. And it has to do with
14 toxic emissions at startup.

15 Again, part of the un-clarity is how
16 often this CT is going to be starting up or not.
17 And I think in the Metcalf proceeding there was a
18 discussion about the toxic emissions that occur
19 when a CT is started up frequently.

20 And this is another issue that would
21 disappear if it were contingent on the Dataport
22 project.

23 MR. RATLIFF: Is it acrolein, or
24 acrolein, depending on which you want to --

25 MS. SCHILBERG: Yes.

1 MR. RATLIFF: Is that the identified
2 toxic that you're talking about?

3 MS. SCHILBERG: Yes.

4 MR. RATLIFF: Okay.

5 MS. SCHILBERG: And I don't think staff
6 analyzed that.

7 MR. RATLIFF: Oh, we analyzed it as far
8 as it can be analyzed. And we analyzed it to
9 death, but the problem is that there is no agreed-
10 upon method for doing source testing for acrolein.
11 So it's basically one of those unanswered issues,
12 or unanswerable issues, I should say, to some
13 degree.

14 I would request that rather than do
15 that, if anyone wants to make an issue of
16 acrolein, let's just take official notice of the
17 Metcalf records on acrolein. Because we have
18 extensive testimony from all parties, including
19 intervenors, on that very issue. And not try to
20 reinvent the wheel again here.

21 PRESIDING MEMBER KEESE: Hold on a
22 second. Let's try to go a little further on this.
23 The specific issue that you'd like to raise?

24 MS. SCHILBERG: Well, there's a toxic
25 called acrolein that is emitted more severely

1 during startup of the combustion turbine.

2 PRESIDING MEMBER KEESE: Okay, now let
3 me ask, is that in the staff assessment? Do you
4 deal with that issue in the staff assessment?

5 MR. WORL: I don't recollect how much
6 discussion there is specifically of that
7 particular contaminant.

8 MR. RATLIFF: We have a discussion of
9 all contaminants, and of their concentrations in
10 proximity to the project, because these tend to be
11 very close in to the project site, itself, where
12 you actually have measurable concentrations.

13 PRESIDING MEMBER KEESE: Okay, let me
14 jump back to the Coalition. Your issue is you're
15 not concerned about the cumulative or all of the
16 contaminants, you're talking about just one?

17 MS. SCHILBERG: Well, yeah, I'm talking
18 about this one. And at startup. Because it's
19 unclear, again, how many times this combustion
20 turbine is going to be starting up, or if it's
21 going to be running all the time.

22 I think in the phase where --

23 PRESIDING MEMBER KEESE: So, the
24 question that you want to --

25 MS. SCHILBERG: -- it's a DWR project,

1 it --

2 PRESIDING MEMBER KEESE: -- ask is, is
3 there -- would staff have a different analysis
4 about this substance were the project to be in a
5 mode where it was started frequently, or
6 differently? And this is not a baseline plant,
7 but --

8 MS. SCHILBERG: Well, might there need
9 to be a mitigation if this plant is running up and
10 down often.

11 MR. SMITH: And your factual issue is
12 that staff's analysis doesn't just startup,
13 shutdown, startup, shutdown cycling of the
14 turbines with respect to --

15 MS. SCHILBERG: Correct.

16 MR. SMITH: -- acrolein emissions? So
17 that's your issue, that's the factual --

18 MS. SCHILBERG: Correct.

19 MR. SMITH: -- issue that you're trying
20 to raise?

21 PRESIDING MEMBER KEESE: Applicant.

22 MR. RATLIFF: Well, I'm not entirely
23 sure that's correct. I think the staff assumes a
24 number of startups when they do their analysis.
25 And likewise, so does the FDOC that the Air

1 District performs.

2 And I'm subject to correction by the Air
3 District, themselves, but typically there is an
4 assumption for startups.

5 MR. SMITH: What I heard a minute ago,
6 Mr. Worl stated with respect to acrolein emissions
7 that he didn't believe staff analyzed the startup,
8 shutdown mode with respect to --

9 MR. RATLIFF: We didn't address that
10 specific toxic.

11 MR. SMITH: And that's what the
12 Coalition's --

13 MR. RATLIFF: I mean there's a long list
14 of contaminants that are actually in the TAC list.
15 And you basically, the way those are used is you
16 do a health risk assessment with that list of
17 contaminants. And you do a dispersion modeling
18 analysis of where the highest point of
19 concentration is.

20 Both the Air District's modeling and the
21 staff's check of that modeling indicated that
22 there would be no either increased cancer risk or
23 chronic health risk as a result of all of those
24 toxic air contaminants, including acrolein, and in
25 combination.

1 That's what the current testimony shows.

2 PRESIDING MEMBER KEESE: Okay, all
3 right, and that is the way staff would generally
4 do the analysis? They would generally not do an
5 analysis of each specific, they would do --

6 MR. RATLIFF: Because they're additive,
7 so you put them all together in a --

8 PRESIDING MEMBER KEESE: Put them all
9 together and see what their additive impact is,
10 and study that.

11 MR. RATLIFF: That's correct.

12 MS. LUCKHARDT: And the air permit,
13 itself, as well as staff's conditions, contain
14 limits on hours of operation and limits on startup
15 hours and things like that. So all of that has
16 been analyzed to the maximum extent that this
17 project can operate.

18 PRESIDING MEMBER KEESE: Okay.
19 Coalition?

20 MS. SCHILBERG: Well, see here we're all
21 getting into factual issues, and I'm not ready to
22 present all the factual issues. But, as I recall,
23 the air permit was for 8760 hours, so it wasn't
24 for a whole lot of startups and I'm not sure what
25 staff's assumption was about number of startups.

1 But as I read the contract it could be
2 up to 1200 startups, 300 for each unit. So I'm
3 just wondering if staff's analysis used the same
4 assumptions as -- well, what are the correct
5 assumptions, and did staff's analysis incorporate
6 those.

7 PRESIDING MEMBER KEESE: Okay. We're
8 trying to find clarity here.

9 MR. RATLIFF: This should be something,
10 I think, that our air quality person should be
11 able to address. So, why don't you just plan to
12 address it at that point.

13 What I would, I guess, hope that we will
14 not attempt to do at these hearings is recreate
15 the Metcalf record on acrolein, because we spent
16 two days in hearings on that there, and I don't
17 think we're going to add to that in terms we won't
18 profit, probably, from revisiting in this case.

19 PRESIDING MEMBER KEESE: Okay -- I
20 didn't hear what the question was.

21 MS. SCHILBERG: Except to the extent --
22 well, if we could just incorporate that whole
23 record, and what I'm entertaining is if a
24 mitigation measure is needed, then we should have
25 the opportunity to clarify that.

1 HEARING OFFICER WILLIAMS: Staff, could
2 you also file that testimony from Metcalf on the
3 acrolein?

4 MR. RATLIFF: What I would ask is that
5 official notice be taken of the Metcalf --

6 HEARING OFFICER WILLIAMS: Understood,
7 but --

8 MR. RATLIFF: I'll tell you what, I will
9 file a motion requesting official notice of
10 portions of the Metcalf decision --

11 HEARING OFFICER WILLIAMS: Okay, yeah,
12 let's do it that way.

13 MR. RATLIFF: -- for the purposes of
14 this proceeding. And we'll be willing to make
15 that available to whomever wants it --

16 HEARING OFFICER WILLIAMS: That doesn't
17 detract from anything that you're requesting. The
18 witness will be there.

19 MS. SCHILBERG: Yes, I think I would
20 also request, if we're going to take notice of the
21 staff's record, could we also get what the
22 applicant said about acrolein in that Metcalf,
23 because I think there is an element that is
24 different in this plant, the size.

25 MS. LUCKHARDT: Since I didn't work on

1 Metcalf, I don't believe Todd did, either, we
2 would need to check with Chris Ellison and Jeff
3 Harris and folks at Calpine to double check. I'm
4 assuming, since Dick's referencing it, that it's
5 probably fine. But I would need to do that check
6 before we could agree to that.

7 PRESIDING MEMBER KEESE: Okay, staff
8 will do theirs, and applicant will check theirs.

9 MR. GARBETT: I've previously given an
10 objection to anything from Metcalf, however if you
11 want to docket those portions of the testimony and
12 record regarding that from Metcalf, I'll rest on
13 that.

14 PRESIDING MEMBER KEESE: You want it
15 both ways all the time, huh?

16 (Laughter.)

17 PRESIDING MEMBER KEESE: All right.

18 MR. GARBETT: -- to die from boredom. I
19 do have a question here under public health, is
20 under hazardous materials the water conditioners
21 used, probably be using those as standard EPA data
22 sheets. And the EPA data sheets only apply to the
23 handling, and not the end use, after they're
24 actually used. And the hazards with polymers,
25 particularly, is what I'm concerned with. That if

1 you're using polymers and the effect upon the
2 population.

3 PRESIDING MEMBER KEESE: Okay.
4 Socioeconomics.

5 MR. BAKKER: This is another item where
6 I don't believe there are any factual issues;
7 however, Milpitas would like to reserve the right
8 to provide some comments on this particular issue.

9 In our prehearing statement I think I
10 alluded to the fact that we'd like to have some
11 public officials present to make commentary at the
12 hearings. That would perhaps involve either a
13 city manager or a member of the city council or
14 the mayor or something. So, I --

15 PRESIDING MEMBER KEESE: From Milpitas?

16 MR. BAKKER: From Milpitas, yeah, fine.

17 PRESIDING MEMBER KEESE: And usually
18 we're accommodating in finding you time when they
19 can make a comment on two or three issues at the
20 same time, and so we can accommodate their
21 schedule.

22 MR. BAKKER: Great. I don't know if we
23 should work out the time for that commentary now,
24 or how I work that out in the future. Should I
25 just bring them to a particular hearing, or how do

1 we want to deal with that?

2 PRESIDING MEMBER KEESE: Well, --

3 HEARING OFFICER WILLIAMS: Here's what I
4 had in mind for the hearing. I had in mind that
5 we take the uncontested matters first, the
6 declarations in those areas first, the nine or so
7 areas that are totally uncontested. Take whatever
8 stipulations we need to take in those areas.

9 And then proceed to the matters that are
10 contested. So, I don't think it would be wise to
11 bring them, but -- 1:00, if that's something --

12 MR. BAKKER: One o'clock on day one?

13 PRESIDING MEMBER KEESE: One o'clock on
14 day one.

15 HEARING OFFICER WILLIAMS: Yeah.

16 MR. BAKKER: Okay.

17 PRESIDING MEMBER KEESE: I hate to be a
18 total optimist, but I really don't see why this
19 should take more than one day. Maybe one vigorous
20 day, but one day would be the goal.

21 It just requires everybody to have a
22 little discipline, but get all the issues out
23 there.

24 So, if we take the stipulated ones
25 first, we should be able to take some testimony

1 before the break. But then if a public official
2 wants to comment on a number of areas, as I say,
3 the Committee usually gives them the courtesy of
4 doing it someplace in there. That --

5 MR. BAKKER: Okay. I think 1:00 is a
6 good time. That's assuming we're going to have a
7 break at 12:00, and then 1:00 we come back?

8 PRESIDING MEMBER KEESE: You know, I
9 don't know how many of -- doesn't always work that
10 way, but, yeah, that would be the assumption.

11 MR. BAKKER: Okay, great.

12 PRESIDING MEMBER KEESE: So it would
13 probably be pretty close to 1:00.

14 HEARING OFFICER WILLIAMS: We're
15 starting at 10:00.

16 MS. LUCKHARDT: At your pleasure.

17 HEARING OFFICER WILLIAMS: We have the
18 room starting at 10:00.

19 SPEAKER: We could start at 7:00 if
20 you'd like.

21 (Laughter.)

22 HEARING OFFICER WILLIAMS: We have the,
23 just let me check --

24 PRESIDING MEMBER KEESE: Yes, it says --

25 HEARING OFFICER WILLIAMS: Ten? So

1 we're starting at 10:00. If we're going to get
2 through these proceedings in one day it would be
3 helpful if we could not break for lunch, and
4 perhaps have lunch brought in or something like
5 that.

6 I just throw that out there. We might
7 want to make those arrangements.

8 PRESIDING MEMBER KEESE: In either
9 event, 1:00 would look good for the --

10 SPEAKER: What is the location that you
11 have written down?

12 HEARING OFFICER WILLIAMS: Berger
13 Center. Berger Center.

14 MR. GARBETT: Berger Center.

15 PRESIDING MEMBER KEESE: San Jose.
16 Coalition?

17 MS. SCHILBERG: I just wanted to
18 identify that if we're only going to have one day
19 of hearings, I assume it --

20 HEARING OFFICER WILLIAMS: We have three
21 scheduled. We have three days scheduled.

22 PRESIDING MEMBER KEESE: We're planning
23 on scheduling for three days.

24 MS. SCHILBERG: Yes, because I had
25 identified that our witness has a conflict with

1 two days in the week of March 11th, not yet
2 determined. So I was just noting the potential
3 conflict if we only have it March 11th.

4 PRESIDING MEMBER KEESE: Is that a
5 conflict date?

6 MS. SCHILBERG: Well, it's that there's
7 two dates in that week, and it hasn't been
8 determined yet when the witness' other hearings
9 would be. I can make a call at the break and see
10 if that's been determined yet. But I don't think
11 it has been.

12 I'll have to just ask what we can do
13 about that if you're assuming that it's going to
14 be that week.

15 PRESIDING MEMBER KEESE: Remind me,
16 again. Your witness is going to speak on?

17 MS. SCHILBERG: Alternatives.

18 PRESIDING MEMBER KEESE: Alternatives.
19 Well, then we'll be as accommodating as possible
20 to take up alternatives at a time when they could
21 do it. And if it was at, you know, other than at
22 10:00 in the morning, because I think we want to
23 start with uncontested, just clear that off. But
24 if it was sometime in that afternoon, that would
25 be --

1 HEARING OFFICER WILLIAMS: Yeah, we're
2 going until 9:00. We have the room until 9:00 --

3 MS. SCHILBERG: 9:00 p.m.?

4 HEARING OFFICER WILLIAMS: -- at night,
5 9:00 p.m.

6 MS. SCHILBERG: Well, I will definitely
7 call this morning.

8 PRESIDING MEMBER KEESE: Okay.

9 HEARING OFFICER WILLIAMS: If we do
10 need, keep in mind if we need to continue on to
11 the 12th, we won't be able to start until 3:00
12 p.m. on the 12th.

13 And, of course, if we do need the 13th,
14 then we'll start back at 10:00 a.m. again. So
15 that's the schedule that we have in mind. Of
16 course, we're going to try to do it in one day.
17 But those are the timeframes that we have.

18 PRESIDING MEMBER KEESE: All right, that
19 takes care of socioeconomic, I believe, comments.
20 Soil and water is clear. Traffic and
21 transportation clear. Transmission system
22 engineering and project schedule, I think that's
23 what you're talking about, isn't it?

24 MS. SCHILBERG: Well, we also will have
25 some cross-examination on transmission engineering

1 since the alleged voltage support benefits from
2 this project are identified by the applicant as a
3 reason to move it up more quickly.

4 So we will want to be cross-examining on
5 some of the assumptions with respect to the
6 transmission studies, including the load, and the
7 load forecasts used, and voltage support at
8 various substations, interconnection agreements
9 and various things like that.

10 HEARING OFFICER WILLIAMS: Okay.

11 MS. LUCKHARDT: Is it possible to get
12 the ISO, do we know?

13 MR. RATLIFF: We haven't checked on the
14 ISO, but we will check. Maybe we should try to
15 get the ISO at the hearing, as well, --

16 MS. LUCKHARDT: That sounds like
17 that's --

18 MR. RATLIFF: -- so they can help answer
19 those questions.

20 MS. LUCKHARDT: That sounds like ISO
21 questions.

22 MR. RATLIFF: And, Ms. Schilberg, you
23 also identified staff as a source of your cross-
24 examination, too, is that correct?

25 MS. SCHILBERG: Right. It's basically

1 sort of the same questions with the essentially
2 has the staff considered, or what's the staff's
3 view on these various issues.

4 MR. RATLIFF: Okay.

5 MS. SCHILBERG: Yeah.

6 HEARING OFFICER WILLIAMS: So the
7 applicant and staff will try to make arrangements
8 to have the ISO present.

9 PRESIDING MEMBER KEESE: All right, line
10 safety and nuisance is not an issue. Visual
11 resources we know is an issue. And we've heard
12 from T.H.E.P.U.B.L.I.C. what their interest was,
13 striking references to Dataport. Milpitas or the
14 Coalition?

15 MR. BAKKER: Yeah, Milpitas is prepared
16 to raise a number of issues in visual resources.
17 I'm not sure that we need to go through them item
18 by item.

19 PRESIDING MEMBER KEESE: Do you have a
20 witness?

21 MR. BAKKER: We have a witness; we're
22 prepared to cross-examine the applicant's witness
23 and the staff's witness. Essentially our issue is
24 that we think there is significant visual impacts
25 that can't be mitigated in this project, so --

1 visual impacts.

2 PRESIDING MEMBER KEESE: And you will be
3 submitting written --

4 MR. BAKKER: Written testimony --

5 PRESIDING MEMBER KEESE: -- testimony
6 for that?

7 MR. BAKKER: That's correct.

8 PRESIDING MEMBER KEESE: Right.

9 MR. RATLIFF: And I suppose we should
10 schedule today the timing for that testimony.

11 MR. BAKKER: Yeah, I would request that,
12 as well.

13 PRESIDING MEMBER KEESE: Let's hold off
14 on it, though.

15 MS. SCHILBERG: The Coalition's issues
16 with respect to visual resources are not so much
17 factual questions, but rather the policy
18 conclusion that linking it with Dataport would
19 ameliorate some of the problems.

20 MR. RATLIFF: We intend to have our
21 witness there to be cross-examined, so it --

22 PRESIDING MEMBER KEESE: You'll have
23 your witness there.

24 MR. RATLIFF: -- makes -- it's --

25 PRESIDING MEMBER KEESE: Yeah, we're

1 going to clearly have witnesses on that subject.

2 Waste management there's no issues.

3 Worker safety and fire protection, was that the
4 same issue that we --

5 MR. BAKKER: Yeah, I think on the fire.
6 I wasn't sure where that needed to be addressed,
7 but that was the same issue that I raised earlier.

8 MS. LUCKHARDT: And I'm wondering if the
9 concern is truly to make sure that Milpitas gets,
10 is a recipient of the same type of training, if
11 that's something that we could have included in
12 Todd Stewart's declaration to that effect.

13 PRESIDING MEMBER KEESE: Sure, I think
14 that would be --

15 MS. LUCKHARDT: And I don't know that --

16 MR. BAKKER: I think that would be fine.

17 MS. LUCKHARDT: I don't know that that's
18 a --

19 MR. BAKKER: This is just an issue that
20 staff raised with me, and I wanted to make sure
21 that it got addressed. Thank you.

22 MR. RATLIFF: We don't need a witness on
23 that?

24 MR. BAKKER: I don't think so, no.

25 MR. GARBETT: I have a question

1 regarding the fire protection -- that are to be
2 used. And you may -- that as a visual --

3 PRESIDING MEMBER KEESE: Under visual?

4 MR. GARBETT: Well, the fire protection,
5 because they have large tanks that are quote, not
6 identifiable, and some of the things. And the
7 size and the -- require -- and the exception from
8 the San Jose procedures on having a fire main
9 interconnection. Which actually touches in land
10 use, too, so --

11 PRESIDING MEMBER KEESE: That's a
12 question?

13 MR. GARBETT: Yeah, my concern is these
14 here quote large -- millions of gallons of fire
15 water.

16 PRESIDING MEMBER KEESE: On this
17 property? In conjunction with this project?

18 MR. STEWART: That's incorrect.

19 MS. LUCKHARDT: Yes.

20 PRESIDING MEMBER KEESE: Pardon?

21 MR. STEWART: We have fire tanks, but
22 they're not millions of gallons of fire water.

23 PRESIDING MEMBER KEESE: Okay. But he's
24 going to ask the question and we'll get the
25 answer.

1 Okay, --

2 COMMISSIONER BOYD: Well, excuse me, was
3 the question relative to visual aspects of these,
4 quote, tanks? Or to the adequacy of this water
5 tank fire protection system to do its job?

6 MR. GARBETT: It touches on both. I
7 spoke to the Fire Captain here the other day, and
8 one of the things is there's certain exceptions in
9 the City Codes have done. The City has a policy,
10 and this does not comply with the City policy,
11 even though technically supposedly they have two
12 different projects they have signed off on on this
13 two different planned development rezonings on the
14 same area with these same kind of exceptions. But
15 yet they say there are no exceptions, and I'm
16 getting double-talk out of the City.

17 PRESIDING MEMBER KEESE: You got to help
18 me here, though. Are you looking for a bigger
19 tank or a smaller tank?

20 MR. GARBETT: I'm not arguing about the
21 tanks, themselves. I'm wondering if they are not
22 clandestine, for instance, enabling greater
23 contact time for the chlorine that's going to be
24 used in the recycled water, or whatever, because
25 the recycled water cannot be adequately treated

1 because of the short pipeline, because the EPA
2 requirements on chlorine contact time.

3 PRESIDING MEMBER KEESE: Okay.

4 MR. GARBETT: Those are some subtle
5 issues.

6 PRESIDING MEMBER KEESE: That's the
7 question.

8 MR. GARBETT: And we can beat around
9 those and some of the other areas --

10 PRESIDING MEMBER KEESE: Okay, well, I'm
11 going to take worker safety and fire protection
12 off. I think that you'll get your answer on that.
13 If you don't get the answer you can take it up
14 somewhere, but we're going to consider that that's
15 a closed issue.

16 And we'll take the other question up
17 under visual or wherever you want to take it up.

18 Why don't we take a five-minute break
19 here, five -- ten-minute break.

20 (Brief recess.)

21 PRESIDING MEMBER KEESE: I guess there's
22 a couple things we'd like to flesh out. Mr.
23 Ratliff, let's have a conversation. The staff's
24 analysis indicates that this project stands on its
25 own. It is not contingent upon the building of

1 U.S. Dataport, is that correct?

2

3 MR. RATLIFF: Staff analyzed the
4 critical areas both with and without Dataport. We
5 took no position on whether or not Dataport would
6 be built. It's our expectation based on what
7 we've heard that it would be.

8 PRESIDING MEMBER KEESE: But in staff's
9 analysis it is not a contingency on any of its
10 decisions on items of import that U.S. Dataport
11 must be built?

12 MR. RATLIFF: In terms of the critical
13 environmental areas, such as biological resources
14 and visual resources, that's correct.

15 PRESIDING MEMBER KEESE: That's correct.

16 MR. RATLIFF: We analyzed both ways.

17 PRESIDING MEMBER KEESE: The confusion
18 seems to be, Mr. Boyd, would you read us the
19 language?

20 COMMISSIONER BOYD: Well, I'm reading a
21 section 2 of the staff report that's entitled
22 project description. 2.1 is introduction; 2.1-1
23 says: U.S. Dataport PEZ approved EIR. And it
24 says, quote, "This project is actually being
25 proposed as mitigation for the U.S. Dataport

1 planned development zoning project approved by the
2 City of San Jose at a City Council meeting on
3 April 3, 2001." Et cetera, et cetera, et cetera.

4 And that confuses me relative to the
5 discussion we had earlier today as to whether this
6 is an application for a stand-alone energy
7 facility that may or may not be, you know, linked
8 to another project some day.

9 Maybe, Mr. Chairman, the question also
10 needs to be directed to the applicant as to
11 whether they view their application to be for an
12 energy facility that's a stand-alone energy
13 facility.

14 MR. RATLIFF: Maybe I could provide, and
15 the applicant should help, too, if they wish, but
16 if I can provide the background. This project was
17 originally a Dataport project.

18 Perhaps you remember about a year --

19 COMMISSIONER BOYD: I remember the
20 project well.

21 MR. RATLIFF: You remember, okay. About
22 a year ago --

23 COMMISSIONER BOYD: I remember the
24 diesel project.

25 MR. RATLIFF: -- there was some

1 discussion as to whether the project, as proposed,
2 was subject to Energy Commission jurisdiction.
3 And the chief counsel of our agency was asked to
4 negotiate, as I understand it, with Dataport to
5 see if they could not come up with a project that
6 was not going to be supported by diesel backup
7 engines. We had about 100 megawatts of diesel
8 backup in the original proposed form.

9 Calpine and Dataport both then, I think,
10 went back and formulated this proposal to be the
11 Energy Center for the Dataport project. That is
12 the purpose of the project. That was its
13 fundamental reason as we understand it.

14 It also has now been proposed as a gas-
15 fired project, so it has at least until it is
16 performing the Energy Center role as the backup
17 for the Dataport project, it will actually be
18 serving power into the grid, as I understand it.

19 MS. LUCKHARDT: That's correct.

20 MR. STEWART: Correct.

21 MR. RATLIFF: But the City obviously is
22 making a large land use decision for themselves,
23 that is they are approving the entitlements and
24 the zoning approvals for the Dataport project.
25 And they have done so. And they have, in that

1 approval they have zoned the land for the interim
2 Energy Center, which is an integral part of that
3 project.

4 Under a normal CEQA scenario they would
5 be the lead agency for all of this in its
6 entirety. But because under the Warren Alquist
7 Act the Energy Commission must license all power
8 plants as a lead agency, you essentially have a
9 different lead agency licensing the power plant.

10 When we set out to do the analysis for
11 the power plant we started assuming that Dataport
12 was, I think inconsistently assuming that Dataport
13 was part of the project.

14 We had some difficulty with knowing what
15 to assume because it was pointed out that the
16 Dataport project may not be built as soon as this
17 power plant would be online. It does not exist
18 currently.

19 So then we decided that because the City
20 needed to be informed by our analysis for their
21 entitlements we would assume that the Dataport
22 project existed for the purpose of our analysis.
23 But we would also in our analysis consider all of
24 the impacts were the project a stand-alone
25 facility.

1 So we have essentially analyzed it both
2 ways. That was to enable the City to be informed
3 by our analysis for their project so they could
4 look at it in the context of their project. But
5 also so that you would have an analysis which
6 indicates what the impacts are, for instance, in
7 the visual sense if the project is there before
8 Dataport is actually constructed.

9 COMMISSIONER BOYD: I mean frankly what
10 I inferred from my knowledge of this project and
11 my weekend of reading about it in detail, and the
12 knowledge of the past, is that -- and this is not
13 meant to be a legal description, but kind of a lay
14 interpretation, is that in a sense Dataport
15 project, in the eyes of the City, is dependent
16 upon an energy source other than the type
17 originally proposed in the earliest project, i.e.,
18 the diesel system.

19 So, in a way the Dataport project is
20 contingent upon a let's call it clean energy
21 center being in existence. But I didn't read
22 anything to say that the energy center's existence
23 is dependent upon there being a -- the Dataport
24 facility.

25 So there may be, you know, a one-way

1 street from the Dataport project in the eyes of
2 the City, and it's allowing there to be such a
3 project, being contingent upon, let's say, a clean
4 energy source.

5 But there isn't anything that I ever
6 read that required that the Dataport project -- or
7 that the energy center is dependent upon their
8 being a Dataport project.

9 And therefore I'm kind of reaching, in
10 my own mind, the conclusion that we can declare
11 the energy project a stand-alone energy project
12 that I think the staff has done, gone the extra
13 mile and analyzed what contingent projects might
14 exist out there, since long history of Dataport is
15 hard to ignore that it may well come along.

16 But, it still could be declared a stand-
17 alone facility that this Commission has to act
18 upon. And the concerns of many of the parties
19 about whether it's coupled and contingent or not
20 can be dispensed with as not being relevant in any
21 of the couplings they want to make about
22 dependence, can be decoupled for purposes of this
23 Commission's responsibility with regard to the
24 energy project, itself.

25 And if that is indeed the case, it might

1 make all the hearings that are planned for the
2 future much simpler to deal with. And might get
3 to the Chairman's thought that this is do-able in
4 the first 10:00 a.m. to 9:00 p.m. day, rather than
5 a day that I've seen that based on logistics would
6 have to be 3:00 p.m. start the next day, and et
7 cetera, et cetera.

8 So I was thinking there is a way to
9 maybe make this simpler for everybody, and to
10 perhaps assure that in an 11-hour day we might be
11 able to deal with this project. And if it runs
12 day and night, it afford the various publics the
13 opportunity to be present, so on and so forth.

14 PRESIDING MEMBER KEESE: I would concur
15 in that. Frankly, unless we're going to put a
16 condition in here that says this can't be built
17 until Dataport starts construction or something, I
18 don't see us going through this process.

19 What we're going to do in the four-month
20 process, if that's if we stick with the four-month
21 process, what we're going to do here is license a
22 power plant as a stand-alone facility,
23 understanding that if Dataport is built, we still
24 would have licensed it.

25 So it's not that Dataport is a

1 contingency for the licensing of the plant; it's
2 that we license the plant, and even if Dataport is
3 built, we would have licensed the plant. Right?

4 MS. LUCKHARDT: Yes.

5 MR. RATLIFF: Okay.

6 PRESIDING MEMBER KEESE: Okay.

7 Coalition, you -- and we're trying to answer some
8 of the questions because I think there's this idea
9 that we're going to look at whether we need the
10 Dataport for the licensing of this plant, and
11 we're not going to look at that.

12 MS. SCHILBERG: Under the scenario you
13 just outlined that might follow, but if that is
14 the scenario you're going to look at, then I think
15 the no-project analysis, the no-project section is
16 inadequate.

17 Because the major reason that the
18 project came out okay under the alternatives was
19 because it's the only way to provide energy to
20 U.S. Dataport.

21 If you're going to make it a stand-
22 alone, first of all I don't think it would have
23 been designed with the extra redundancy and the
24 extra costs that it has as a stand-alone project.

25 PRESIDING MEMBER KEESE: That's true.

1 MS. SCHILBERG: And so then the
2 alternatives analysis is lacking if you take that
3 route, in my feeling.

4 MR. RATLIFF: I think Ms. Schilberg
5 has -- there's some validity to her point. The
6 alternatives analysis that the staff did was, I
7 think, premised on the notion that it was of the
8 nature, at least, if not in fact, a cogeneration
9 project that was supplying power to the
10 foreseeable facility, which has already been
11 approved by the land use entitlements at the City.

12 That being a foreseeable project we did
13 our alternatives analysis with that in mind. We
14 didn't spend a lot of time going around looking
15 for alternative sites for this particular power
16 plant because, obviously it wouldn't serve the
17 identified project purpose, which was to be the
18 energy center for the Dataport project.

19 And we probably would have done more had
20 that not been one of the project objectives that
21 we had identified.

22 Nevertheless, if you want to look at it
23 as a stand-alone project pure and simple, which I
24 think is a bit of a blinder's approach, but if you
25 want to do that, what I would suggest is -- and we

1 would request that you take official notice of the
2 Metcalf alternatives analysis performed by staff,
3 which is an extensive, very extensive analysis of
4 all of the alternative sites in the region. And
5 which identified this particular site as one of
6 the most favored sites, both from its electrical
7 integration standpoint, but also from the
8 standpoint of its environmental impacts.

9 There's no reason for -- I mean I think
10 it would be incredible, actually, for this agency
11 to ignore that analysis, given the fact that we
12 just spent so much staff time actually doing that
13 analysis for the entire local area.

14 PRESIDING MEMBER KEESE: Okay, we'll
15 take that.

16 HEARING OFFICER WILLIAMS: Staff, could
17 you -- go ahead, City.

18 MR. BAKKER: Oh, I'm sorry, I just
19 wanted to comment briefly on this issue. Just to
20 let you know Milpitas' perspective, and that is
21 that I think our perspective is consistent with
22 Commissioner Boyd's interpretation and that is
23 that we've always viewed this project as a stand-
24 alone project. And we criticized the staff and
25 the applicant for assuming the presence of U.S.

1 Dataport.

2 One of the ways that this project has
3 sort of evolved is that the applicant's original
4 visual impacts and a couple other, I think bio and
5 a couple of these other areas, has assumed the
6 presence of the U.S. Dataport such that the
7 buildings around the perimeter of the Dataport
8 would block the view from Milpitas and the various
9 other places of the power plant project.

10 And we've been critical of that because
11 it's our assumption there's nothing in the
12 application to the contrary that if the Commission
13 approved this project, the power plant could go
14 forward notwithstanding the Dataport ever being
15 built.

16 So, from a CEQA perspective we are
17 looking at it and saying, look, the baseline that
18 you have to analyze, Commission, is empty land out
19 there, and your approval will allow a power plant
20 project to go forward on that empty land. So,
21 just from a CEQA perspective, that's been our
22 argument.

23 And I think that's consistent with what
24 Commissioner Boyd was saying.

25 HEARING OFFICER WILLIAMS: Mr. Garbett.

1 MR. GARBETT: T.H.E.P.U.B.L.I.C.'s
2 viewpoint is is that the power plant has always
3 been, along with Metcalf, has been a scheme for
4 the City of San Jose to go and use recycled water.
5 As a consumer of recycled water, and the
6 incidental generation of power was something that
7 was considered as just merely an excuse to justify
8 things.

9 The City of San Jose is limited on
10 growth by the cap based on the flow to the San
11 Francisco Bay from their sewage treatment plant.
12 They can only discharge so much water.

13 They've met that cap. The only way they
14 can have any growth is to basically get rid of
15 their water somehow. There's been a conflict of
16 interest with the former city attorney, also
17 working for a lawfirm. There's a year where she
18 wasn't supposed to work back for the City as a
19 consultant, but beings as she was the attorney
20 that got the ordinance in place, she got an
21 exception to that. And she's worked both sides of
22 the fence all the way along to basically get this
23 recycled water to go through.

24 And the Dataport, we believe, was a
25 stalking horse just to go and get a consumer

1 recycled water irregardless of public safety or
2 anything else.

3 The drive to use recycled water, both on
4 Metcalf, as well as Los Esteros, is the
5 overwhelming consideration the City has had. And
6 this would, you might say, fuel or accelerate
7 growth, stimulate growth.

8 Not that we're against that, but hey,
9 let's throw your cards down on the table. Let's
10 let this just be a stand-alone power plant and get
11 on with business is what I'm trying to say.

12 PRESIDING MEMBER KEESE: All right, I do
13 want to hear from the Coalition. Let's hear from
14 the Coalition here.

15 MS. SCHILBERG: The other comment I have
16 about considering this is a stand-alone project is
17 that on the fly I've made a few comments, but
18 essentially what it feels like you're trying to
19 engineer is redoing the whole analysis midstream
20 in a contained four-month process. In other
21 words, redefining the whole way we're looking at
22 this.

23 And it strikes me as a lot to do within
24 a hurried timeframe.

25 MS. LUCKHARDT: At this point, if I

1 might.

2 PRESIDING MEMBER KEESE: Go ahead.

3 MS. LUCKHARDT: You know, this whole
4 project has been designed to support a data center
5 of one type or another. It's designed with
6 additional reliability features. And, you know,
7 the whole thing has been approved by the City, as
8 one big project concept for zoning.

9 I think to totally ignore that would be
10 leaving us open to a certain extent, as well. So,
11 I think that the approach taken by staff in
12 analyzing both situations has really given us the
13 strongest view of what the project will look at
14 with and without, and what the impacts are of the
15 project with and without datacenter.

16 But I also think that it would be, to a
17 certain extent, inaccurate to look at the project
18 totally stand-alone, because it is designed for
19 that purpose. And that is the intent. And we
20 have every indication that a datacenter will go in
21 around this project.

22 PRESIDING MEMBER KEESE: Thank you. And
23 I was going to make an observation somewhat
24 similar, I think, that when we look at our
25 different issues, air quality, biological, we have

1 to come to a conclusion that will stand whether
2 Dataport is built or not.

3 But when we're looking at things like
4 project design, or some of those related, we must
5 understand that this is the power plant of the
6 future. This is the way that power plants will be
7 built in the future, which is they will be locally
8 centered to service a need for electronic quality
9 electricity.

10 We know that's going to happen and we
11 know that's where this project started. And we
12 can't totally ignore that issue.

13 It's just that the flat project is going
14 to have to, under our analysis, stand on its own.

15 COMMISSIONER BOYD: Mr. Chairman, my
16 attempt was to simplify matters particularly for
17 the Coalition. It sounds like it doesn't work in
18 terms of simplifying matters. So perhaps we'll
19 just leave well enough alone and get on with it.

20 It has a very tortured history that I'm
21 intimately familiar with from my seems like years
22 on the generation task force of the Governor. I'm
23 intimately familiar with Dataport. And I guess in
24 those days it was our desire to do everything in
25 anybody's power not to have a diesel generating

1 station anywhere in California.

2 So, this is a positive step in getting
3 clean power. The water angle, that's the first I
4 ever heard of that one, but needless to say,
5 whatever simplifies it for the greatest number of
6 people is what I was searching for. And since
7 this -- if this is so integrated, it's so
8 synergistically designed, so be it. And would
9 proceed in whatever way makes it easiest.

10 PRESIDING MEMBER KEESE: For some of the
11 issues.

12 MR. GARBETT: Can I make one further
13 comment. Where you may see the Dataport project
14 go, based upon economic times today, is just down
15 the road from where the energy center would be
16 going in stands a vast number of Cisco buildings,
17 which are unoccupied.

18 Across the creek from the power plant in
19 the City of Milpitas stands a number of office
20 buildings right along 880.

21 If Dataport wants to get cooking real
22 fast, these are more likely scenarios of where
23 they will place their operation, rather than right
24 around the energy center, itself.

25 PRESIDING MEMBER KEESE: Thank you. I

1 did a quick sketch of time here. And I'll just --
2 I may as well use my numbers that I threw out.

3 It would probably take us one hour to
4 handle the noncontested items at the front end.
5 At the back end -- well, not take the back yet.
6 Air quality, it looks like we might be able to
7 handle in one hour. And alternatives in one hour.
8 I'm sort of putting them together.

9 One hour for biological resources. And
10 on noise, public health and socioeconomics I got
11 very minor questions that would be asked, and I
12 put 15 minutes, 30 minutes and 15 minutes. So I'm
13 saying basically it sounds like there's about an
14 hour's worth of questions on noise, public health
15 and socioeconomics.

16 MS. LUCKHARDT: I've got on my notes
17 that we're basically looking at public comment on
18 noise and socioeconomics. Am I incorrect on that?

19 PRESIDING MEMBER KEESE: I'm sorry,
20 noise, I gather --

21 MS. LUCKHARDT: On noise it says --

22 PRESIDING MEMBER KEESE: -- I gathered
23 it was going to be very brief on noise.

24 MS. LUCKHARDT: Okay, I just didn't know
25 whether we needed to bring witnesses. I thought

1 it was --

2 PRESIDING MEMBER KEESE: No, I --

3 MS. LUCKHARDT: -- just public --

4 PRESIDING MEMBER KEESE: -- no factual,
5 just that they wanted to make a comment.

6 MS. LUCKHARDT: All right.

7 PRESIDING MEMBER KEESE: So I'm -- but
8 between that comment and then some questions on
9 public health and some questions on
10 socioeconomics, where again there were no factual
11 issues involved, I thought an hour would handle
12 that.

13 Put down 30 minutes for transmission
14 system engineering and two hours for visual, which
15 is probably liberal, but may as well. And that
16 wound up with seven and a half hours.

17 MS. SCHILBERG: I think we may have more
18 on transmission, but we may have less on public
19 health. So it might balance out.

20 PRESIDING MEMBER KEESE: Okay, well,
21 this is just a sketch. We're not -- we're talking
22 here. That's seven and a half hours. That would
23 take us to 5:30. We have to leave time for public
24 comment. And public comment belongs best, other
25 than a government official who wants to choose a

1 time to be there, public comment probably does
2 best when it floats through that evening hour
3 where they can get off work and make the comment.

4 That would take us to 7:30, if there was
5 two hours left for public comment. That leaves an
6 hour and a half of flexibility before the 9:00
7 target. And it leaves quite a bit of flexibility
8 in that public comment because who knows whether
9 there's going to be two hours worth of public
10 comment. We have to have it available, but we
11 don't know whether we'll get it or not.

12 So it would seem to me, unless somebody
13 just says we're just out of our gourd, that we're
14 into an area where we just might make it the first
15 day. Does that sound acceptable?

16 MS. SCHILBERG: Are you anticipating the
17 public comment would be from 7:00 to 9:00 p.m., or
18 from 5:30 to 7:30?

19 PRESIDING MEMBER KEESE: 5:30 to 7:30.
20 We'd take the public comment when we're over, when
21 we're done, but we probably wouldn't leave. I
22 think we would announce that we would stay till a
23 certain time. That we'd be available for public
24 comment up till say 7:30, but if we didn't get
25 done, it would last till 9:00. I don't know if

1 that's a --

2 COMMISSIONER BOYD: I think we have to
3 send a message that we're available till 9:00 if
4 need be.

5 HEARING OFFICER WILLIAMS: Roberta, did
6 you have something?

7 MS. MENDONCA: Thank you very much. I
8 really appreciate this approach. And when you've
9 decided the time period that you'll have for
10 public comment, if you'll just let me know, then
11 if we get calls we can refer --

12 PRESIDING MEMBER KEESE: I'll tell you
13 what, I'll tell you what, why don't we say, if we
14 said we'd have public comment available from 5:30
15 to 7:30. If we're done with our testimony we can
16 break it at 7:30. If we're not, we'll go back
17 from 7:30 till 9:00.

18 MR. GARBETT: Can you make that from
19 6:00 to 8:00, just about a half hour later, trail
20 that, because I think that's where traditionally,
21 shall we say, the earliest anyone gets off is at
22 6:00 from work to get to a public meeting.

23 PRESIDING MEMBER KEESE: Well, the
24 reason I'm picking 5:30 is because that's when,
25 under my target, you'll be done with your

1 testimony. And then nobody would have to sit
2 around for awhile. Now, that's optimistic,
3 although believe it or not, another -- the Morro
4 Bay hearings that I've been coming in are coming
5 in at one-half of estimated time.

6 So if people stick to the facts and the
7 questions and brevity we can get these things
8 done.

9 So I would suggest 5:30 to 7:30; that
10 will -- if they're not there at 5:30, keep going
11 on with testimony.

12 MS. MENDONCA: Might I also verify that
13 should the public be able to attend during this
14 segment under consideration you would call for
15 public comment at that --

16 PRESIDING MEMBER KEESE: Public comment
17 is welcome during the --

18 MS. MENDONCA: Thank you.

19 PRESIDING MEMBER KEESE: Okay. With
20 that the question then would be -- there was one
21 other question raised, which is when should we
22 have witnesses there.

23 Does anybody have a -- is your witness
24 okay?

25 MS. SCHILBERG: Yes, my witness is

1 available that day.

2 PRESIDING MEMBER KEESE: Do you want to
3 try to set a time specific to take up certain
4 issues, would that be -- would you like that,
5 or --

6 MS. SCHILBERG: My suggestion is that we
7 deal with this project description issue early
8 because I think it will color a lot of the things
9 that happen --

10 HEARING OFFICER WILLIAMS: It will be
11 first. Project description will be first after
12 the uncontested areas.

13 MS. SCHILBERG: And scheduling issues,
14 if we could get a clear sense of when the
15 project's --

16 PRESIDING MEMBER KEESE: 11:00?

17 MS. SCHILBERG: So 11:00 for the project
18 description issues?

19 HEARING OFFICER WILLIAMS: Right.

20 PRESIDING MEMBER KEESE: Does that
21 sound --

22 MR. RATLIFF: 11:00 for project
23 description. Should that be the time when we
24 attempt to get Dataport to make a showing and
25 describe what their project is and their timeline?

1 MS. LUCKHARDT: We can call and ask.

2 PRESIDING MEMBER KEESE: Okay, we'll
3 take up the noncontested issues first, followed by
4 project description right around 11:00.

5 Is there any reason then on air,
6 alternatives or biological to schedule specific
7 times?

8 MS. LUCKHARDT: I would just ask that we
9 put air quality and public health, I guess and
10 water, kind of together since the issues seem to
11 flow. We may need our witnesses to stick around
12 for that.

13 HEARING OFFICER WILLIAMS: Okay.

14 MS. LUCKHARDT: Air quality, public
15 health and potentially water --

16 PRESIDING MEMBER KEESE: Okay. And do
17 you want to set a time for that? Do you want to
18 try for that after lunch?

19 MS. LUCKHARDT: 11:00?

20 COMMISSIONER BOYD: Yeah, I would just
21 say next. Next, and hopefully a merciful 30
22 minute break for lunch or 20 minutes or something.

23 MR. BAKKER: Before 1:00 p.m., since
24 we're going to have the public officials at 1:00.

25 PRESIDING MEMBER KEESE: Yeah, I don't

1 think -- no, the public officials are when they
2 choose to get there. And, you know, they can pick
3 1:00, --

4 MR. BAKKER: Okay.

5 PRESIDING MEMBER KEESE: -- or they can,
6 if they want to say they can do it at 12:30.

7 MR. BAKKER: Okay.

8 PRESIDING MEMBER KEESE: I don't think
9 it should break up a presentation. But, if they
10 want to come right after the --

11 MR. BAKKER: Okay, that's fine.

12 PRESIDING MEMBER KEESE: -- the
13 description, project description. If they want to
14 come right after that, that's fine.

15 MR. BAKKER: Okay, good.

16 PRESIDING MEMBER KEESE: So there will
17 probably be some kind of a break right around
18 1:00; starting at 10:00, probably a break right
19 around 1:00 anyway. And right after the break
20 would probably be the appropriate time for them to
21 make a statement if they wanted.

22 MR. BAKKER: Okay.

23 PRESIDING MEMBER KEESE: The one other
24 thing, there are nine conditions that I did not
25 read this morning for a four-month process that

1 have to be met. We're all aware of those, I hope?

2 MS. LUCKHARDT: Yes.

3 PRESIDING MEMBER KEESE: And we'll have
4 to put something on that they have been met.

5 MR. RATLIFF: I think the statute -- I
6 don't have the pro forma, so I can't refer to it,
7 but I believe has three conditions for the
8 licensing of the project. Three findings that the
9 Commission makes, additional conditions for the
10 application.

11 I just wanted to make those distinctions
12 for --

13 PRESIDING MEMBER KEESE: Between the
14 nine that I have on my list?

15 MR. RATLIFF: Right. Commissioner, if I
16 could address just briefly a couple of other
17 things. I think we may have resolved the issue of
18 at least, at least one of the issues of public
19 health that we discussed earlier. And that had to
20 do with the issue of acrolein and toxic air
21 contaminants.

22 Both the Air District and the applicant
23 have confirmed that this project will have an
24 oxidation catalyst. The entire issue that was
25 discussed in Metcalf had to do with whether or not

1 an oxidation catalyst would be required for the
2 Metcalf project, given the fact that the project
3 was proposing to meet its CO requirements without
4 the catalyst.

5 The testimony of the intervenors was
6 that the oxidation catalyst would reduce toxic air
7 contaminants by a significant amount, and the
8 Commission ended up requiring a oxidation catalyst
9 in Metcalf.

10 The uncontroverted testimony in that
11 case was that that would mitigate any acrolein
12 levels, whatever they were, to a level of less
13 than significant.

14 So I don't think that's going to be at
15 issue in this case.

16 PRESIDING MEMBER KEESE: Does that sound
17 like --

18 MS. SCHILBERG: I mean subject to the
19 fact that it is having an oxidation catalyst, yes,
20 I would agree.

21 PRESIDING MEMBER KEESE: Okay.

22 MR. RATLIFF: The second issue is that
23 we are going to try to get an ISO representative
24 to the hearings. We have not arranged to do so.
25 I think we've been remiss in that, but we will try

1 to do that, because although we aren't quite sure
2 of the nature of the transmission engineering
3 questions, it sounds like they may have to do with
4 certain questions that it would be desirable to
5 have their presence to answer. So we'll try to
6 arrange for that to be on our basically -- we'll
7 put them on as a panel with our transmission
8 witnesses.

9 And then with regard to alternatives, I
10 will be requesting that the Commission take
11 official notice of its decision, and of the
12 staff's environmental documents, in the Metcalf
13 case with regard to the alternatives analysis for
14 the Metcalf project, which contains an elaborate
15 analysis of alternatives in the Metcalf region.

16 HEARING OFFICER WILLIAMS: Will you be
17 filing that?

18 MR. RATLIFF: Filing the actual
19 documents, themselves?

20 HEARING OFFICER WILLIAMS: Yes.

21 MR. RATLIFF: I didn't intend to. I
22 mean do you want me -- you mean --

23 HEARING OFFICER WILLIAMS: I think it
24 would be --

25 MR. RATLIFF: Do you want me to docket a

1 copy --

2 HEARING OFFICER WILLIAMS: Yes.

3 MR. RATLIFF: You're able to take
4 official notice without the actual docketing of
5 one of your decisions, since it is your decision.

6 PRESIDING MEMBER KEESE: I think it
7 would be helpful to get it around, though.

8 MR. RATLIFF: Then maybe we could ask
9 the parties before they leave today to stick
10 around and we'll give them copies so we don't have
11 to mail them. Because it's simply a matter of
12 going over to the publications office, I believe.

13 PRESIDING MEMBER KEESE: Okay. I think
14 that will work then. Why don't we give the
15 parties here --

16 MR. RATLIFF: It's a public document;
17 it's readily available; it's --

18 PRESIDING MEMBER KEESE: And then other
19 than that we'll take notice of it. So you make a
20 copy available.

21 MR. RATLIFF: Okay.

22 PRESIDING MEMBER KEESE: All right.

23 Let's talk about what we have in mind for
24 deadlines here.

25 Let me just read what we have in mind

1 here. Throw your arm up or yell. Applicant files
2 sworn written testimony on the 11 disputed
3 topics -- reduced total now, on Monday, March 4th.

4 By Wednesday, the parties file any
5 objections to written testimony on the disputed
6 topics.

7 MS. LUCKHARDT: That would be Wednesday,
8 like the 6th?

9 PRESIDING MEMBER KEESE: Wednesday, the
10 6th.

11 MR. GARBETT: Can I just make an
12 objection. What happens is I require service by
13 mail, and --

14 PRESIDING MEMBER KEESE: I think we're,
15 you know, --

16 MR. GARBETT: -- is there a way --

17 PRESIDING MEMBER KEESE: If you're going
18 to get this --

19 MR. GARBETT: Is there a way to stop by
20 the applicant or somehow in order to get it, other
21 than electronically?

22 PRESIDING MEMBER KEESE: Is there any
23 way you have --

24 MS. LUCKHARDT: We can overnight, but
25 all of our material is already filed, but we can

1 overnight our list of materials.

2 PRESIDING MEMBER KEESE: Yeah, so what
3 they're saying is --

4 MS. LUCKHARDT: If you can give us an
5 overnight address.

6 PRESIDING MEMBER KEESE: -- everything
7 they're going to submit has already been filed,
8 but they're going --

9 MR. GARBETT: Okay, that's what I
10 thought, so --

11 MS. LUCKHARDT: Yeah, it's --

12 MR. GARBETT: -- I don't think they're
13 going to have any surprise --

14 PRESIDING MEMBER KEESE: But they're
15 just putting it together.

16 All right, and by Wednesday, also,
17 parties would file a statement of disputed facts
18 by topic area. So if you dispute anything, you'd
19 file it by Wednesday.

20 MR. RATLIFF: We're filing a statement
21 of disputed facts?

22 PRESIDING MEMBER KEESE: If there's
23 going to be any filed, it would be filed by
24 Wednesday.

25 MR. RATLIFF: Wednesday.

1 PRESIDING MEMBER KEESE: So that the
2 Monday, March 4th, is when the applicant will file
3 their sworn written testimony. By Wednesday the
4 parties will file objections or statements of
5 disputed fact, or request for changes to schedule
6 of topics and witnesses.

7 By Friday, March 8th, the applicant
8 would file sworn written declarations on the 11
9 undisputed topics.

10 HEARING OFFICER WILLIAMS: The numbers
11 have changed, but --

12 PRESIDING MEMBER KEESE: Yeah.

13 MS. LUCKHARDT: Okay, declarations on
14 undisputed areas, okay.

15 PRESIDING MEMBER KEESE: Would come in
16 on Friday. And the applicant would file responses
17 to the parties' objections, to anything any party
18 chose to file. You have till Wednesday.

19 So it's Monday, Wednesday and Friday.
20 And on Friday, the parties can file any objections
21 to declarations -- this isn't going to work --

22 (Pause.)

23 PRESIDING MEMBER KEESE: And then the
24 following week starting on Monday we'll have the
25 hearing.

1 MR. RATLIFF: When do the intervenors
2 file their testimony?

3 PRESIDING MEMBER KEESE: Pardon?

4 MR. RATLIFF: When do the intervenors
5 file their testimony?

6 PRESIDING MEMBER KEESE: I think they
7 have to file by -- when did you have intervenors
8 filing their testimony?

9 (Pause.)

10 PRESIDING MEMBER KEESE: What I have in
11 front of me is obviously a draft, a little
12 inconsistent. We have a little internal
13 inconsistency.

14 MS. LUCKHARDT: So the applicant isn't
15 filing anything in addition to what we've already
16 filed, or at least we don't intend to at this
17 point. We could use the same schedule that we're
18 on.

19 PRESIDING MEMBER KEESE: Okay, --

20 MS. LUCKHARDT: Because they have
21 everything. It's not like they need something to
22 respond to.

23 PRESIDING MEMBER KEESE: Intervenors are
24 going to have to file by the 6th. And it would be
25 the same schedule. That'll work.

1 MR. BAKKER: Thank you. Monday wasn't
2 going to work, so the 6th will be fine.

3 PRESIDING MEMBER KEESE: And one way, it
4 would be 6, 8 and 10, Monday, Wednesday, Friday.

5 MS. SCHILBERG: Could I just ask, is
6 there an electronic service list in this
7 proceeding? Because I believe I'm not on it,
8 number one. And it's not accessible on the web,
9 either. There's only the paper service list.

10 PRESIDING MEMBER KEESE: Ms. Mendonca,
11 can you help us out?

12 MS. LUCKHARDT: I know we could
13 definitely make sure we've got you on our list,
14 because we mail things out when we file, so --
15 everything that's not hard copy, and we get
16 overnight if we need to do that.

17 HEARING OFFICER WILLIAMS: Yeah, I would
18 request that we all, to the extent feasible, make
19 electronic filings here, keeping in mind that Mr.
20 Garbett isn't on any list. So we'll have to make
21 special arrangements for him.

22 But everything that the Committee files
23 will be filed electronically to the parties.

24 MS. SCHILBERG: Do you have the list of
25 emails --

1 HEARING OFFICER WILLIAMS: Yes, yes.

2 You're on the list that the Committee uses.

3 MS. SCHILBERG: Because my address is
4 not on the list, so I want to make sure my email
5 address is on the list.

6 HEARING OFFICER WILLIAMS: All right. I
7 believe we have it, but if you would just write it
8 for me, I'll make sure that it's on the list that
9 the Committee has.

10 MR. RATLIFF: Commissioners, if the ISO
11 should choose to file any testimony for this case,
12 it would be due on the same date that the
13 intervenors' testimony is due?

14 PRESIDING MEMBER KEESE: The 6th.

15 MR. RATLIFF: Would that be acceptable?

16 PRESIDING MEMBER KEESE: The 6th?

17 MR. RATLIFF: Yes.

18 PRESIDING MEMBER KEESE: I think
19 that's -- anything we want people to respond to,
20 the 10th is okay for the undisputed areas.

21 MR. RATLIFF: Staff does not intend to
22 file anything that I'm aware of, --

23 PRESIDING MEMBER KEESE: Okay.

24 MR. RATLIFF: -- other than what is
25 filed already, with that possible exception.

1 PRESIDING MEMBER KEESE: Okay.

2 HEARING OFFICER WILLIAMS: That's fine.

3 The 6th is fine for ISO's testimony.

4 PRESIDING MEMBER KEESE: Anything else?

5 MS. LUCKHARDT: Do we have a schedule

6 for the remainder of the case?

7 (Laughter.)

8 PRESIDING MEMBER KEESE: You want to do

9 a schedule for the remainder of the case.

10 MS. LUCKHARDT: Since we have you

11 physically in the room today.

12 (Laughter.)

13 (Pause.)

14 PRESIDING MEMBER KEESE: I guess you'd

15 be asking how soon the Committee could get the

16 document out, is what you're asking?

17 MS. LUCKHARDT: Right, and what you

18 anticipate for a turnaround, because we have a

19 very short timeframe --

20 PRESIDING MEMBER KEESE: We recognize

21 that, and we're under, you know, we're under

22 instructions on the four-month project to do the

23 best we can to expedite.

24 If this hearing takes one day and we get

25 a transcript back promptly, the Committee's

1 intention is to come out with a document as soon
2 as possible. That's about all we can tell you.
3 We will expedite.

4 Thank you, everybody.

5 MR. BAKKER: Just a brief question. You
6 all want statements of disputed facts. We sort of
7 went over some of them today. Is that a typical
8 requirement that the Committee requires, a
9 statement of disputed facts? I'm just trying to
10 get a feel for what all you want.

11 HEARING OFFICER WILLIAMS: No, it's not
12 typical. What the Committee is attempting to
13 identify there is issues that arise subsequent to
14 what we've talked about today.

15 MR. BAKKER: Okay.

16 PRESIDING MEMBER KEESE: There may be
17 nothing on that.

18 HEARING OFFICER WILLIAMS: There may be
19 nothing.

20 MR. BAKKER: So this is just disputed
21 facts based on the applicant's testimony that's
22 submitted on the 4th?

23 HEARING OFFICER WILLIAMS: That's right.

24 MR. BAKKER: Okay.

25 PRESIDING MEMBER KEESE: And since

1 they're suggesting there's not going to be
2 anything new, there probably won't be anything
3 there, but --

4 MR. BAKKER: Right. Okay, good.

5 MS. SCHILBERG: So am I to understand
6 that for example on our transmission issues we
7 have to list all the facts that we dispute, and --

8 HEARING OFFICER WILLIAMS: Well, you'll
9 get testimony, concerning the ISO's testimony that
10 will be filed on the 6th?

11 MS. SCHILBERG: Well, it was concerning
12 the documents already in the record on
13 transmission.

14 HEARING OFFICER WILLIAMS: No, no, no,
15 if it's already a disputed topic that we've talked
16 about there's no need to detail any further those
17 issues. It's only issues that arise subsequent to
18 the filing by applicant.

19 MR. RATLIFF: And since neither the
20 applicant nor ourselves are intending to file
21 anything else, perhaps there won't be any.

22 PRESIDING MEMBER KEESE: Hopefully those
23 will be --

24 HEARING OFFICER WILLIAMS: Hopefully.

25 PRESIDING MEMBER KEESE: Hopefully those

1 will not be -- hopefully we've discussed
2 everything that's going to be discussed at the
3 hearing already here today. And we have a pretty
4 good idea, and we can expedite the process.

5 But if there's something, if Calpine
6 slips something in, or you think they've slipped
7 something in and you want it to be contested, then
8 you've got to let us know. Okay? I'm glad
9 they've told us they're not going to.

10 Okay? Thank you, everybody.

11 HEARING OFFICER WILLIAMS: Thank you.

12 (Whereupon, at 11:45 a.m., the
13 preconference hearing was concluded.)

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CERTIFICATE OF REPORTER

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 27th day of February, 2002.

PETER PETTY

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