

HEARING
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)
_____)

BUILDING #2
1555 BERGER DRIVE
SAN JOSE, CALIFORNIA

MONDAY, MARCH 11, 2002

10:13 a.m.

Reported by:
Duncan Fankboner
Contract No. 170-01-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

James D. Boyd, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Major Williams, Hearing Officer

Mike Smith, Advisor

Susan Bakker, Advisor

STAFF AND CONSULTANTS PRESENT

Robert Worl, Project Manager

Dick Ratliff, Staff Attorney

Mark Hesters

Gabriel Behymer

Natasha Nelson

Michael Clayton
Aspen Environmental Group

John S. Kessler
Kessler and Associates

Alvin J. Greenberg
Risk Science Associates

Negar Vahidi
Aspen

PUBLIC ADVISER

Roberta Mendonca

APPLICANT

Jane E. Luckhardt, Attorney
Kimberly A. McFarlin, Attorney
Downey, Brand, Seymour and Rohwer
representing Calpine Corporation

APPLICANT

Todd Stewart, Project Manager
Charles J. Vosicka, Civil Engineer
Calpine C*Power

Dave Solhtalab, Senior Electrical Engineer
WRMS, A Calpine Company

Ali Amirali

Gary S. Rubenstein
Sierra Research

Jerry P. Salamy, Air Quality Engineer
Valerie J. Young, Vice President
David L. Richardson, Vice President
EJ Koford, Project Manager
Thomas Priestly, Senior Environmental Planner
John A. Lowe, Risk Assessor
CH2MHILL

Marsha Gale, Managing Principal
Environmental Vision

INTERVENORS

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

Gayatri Margaret Schilberg, Senior Economist
JBS Energy, Inc.
Matthew Freedman, Attorney
The Utility Reform Network (TURN)
representing Coalition of Ratepayer and
Environmental Groups

Henry C. Manayan, Esq., Mayor
Joseph J. Brecher, Attorney
City of Milpitas

Gary R. Clay, Associate Professor
California Polytechnic State University
San Luis Obispo

ALSO PRESENT

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

Rob Eastwood, Planner II
City of San Jose

Irina Green, Senior Grid Planning Engineer
California Independent System Operator

Luis Jaimes
Santa Clara Valley Water District

Grant Sedgewick
U.S. Dataport

Dean Beard

Jim Kanine, President and CEO
San Jose Silicon Valley Chamber of Commerce

Jose Garcia
Building and Construction Trades Council

Richard Santos

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P R O C E E D I N G S

10:13 a.m.

PRESIDING MEMBER BOYD: Good morning, ladies and gentlemen, and welcome to this evidentiary hearing of the Los Esteros Siting Committee of the California Energy Commission.

I'm Jim Boyd, Commissioner for the Commission, and the Second Member of this particular Siting Committee. The Presiding Member and Chairman of the Siting Committee, Commissioner Keese, is out of the state and unable to be at this hearing and preside over this hearing. So, as the Second Member, I have that responsibility.

For those of you who don't know me, which is practically everybody in the room, I'm also not only the junior member of this Committee, but I'm the junior member of the Energy Commission, having just been appointed a few weeks ago. So this is my first such hearing of the Commission. And I already made a faux pas by not going on the record soon enough for the court reporter.

But mine is the easy part of the hearing today because the Hearing Officer Major Williams is going to carry the major burden. But, in any

1 event, I wanted to just add my welcome; indicate
2 that we have some housekeeping matters that the
3 Hearing Officer will discuss first. Then the
4 first order of business following that will be to
5 hear a petition that's been provided to the
6 Commission from the applicant, and then get into
7 the main body of today's hearing.

8 And with that welcome, Mr. Williams, I
9 think I will turn the microphone over to you and
10 confine the rest of my day to questions and
11 answers thereto.

12 HEARING OFFICER WILLIAMS: Thank you,
13 Commissioner Boyd. Again, welcome to the Energy
14 Commission.

15 We're here this morning to conduct
16 evidentiary hearings on the application for
17 certification for the Los Esteros Critical Energy
18 Facility, docket number 1-AFC-12.

19 For those parties, would you state your
20 appearances, please.

21 MS. LUCKHARDT: Hi, this is Jane
22 Luckhardt from Downey, Brand, Seymour and Rohwer,
23 representing Calpine C*'s application.

24 MS. McFARLIN: Kimberly McFarlin from
25 Downey, Brand, Seymour and Rohwer.

1 MR. STEWART: Todd Stewart from Calpine.

2 MR. FREEDMAN: Matt Freedman from TURN,
3 representing the Coalition of Ratepayer and
4 Environmental Groups.

5 MS. SCHILBERG: Gayatri Schilberg from
6 JBS Energy, representing the Coalition.

7 MR. GARBETT: William Garbett
8 representing T.H.E.P.U.B.L.I.C.

9 MR. WORL: My name is Bob Worl, Robert
10 Worl; I'm the Project Manager for the Energy
11 Commission on the Los Esteros case.

12 MR. RATLIFF: Dick Ratliff, Counsel to
13 the Energy Commission Staff.

14 HEARING OFFICER WILLIAMS: Thank you.

15 MS. MENDONCA: And my name is Roberta
16 Mendonca; I'm the Energy Commission's Public
17 Adviser. Thank you very much.

18 HEARING OFFICER WILLIAMS: Thank you,
19 Roberta. Roberta is the person you need to talk
20 to if you are a member of the public and you need
21 to ask some questions about what's happening here
22 today. She can help you with that. Don't
23 hesitate to call upon her to do that if you need
24 some assistance.

25 MS. BAKKER: I'm Susan Bakker with the

1 Energy Commission.

2 MS. SMITH: My name is Michael Smith;
3 I'm Advisor to Chairman Keese.

4 HEARING OFFICER WILLIAMS: I would point
5 out that Ms. Bakker is the mother of the
6 representative from the City of Milpitas who is no
7 longer -- the former representative of the City of
8 Milpitas.

9 Ms. Bakker has not been involved in the
10 case for that reason up until now. But we were
11 informed last week, I guess, that he would no
12 longer -- Jim Bakker -- John, excuse me, John
13 Bakker was no longer representing that firm, John
14 and the firm was no longer representing the City
15 of Milpitas.

16 And Mr. Joseph, I believe it's Brecher,
17 has taken on that role. I'm assuming that Mr.
18 Brecher will be here around 2:00. They're
19 interested in the topic of visual resources. So
20 there is another party who will be present later
21 in the day who is not here right now. Also, CURE
22 is not actively participating in the proceedings,
23 either.

24 So, with that, we just wanted to put
25 that on the record so everyone would be informed

1 of it.

2 Now, do we have any governmental
3 agencies or other jurisdictions represented here?
4 Sir, could you come up to the mike. And if you
5 have a business card, also we would ask that you
6 spell your name also for the court reporter.

7 MR. JAIMES: Luis Jaimes with the Santa
8 Clara Valley Water District.

9 HEARING OFFICER WILLIAMS: Could you
10 spell your name, sir?

11 MR. JAIMES: Yes. L-u-i-s, and the last
12 name is J-a-i-m-e-s.

13 HEARING OFFICER WILLIAMS: And who do
14 you represent?

15 MR. JAIMES: The Santa Clara Valley
16 Water District.

17 HEARING OFFICER WILLIAMS: Thank you.
18 Anyone else?

19 MR. WOCASEK: Yes, Dick Wocasek, Bay
20 Area Air Quality Management District.

21 HEARING OFFICER WILLIAMS: Thank you.

22 MR. EASTWOOD: Rob Eastwood, City of San
23 Jose.

24 HEARING OFFICER WILLIAMS: Again, if you
25 have a business card please drop that off with the

1 court reporter.

2 Okay, any other jurisdictions present,
3 agencies, what-have-you? Any members of the
4 public here who would like to come forward and
5 introduce themselves?

6 Seeing none, I would also add that Mayor
7 Manayan will be making an appearance at 3:30, so
8 we'll look for him. The City of Milpitas Mayor
9 will be coming in.

10 On February 25, 2002, the Committee
11 issued a notice setting today's hearing. During
12 the course of today's hearing the Committee will
13 take occasional short recesses as needed. Our
14 expectation is that we will continue through the
15 lunch hour, as catering services have been
16 provided. The notice indicates scheduled hearings
17 today and a continuation of today's hearing if
18 needed tomorrow, to begin at 3:00 p.m.; and
19 Wednesday, March 13, 2002.

20 However, the Committee's strong
21 preference is that we complete hearing of all
22 matters today. And we will seek to do that.

23 On March 7, 2002, applicant filed a
24 motion for reconsideration of the Committee's
25 ruling on applicant's petition for expedited

1 review. We'll take up that matter now.

2 Before we do that just let me announce
3 that evidentiary hearings are formal in nature,
4 similar to court proceedings. The purpose of the
5 hearing is to receive evidence including testimony
6 and to establish the factual record necessary to
7 reach a decision in this case.

8 The applicant has the burden of
9 presenting sufficient substantial evidence to
10 support the findings and conclusions required for
11 certification of the proposed facility.

12 The order of presentation on the motion
13 for reconsideration and on the presentation of
14 testimony throughout the day will be as follows:
15 applicant, staff, the Coalition, T.H.E.
16 P.U.B.L.I.C., and the City of Milpitas when they
17 arrive.

18 I've earlier distributed the appendix A,
19 which is a topic and witness schedule, and a
20 tentative exhibit list, the Committee's tentative
21 exhibit list. If the parties could look at that
22 and mark the exhibits that they will be presenting
23 in accordance with that, as best as possible, that
24 would help, I think, to speed things along, to get
25 those exhibits marked. And if you have any

1 questions about the exhibits, let me know.

2 We will now move on to the argument on
3 applicant's motion for reconsideration. And we're
4 going to limit that to 15 minutes.

5 MS. LUCKHARDT: Okay, and then I have
6 just one question since we have moved the argument
7 forward, it might be more appropriate if other
8 people responded. Because I'm just hereby
9 continuing to argue the same things.

10 And I can do that, if you want me to go
11 first. But it just seems that it would make more
12 sense if other parties gave their opinions and
13 then I responded to that.

14 HEARING OFFICER WILLIAMS: Well, --

15 MR. GARBETT: Could we find out what
16 you're talking about since we haven't seen any
17 reconsideration filed or served?

18 HEARING OFFICER WILLIAMS: Yeah, since
19 Mr. Garbett hasn't seen it, it probably would be
20 best if you go ahead and give a summary of what
21 the motion is all about.

22 MS. LUCKHARDT: Okay.

23 HEARING OFFICER WILLIAMS: And let's
24 proceed that way.

25 MS. LUCKHARDT: No, that's fine. What

1 we basically asked the Committee to consider is to
2 create a schedule for the completion of the review
3 of this application with a final Commission
4 business meeting and decision on this application
5 by the April 17th business meeting.

6 We believe that that is well within the
7 requirements of a project that is generally under
8 the 25552, four-month schedule. We realize that
9 this has been extended, and carrying it through
10 the April 17th business meeting would be an
11 extension of an additional three months on this
12 project.

13 Since the 25552 four-month review
14 processes require that a project not have
15 significant environmental impacts, and not be a
16 major source under the air quality requirements,
17 that it fits well within the typical requirements
18 in CEQA for a mitigated negative dec.

19 Mitigated negative declarations require
20 a 20-day comment period. We feel that that is
21 appropriate as a comment period on the Presiding
22 Member's Proposed Decision in this proceeding.

23 And that would be adjusted from a 30-day
24 comment period, which is typically required of a
25 full 12-month application for certification

1 conducted under the standard 25500 proceeding
2 requirements.

3 We also are requesting in this petition
4 to be permitted to do preconstruction activities,
5 some site mobilization and site preparation
6 activities. We feel that these types of actions
7 are permissible under the definition of
8 construction in 25105, and as interpreted in the
9 whole of the statute, including sections of Public
10 Resources Code section 25517, which clearly
11 contemplates types of activities that are
12 preconstruction in nature.

13 We would recommend that the Committee
14 consider applying a requirement for construction
15 activities that is consistent with that applied by
16 the Air District. And air districts typically
17 allow, prior to receiving an authority to
18 construct, that site preparation work can proceed
19 to the point of pouring concrete for foundations.

20 The requirement in section 25105 limits
21 construction activities to the installation of
22 permanent equipment or structures. And that would
23 be consistent with the typical requirements placed
24 on projects or limitations placed on projects by
25 air districts, such as pouring concrete. Because

1 once you pour concrete that would well be
2 considered a permanent structure.

3 And we also, to reference one other code
4 section that we did not reference in our filing,
5 that's 25523(e) which also contemplates additional
6 work prior to receiving site certification. And
7 it requires provisions for restoring the site
8 should the Commission deny approval of the
9 application.

10 And we feel that is also consistent with
11 our interpretation of what is allowed under the
12 construction definition of 25105.

13 And so we would ask that the Commission
14 adopt, or this Committee adopt a schedule that
15 allows a final decision on the application on
16 April 17th. And we also would ask that the
17 Committee provide specific guidance on the level
18 of preconstruction site mobilization activities
19 that Calpine may proceed with on this project
20 prior to receiving a final decision on the
21 application.

22 Applicant also agrees to complete all
23 preconstruction conditions of certification as
24 specified by staff in the staff assessment and
25 staff assessment addendum, or as modified

1 subsequently. And agrees to return the site to
2 its original condition should the Committee or the
3 Commission decide not to grant Calpine a license
4 for this facility.

5 Thank you.

6 HEARING OFFICER WILLIAMS: Thank you.
7 Staff.

8 MR. RATLIFF: Staff's view of this is
9 probably best addressed in breaking it into two
10 pieces. The first piece being the review period
11 for the PMPD.

12 Staff is supportive in this case for a
13 shortened review period and for trying to deliver
14 a decision by April 17th.

15 We think that there is no provision
16 governing the length of the review period for the
17 PMPD. The general 12-month provision would seem
18 to be of questionable application given the fact
19 that you only have four months to do a four-month
20 case, and that would be a full 25 percent of the
21 entire time for that particular step in the
22 process, with very many steps.

23 So, particularly given the few number of
24 areas where you have conflicting testimony we
25 think that it would be appropriate to have a much

1 shorter period of say 10 to 15 days for the review
2 of the PMPD, and have people submit their comments
3 in that time.

4 We realize there's certain kinds of
5 notification requirements that apply to Mr.
6 Garbett, and I think maybe some kind of special
7 arrangement should be made for him such that he
8 could get delivery of the PMPD by hand, by special
9 delivery, by some manner that enables him to get
10 that full period of time to accommodate his needs,
11 since he doesn't have electronic service or fax.

12 But if that can be worked out, certainly
13 two weeks would seem to be a lot of time to
14 address the areas of conflict as limited as they
15 are in this case.

16 Going to the second area where I think
17 you have to consider the timing, the issue of
18 preconstruction activity is one that staff has
19 traditionally been very restrictive about. We've
20 always basically said don't do anything to the
21 site. We've done that, I think, out of caution.

22 Clearly the statute does contemplate
23 that there are activities that are not
24 construction. As counsel just pointed out,
25 section 25517 and 25523(e) both talk about the

1 necessity of restoring the site to its original
2 environmental condition in the case where an
3 application is rejected.

4 In our view, in a four-month case where
5 you actually have a statutory deadline in which
6 the project must be built, or else the project
7 fails, probably a hard examination of what
8 preconstruction activity really should occur.

9 So for the purposes of four-month cases,
10 the staff is taking the position that we believe
11 site mobilization activities should be allowed.
12 And activities which do not cause irreversible
13 harm to resources on the site should be allowed.

14 We have a certain amount of concern
15 about grading and trenching activities, and we
16 would want to make sure that any biological or
17 cultural resources were not disturbed in such
18 activities. So if the Committee does rule to
19 allow site mobilization activities we would
20 request that any such order require the applicant
21 to confer with the staff to adjust those
22 activities in ways which are protective of those
23 resources.

24 I really have nothing further to add.
25 I'd like to maybe reserve one minute to respond to

1 any additional discussion that may occur.

2 HEARING OFFICER WILLIAMS: Mr. Freedman.

3 MR. FREEDMAN: Thank you. Matt Freedman
4 on behalf of the Coalition. We strongly oppose
5 the request both to shorten the time for review of
6 the proposed decision, and also to begin
7 preconstruction activities. So, I'd like to take
8 those in turn.

9 Let's talk about the scheduling issues.
10 It appears to us that the primary harm from the
11 reduction of the timing that's proposed by the
12 applicant would come in reduced opportunity for
13 the intervenors to review the proposed decision
14 and file comments on that decision to participate
15 in a hearing.

16 We don't think it's fair for the
17 intervening parties to have to take the full
18 burden for expedited review of the petition here.

19 The proposal from Calpine would reduce
20 the time between the issuance of the proposed
21 decision and the hearing from 18 days, which is
22 already a short period of time, to 10 days, barely
23 more than half the original time.

24 It's clearly important to the process
25 that the Commission has sufficient time to prepare

1 its proposed decision in a proceeding with 12
2 issue areas. And we believe that was good
3 justification for the Commission to reject the
4 original application.

5 But it's also important, as I mentioned,
6 for active intervenors to have a sufficient
7 opportunity to review the proposed decision and to
8 prepare for a hearing on some of the issues where
9 there may be disagreement. And cutting that time
10 in half would simply be grossly unfair.

11 It appears that Calpine is arguing for
12 the expedited review on the basis of its contract
13 with the California Department of Water Resources,
14 which has certain provisions regarding commercial
15 online dates.

16 If Calpine wishes this Committee to
17 consider the contract as a basis for an expedited
18 review, the Coalition would be happy to oblige.
19 And we would be willing to engage in a discussion
20 of whether that contract is a reasonable
21 justification for such expedited review. And I
22 would be interested in hearing what the applicant
23 has to say.

24 As far as illustrative deadlines that
25 are cited by the applicant, we've heard from

1 staff, and it's true that there is no specific
2 process, no specific deadlines in statute
3 referencing the CEQA notice requirements
4 applicable to mitigated negative declarations, is
5 not appropriate.

6 The CEQA requirements, themselves, apply
7 to comments on the draft environmental impact
8 report, that's 20 days, at least 20 days for the
9 review of the draft EIR. Rather than comments on
10 the final Commission action based on that report.
11 So we think it's misleading to use that 20-day
12 period as the basis.

13 As far as the example schedule that the
14 Commission put out, it's simply that, an example
15 schedule. This proceeding has been delayed for
16 good reason; it could not be completed within the
17 initial four months.

18 And the Commission, itself, has found
19 that this process is more akin to a 12-month
20 review. And under the 12-month review process,
21 section 2030, it provides for at least 30 days
22 after the filing and service of the Presiding
23 Member's Proposed Decision before the Commission
24 shall hold a hearing to determine what action to
25 take.

1 We think that the intervenors and other
2 folks need as much time as possible to review the
3 proposed decision and be able to comment
4 effectively.

5 As far as preconstruction activities,
6 we're disturbed about the kind of hair-splitting
7 that the applicant engages in with respect to what
8 is or is not construction.

9 Construction, according to code section
10 25105, means onsite work to install permanent
11 equipment or structure for any facility. It
12 enumerates a series of exceptions. These
13 exceptions are explicitly for the purpose of
14 evaluating the project; activities that allow the
15 Commission to look at whether or not this
16 Commission (sic) should receive its permit.

17 The activities proposed by Calpine are
18 not within that category. They are clearly
19 intended to be activities that will allow the
20 applicant to actually build the facility. It's
21 the first steps of the construction process,
22 itself.

23 Each of the activities for which Calpine
24 seeks approval is indisputably necessary onsite
25 work to install permanent equipment or structures

1 for the Los Esteros facility.

2 We think that the exceptions that are in
3 the statute, the exceptions from the construction
4 definition, are helpful guides. They are
5 activities that are allowed in order to help the
6 agency perform its assessment as to whether a
7 permit should be issued.

8 But Calpine instead proposes to grade
9 some 20 to 27 acres; install power poles and
10 construction trailers. We've now heard about
11 pouring concrete and other activities. This has
12 nothing to do with evaluating the application,
13 it's about starting the construction process.

14 And according to the logic that the
15 applicant uses here, even the entire facility
16 could be built lock, stock and barrel on the
17 facility, and it could be characterized as
18 something other than construction. Why?

19 Well because with enough money and
20 labor, of course, Calpine could remove all of
21 those facilities from the site. But, the
22 standard's not reversibility here. The statutory
23 definition is clear. If it's work that's
24 necessary to build the final facility, rather than
25 perform an assessment by the agency, then it's

1 prohibited.

2 Returning the site to its original
3 condition should not be the guiding criteria for
4 the Committee here. And therefore we urge the
5 rejection of both planks of the applicant's
6 petition.

7 HEARING OFFICER WILLIAMS: Thank you,
8 sir. Mr. Garbett, are you sufficiently educated?

9 MR. GARBETT: Well, first of all, I like
10 the spirit of the applicant. They jump the gun in
11 a way, because this here was an expedited four-
12 month process. However, the Governor's emergency
13 proclamation has expired and this is about the
14 only application you have that is trailing in this
15 four-month process.

16 And because of that you need to look
17 very closely. CEQA basically requires anything, a
18 45-day notice period, and even on an expedited
19 procedure, 30 days are still required.

20 Part of the problems that we have also
21 is since we are in evidentiary hearings now, we do
22 have formal transcripts. In the denial of the
23 petition that they're asking for reconsideration
24 now they were talking about three days for
25 transcripts, quite a burden on your court

1 reporter.

2 However, what happens is the statute
3 says is that transcripts are not considered
4 certified until 30 days have passed, and any
5 corrections may be adopted into them. So we have
6 a problem just with a legalized transcript of the
7 proceedings.

8 In the previous proceedings I've
9 participated in, such as Metcalf, the transcripts
10 were never made available. And every request was
11 denied. And we have not seen any transcripts in
12 this procedure, or any way in order to get our
13 hands on them.

14 With this, we have to look at what has
15 been going on so far on the project with Calpine
16 C*Power. I guess we're going to use the generic
17 term Calpine to go and refer to C*Star Power. So,
18 I'll --

19 HEARING OFFICER WILLIAMS: Or simply the
20 applicant.

21 MR. GARBETT: Or the applicant, okay.
22 So what we have is during the onsite visit at the
23 first public input here, we seen the applicant
24 grading and tearing down structures. We basically
25 saw them commingling hazardous materials that were

1 onsite. Call it dilution so that they won't have
2 to dispose of them offsite. That may be what you
3 might call it.

4 We've also seen them in well closures
5 where one well was filled with debris, hazardous
6 material, before it was capped.

7 HEARING OFFICER WILLIAMS: Mr. Garbett,
8 I think if I could ask you to save that material
9 for the specific topic that we're going to be
10 dealing with. Right now we just want to hear on
11 the two aspects of Calpine's motion, that is to
12 shorten the comment period --

13 MR. GARBETT: Yes.

14 HEARING OFFICER WILLIAMS: -- period and
15 preconstruction activities.

16 MR. GARBETT: But basically they've
17 already engaged in these preconstruction
18 activities already. The demolition that was
19 performed on site, using the excuse of the City of
20 San Jose memo that said they had to destroy
21 things. No, the memo from the City of San Jose,
22 which only after we requested at that onsite
23 inspection where we were taken out there by buses,
24 the memo was generated.

25 Unfortunately, there's three memos of

1 that nature. One preceding the approval of the
2 application of the project; one dated the
3 application date; and yet another one that found
4 its way to the City Council.

5 So, basically we have false
6 documentation, forgeries or whatever you want to
7 call them, that have basically predicated their
8 preconstruction activities so far.

9 Also, one of the things is irreparable
10 harm. In the Public Utilities Commission EIR on
11 the same basic area, there were many Chinese
12 designated by name and location. These were
13 removed upon the acquisition of the particular
14 applicant taking control of the property.

15 We wonder what has happened to these
16 Chinese, because it is a great socioeconomic
17 effect, and what is the mortality rate on these
18 people, realizing they were mostly elderly
19 Chinese. But we wonder what the mortality rate is
20 as of this date.

21 And for this reason any reconsideration
22 should be, like the original request was, denial.

23 Thank you.

24 HEARING OFFICER WILLIAMS: Thank you,
25 sir. Okay, applicant, do you have a reply?

1 MS. LUCKHARDT: I'll make it short. I
2 would just want to point out a response to the
3 comments of Mr. Freedman that the review periods
4 that we had specified in our proposed schedule are
5 equivalent to or greater than the review periods
6 in the example four-month schedule provided on the
7 Commission's website.

8 I would also reply that no, we're not
9 interested in discussing the contract here,
10 especially in light of the Committee's earlier
11 order to that effect.

12 And that in response to his comment
13 regarding -- I think he failed to understand that
14 I was drawing the line at pouring concrete, and
15 that that's where the Air District draws its line.
16 And that's where we would suggest that the
17 Committee also draw the line on what is
18 preconstruction and what are construction
19 activities.

20 And I'd also just like to remind the
21 Committee that all of the demolition activities
22 were directed by the City of San Jose due to the
23 fact that they were posing a public nuisance, and
24 permitted under the City of San Jose per the
25 direction of the Committee.

1 HEARING OFFICER WILLIAMS: Thank you.

2 COMMISSIONER BOYD: A question of the
3 applicant. I want to get the record straight on
4 the issue of pouring concrete, and I'm still a
5 little confused by the answer, so help me through
6 this.

7 I did not read your petition as asking
8 to pour concrete. I heard the analogy to what the
9 Bay Area allows, but am I correct in assuming
10 you're not asking to go so far as to pour
11 concrete?

12 MS. LUCKHARDT: Yes, that's correct.
13 The Air District allows you to dig foundations,
14 but not to pour concrete. And that's where they
15 draw the line.

16 COMMISSIONER BOYD: Thank you.

17 MR. RATLIFF: And if I could just add,
18 the staff position would be at least as
19 restrictive as the Air District's and perhaps
20 moreso. We would have to consider whether or not
21 we would allow trenching in that area prior to
22 construction. We haven't really been able to
23 decide that until we know exactly where the
24 trenching would be.

25 But we would be, if anything, more

1 restrictive than the Air District. That would be
2 the outer limit of what we would believe would be
3 appropriate preconstruction, or defined as
4 preconstruction.

5 The only other comment that I would make
6 is in terms of the review period, we don't think
7 that the CEQA analogy works very well. Draft EIRs
8 are subject to a minimum 30-day review period.
9 The staff assessment's been out a month already,
10 and I think that any review period for the PMPD
11 certainly should not be based on the review
12 provisions in CEQA for draft EIRs.

13 HEARING OFFICER WILLIAMS: Yes, sir.

14 MR. FREEDMAN: Just two points. With
15 respect to the example schedule that the
16 Commission posted before in the process, I would
17 simply remind the Committee that the Commission
18 has already determined that the very least this is
19 a modified four-month process. At most it's very
20 much like the 12-month process. That's what we've
21 seen in the hearing order and decisions that have
22 come out of this Committee.

23 So using an example schedule for a
24 typical four-month process simply isn't
25 appropriate in this case.

1 Finally, with respect to whether or not
2 concrete should or should not be poured, I
3 apologize for having misconstrued the applicant's
4 claim there. But, again, would remind the
5 Committee that the standard is not how much impact
6 the applicant has on site, but rather what's the
7 purpose of the impact. Is it to allow the
8 Committee to evaluate the application? Or is it
9 to build the facility? And clearly, this falls in
10 the latter category. Therefore we believe it
11 needs to be denied.

12 HEARING OFFICER WILLIAMS: Final
13 remarks, Mr. Garbett?

14 MR. GARBETT: Yes. The four-month
15 process has already failed during the four months,
16 so we call it a modified process.

17 During the course of the cross-
18 examination and so forth during these proceedings
19 starting today we're going to find out that
20 perhaps it is more possible for the applicant to
21 look ahead three years and start building a
22 cogeneration facility and the whole thing from the
23 get-go, rather than proceeding with the peaking
24 plant at the present time.

25 There are other delays that we have in

1 here that PG&E and others have basically put in
2 where more environmental review may have to be
3 before they can even get connecting poles up, and
4 such other things. And the Commission may find
5 itself in restricted on overruling some things
6 that are the jurisdiction of the Public Utilities
7 Commission, like general order 138A.

8 So, for those reasons you have to look
9 at where we've been, where we're going and where
10 we're ultimately ending up at. And perhaps where
11 we're ultimately ending up at, the three years
12 where it has to be converted to cogeneration
13 perhaps is the best concept to look at, rather
14 than, for instance, merely jumping the gun for a
15 peaking plant.

16 Thank you.

17 HEARING OFFICER WILLIAMS: Yes, thank
18 you. Mr. Garbett, I want to point out that -- and
19 I know you don't have available a means to receive
20 electronic material --

21 MR. GARBETT: I have the means, just not
22 the connection.

23 HEARING OFFICER WILLIAMS: -- but the
24 Energy Commission's transcripts are put online.
25 So, if you can get to some sort of internet

1 connection you will find those transcripts there
2 under the case that you're seeking. I just wanted
3 to point that out.

4 Okay, the Committee is going to take the
5 motion under consideration and we'll give you a
6 ruling as soon as possible.

7 Okay, the next order of business, I
8 believe, is we are going to take a witness by
9 telephone, who could not be here today.

10 MS. LUCKHARDT: Yeah, that is Grant
11 Sedgewick from --

12 HEARING OFFICER WILLIAMS: The Dataport?

13 MS. LUCKHARDT: Yes. And he has been
14 scheduled to call in at 11:00. We could try and
15 call him and see if he could call in sooner.

16 HEARING OFFICER WILLIAMS: Yeah. Why
17 don't we go off the record then, and you can make
18 your call.

19 (Off the record.)

20 HEARING OFFICER WILLIAMS: Okay, on the
21 record. The record should reflect that we have
22 Mr. Sedgewick from the U.S. Dataport facility.
23 And there was an objection raised by the Coalition
24 as to taking his remarks as a type of testimony.

25 The Committee has decided that we're

1 going to hear your remarks as public comment.

2 MR. SEDGEWICK: Okay.

3 HEARING OFFICER WILLIAMS: Okay? So,
4 with that, you may proceed, sir.

5 MR. SEDGEWICK: I haven't got so much
6 prepared remarks as I was prepared to, or was
7 going to make myself available if there were
8 questions.

9 But I might, just if I could, by way of
10 introduction, describe what our plans have been
11 and are; and how they relate to what you're
12 considering.

13 Our company, which is called U.S.
14 Dataport, is a San Jose company. We began to plan
15 a project that could be described as an internet
16 datacenter campus on the lands which surround and,
17 in effect, incorporate the site of the proposed
18 power plant about two years ago, a little more
19 than two years ago.

20 I'm the President of the company and one
21 of the founders. And essentially led the effort
22 to plan the project, and to carry it through the
23 local entitlements process in San Jose, which
24 involved three major elements:

25 Annexation of the lands into the City;

1 these were previously County lands, unincorporated
2 County lands. Secondly, to obtain a zoning that's
3 compatible with the proposed uses; the lands were
4 previously zoned for agricultural use. And with
5 the process still underway, the process of
6 obtaining specific development permits for various
7 components of the project, as they proceed.

8 Your Committee may well be aware from
9 other testimony that just in the last week or two
10 the City of San Jose Planning Commission and City
11 Council both approved some modifications to the
12 earlier approval which would permit larger energy
13 facility. And I'm sure that's the matter before
14 you. And I don't have much to add, I'm sure, to
15 the deliberations on that front.

16 But we were enthusiastic supporters of
17 that and proponents of that application because
18 initially our project had a somewhat flawed
19 solution insofar as providing for reliable energy,
20 that arose by virtue of our only -- or of the
21 City's only having authority to approve an onsite
22 power facility that would be smaller than 50
23 megawatts.

24 So we had kind of a combination solution
25 which involved both that and a number, a series of

1 diesel powered generator sets, which would be
2 built sequentially to match the buildout of the
3 datacenter campus. And with which a number of
4 public agencies, including the City, expressed
5 some misgivings, although -- and in fact
6 conditioned our earlier approval on finding a
7 better solution to the supply of highly reliable
8 electric power to the datacenter buildings,
9 themselves.

10 So that's kind of the background. Our
11 company is fairly well experienced, at least the
12 principals are fairly well experienced in large
13 scale land development projects. This is one of
14 at least five or so comparable sized, four or five
15 comparable sized projects in Silicon Valley.

16 Everybody is well aware, I'm sure, of
17 not only a recession that's hampered our progress,
18 and a recession in particular in industries that
19 are focused in technology and telecommunications.

20 But we are very optimistic about the
21 original concept of this project and about demand
22 which is, although currently in some kind of a
23 lull, I guess, it would be hard to deny otherwise.
24 We expect to be very rigorous and vigorous demand
25 over the course of the next two years. And it's

1 as well founded as the whole internet
2 communications platform.

3 Anyway, that's maybe the only remarks
4 I'd make by way of introduction. But if there are
5 questions I would be glad to try to answer them.

6 HEARING OFFICER WILLIAMS: Okay. Thank
7 you, Mr. Sedgewick. Let's see, do we have
8 questions? Applicant, do you have any questions?

9 MS. LUCKHARDT: We asked Grant to call
10 in to respond to questions from other folks, so --

11 HEARING OFFICER WILLIAMS: Okay, yes,
12 let me take staff first. Do you have any
13 questions, staff?

14 MR. RATLIFF: Yes, Mr. Sedgewick, can
15 you hear me?

16 MR. SEDGEWICK: I can, yes.

17 MR. RATLIFF: This is Dick Ratliff,
18 Staff Counsel. One question I'd like to ask you
19 is what is your expectation of the timing of the
20 Dataport structures and facilities?

21 MR. SEDGEWICK: You know what, Mr.
22 Ratliff, I can only barely hear you. In fact, I'd
23 be better, more honest to say I can't hear you at
24 the moment.

25 HEARING OFFICER WILLIAMS: Dick, maybe

1 you want to come over here. He's going to move
2 closer to the microphone.

3 MR. RATLIFF: Can you hear me now?

4 MR. SEDGEWICK: I can, yes, clearly.

5 MR. RATLIFF: What is your expected
6 timeline for the development of the Dataport
7 facilities?

8 MR. SEDGEWICK: I think, you know, it's
9 very difficult to project. I would think that it
10 will take four to five years to build out
11 completely. Maybe three to five years. It's
12 really a function of how strong the recovery; how
13 quickly some of the over-buildings of datacenter
14 space in America, particularly, not specifically
15 Silicon Valley, is taken up.

16 There's a number of things happening in
17 this industry that primarily relate to
18 consolidation among competitive service providers
19 with a move to stronger companies.

20 An example of this is a major Silicon
21 Valley company called Exodus Communications, which
22 has faltered financially, but is being taken over
23 by a big international telecommunications carrier,
24 cable and wireless.

25 A lot of that is going on in the

1 industry; and stronger companies, companies like
2 IBM and AT&T, are more likely to be the dominant
3 players here. And this is evolving fairly
4 quickly, I think.

5 I'd say three, four or five years, but I
6 really don't have a better sense than that.

7 HEARING OFFICER WILLIAMS: Does that
8 answer your question, Mr. Ratliff?

9 MR. RATLIFF: Yes.

10 HEARING OFFICER WILLIAMS: Okay. Mr.
11 Freedman.

12 MR. FREEDMAN: Should I --

13 HEARING OFFICER WILLIAMS: Yeah, I think
14 you ought to move closer to the mike.

15 MR. SEDGEWICK: I'm sorry, this is a
16 great inconvenience you're going to, I know, I
17 realize. I'm on a ski vacation and couldn't get
18 back today, I'm sorry.

19 HEARING OFFICER WILLIAMS: It's not a
20 problem, sir. Go ahead.

21 MR. FREEDMAN: Okay, my first question
22 is how is the snow?

23 HEARING OFFICER WILLIAMS: Introduce
24 yourself to him, first. Please.

25 (Laughter.)

1 MR. FREEDMAN: This is Matt Freedman
2 with The Utility Reform Network, representing
3 Coalition of Ratepayer and Environmental Groups.

4 MR. SEDGEWICK: Okay, Mr. Freedman.

5 MR. FREEDMAN: My first question is
6 how's the snow.

7 MR. SEDGEWICK: Excellent, thank you.

8 MR. FREEDMAN: I'm sure we'd all rather
9 be there than here.

10 MR. SEDGEWICK: Oh, I'm sure that isn't
11 true.

12 (Laughter.)

13 MR. SEDGEWICK: Go ahead.

14 MR. FREEDMAN: A few questions for you.
15 You just mentioned in response to questions from
16 the staff that you're anticipating, although it's
17 difficult to determine with any certainty, that
18 it's three to five years to build out the facility
19 in its completeness, is that correct?

20 MR. SEDGEWICK: Yes, sir.

21 MR. FREEDMAN: Now, what is your
22 estimated construction date for the first phase of
23 the project?

24 MR. SEDGEWICK: Well, it is dependent on
25 leasing. I would like to think a matter of

1 months.

2 MR. FREEDMAN: You expect construction
3 to begin within months of this date?

4 MR. SEDGEWICK: I would think. Again,
5 it's contingent upon leasing. I don't think
6 there's any appetite in the capital markets to
7 build datacenter facilities on a speculative
8 basis. Although there might have been in the
9 past, there may be in the future, today that would
10 not be a true characterization.

11 So I think it will be dependent on
12 having a precommitment to space of some amount.
13 And hopefully that can be achieved. Once your
14 deliberations are finished and this project is set
15 to go, I would hope it would be a matter of
16 months.

17 MR. FREEDMAN: Why is this proceeding
18 relevant to the construction of Dataport?

19 MR. SEDGEWICK: Oh, I think having a
20 completely satisfactory solution insofar as
21 reliable energy is concerned is a key. And the
22 commitment of a shovel to the ground is always
23 important in our business.

24 MR. FREEDMAN: Now, --

25 MR. SEDGEWICK: And as I understand it,

1 Calpine is poised to begin construction on the
2 energy center just immediately as soon as its
3 entitlements process is finished.

4 MR. FREEDMAN: But you are saying that
5 what's far more relevant from Dataport's
6 perspective is the leasing arrangements and
7 whether or not there are secure -- available?

8 MR. SEDGEWICK: That's true.

9 MR. FREEDMAN: So have you not obtained
10 financing yet for the facility?

11 MR. SEDGEWICK: No. No financing has
12 been obtained.

13 MR. FREEDMAN: And does Dataport own the
14 site yet?

15 MR. SEDGEWICK: No. Actually, some 40
16 percent of the site is owned by Calpine, or 45
17 percent, I'd be better to put it in acres, I
18 suppose. But just something less than half the
19 site is owned by Calpine, and the other half of
20 the site is owned by Silker Orchards, with whom we
21 have a contract to purchase.

22 MR. FREEDMAN: Okay, so you have an
23 option to purchase and --

24 MR. SEDGEWICK: It's not an option; it's
25 a conditional contract, but it's like an option.

1 MR. FREEDMAN: So how many tenants have
2 already been signed up for the space?

3 MR. SEDGEWICK: None have.

4 MR. FREEDMAN: None. Now you mentioned
5 in your opening comments something to the effect
6 of four or five comparable facilities that you're
7 looking at. Would you explain that a little bit?

8 MR. SEDGEWICK: Excuse me just a second.
9 I have to settle down some kids.

10 HEARING OFFICER WILLIAMS: Don't we all.

11 (Pause.)

12 MR. SEDGEWICK: I'm sorry. I hope that
13 isn't part of the record what I just had to say.

14 (Laughter.)

15 MR. SEDGEWICK: I'm sorry, Mr. Freedman.

16 HEARING OFFICER WILLIAMS: We didn't
17 hear you.

18 MR. FREEDMAN: In your first set of
19 comments you referenced four or five other
20 facilities that U.S. Dataport --

21 MR. SEDGEWICK: Oh, yes, I'm sorry, no,
22 I said the principals of our company. I was
23 referring to our development background, that's
24 all.

25 MR. FREEDMAN: Those are facilities --

1 MR. SEDGEWICK: This is the only
2 facility that we know of of its kind in Silicon
3 Valley.

4 MR. FREEDMAN: So the --

5 MR. SEDGEWICK: The other -- sorry.

6 MR. FREEDMAN: -- you mentioned are
7 outside of the Bay Area or --

8 MR. SEDGEWICK: No, I didn't mention any
9 others. I was talking about business park and
10 industrial park developments. I'm sorry if I was
11 confusing.

12 MR. FREEDMAN: Okay.

13 MR. SEDGEWICK: And I was referring
14 really to the principals of the company, Mr.
15 Small, Kimbal Small, who's our Chairman; and my
16 own experience is fairly extensive in building
17 fairly big projects like this.

18 MR. FREEDMAN: Now isn't it true that
19 there's already an excess of vacant office space
20 that could be used by prospective tenants of
21 Dataport?

22 MR. SEDGEWICK: Well, office space and
23 datacenter space are not really compatible. There
24 are, you know, quite different physical
25 requirements in the two types of buildings. But

1 it is true there is an excess of office space in
2 Silicon Valley so far as I understand.

3 MR. FREEDMAN: But is it your testimony
4 that there's no excess --

5 MS. LUCKHARDT: He's not testifying.

6 MR. FREEDMAN: Is it your comment that,
7 your statement that there's no excess of space for
8 prospective tenants of server farm folks who are
9 looking for datacenter space?

10 MR. SEDGEWICK: I would -- by the way, I
11 would say to you that I made the comment there is
12 an excess of space, a surplus of space nationally.
13 I commented I wasn't sure if that was true in
14 Silicon Valley.

15 And I will tell you that the statistics,
16 as kept by the real estate professionals, are very
17 -- this being a relatively new industry -- are
18 very sketchy, at best.

19 My guess is that there is not so much a
20 vacancy of space for datacenter use as there is
21 for office space use, which I understand that
22 vacancy rate to be about 17 or 18 percent now. I
23 don't know a number.

24 MR. FREEDMAN: And what are you --

25 MR. SEDGEWICK: And I don't know that

1 anybody does, to be honest, Mr. Freedman.

2 MR. FREEDMAN: Fair enough. What are
3 your expectations for the amount of load the
4 datacenter will require, energy load in the coming
5 years?

6 MR. SEDGEWICK: I'll bet there are
7 better experts in the room than I. But we've been
8 using a 100 watt per square foot power density, or
9 I don't know whether you call it power factor.

10 MR. FREEDMAN: And how many tenants
11 would be the minimum for Dataport to be
12 constructed?

13 MR. SEDGEWICK: One tenant to start, and
14 I should think at completion -- this is very
15 difficult to anticipate, but I would say something
16 between six and 25, but I would just be guessing.

17 MR. FREEDMAN: But only one tenant would
18 be sufficient, you're saying, to --

19 MR. SEDGEWICK: Oh, the project will
20 start, I think, fairly enough to say the project
21 will start with the commitment by one tenant.
22 Now, I don't know what, you know, sort of what a
23 minimum space requirement is to get a project
24 started, but it's likely to be 50,000 feet or
25 more.

1 MR. FREEDMAN: Okay. And just finally,
2 let me just revisit one issue I asked at the
3 beginning. You had mentioned that if a tenant
4 were to sign up you think construction could begin
5 within months?

6 MR. SEDGEWICK: I do.

7 MR. FREEDMAN: And if it began within
8 several months, what's the timeline for completing
9 the first phase of construction?

10 MR. SEDGEWICK: Well, let me break it
11 into two or three parts and then we'll add them
12 up.

13 We're told by our contractors that shell
14 construction, that is the building shell, itself,
15 would take about seven months to complete. And,
16 of course, it's dependent on size, but let's say
17 up to 150,000 square feet, which might be a first
18 building kind of element.

19 About seven months to complete. It will
20 take some months, perhaps three or four, for a
21 tenant to fit out its own special equipment in the
22 shell building.

23 And I think it would take an aggregate
24 of five months to do, maybe four to six months to
25 do working drawings and obtain necessary building

1 permits.

2 So, it's something like say five months
3 plus seven months plus four months.

4 MR. FREEDMAN: And those are --

5 MR. SEDGEWICK: Until a company would be
6 operating. Not built and completed, but
7 operating.

8 MR. FREEDMAN: That's sequential months?

9 MR. SEDGEWICK: Those are sequential. I
10 would think if you said 12 to 18 months I think
11 that would be a good enough bracket to cover most
12 circumstances.

13 MR. FREEDMAN: So even if there were a
14 tenant secured sometime in the next several months
15 what you're saying is that the facility wouldn't
16 be operational probably until the beginning of
17 2004?

18 MR. SEDGEWICK: That sounds reasonable
19 to me.

20 MR. FREEDMAN: Okay.

21 MR. SEDGEWICK: Building complete sooner
22 than that, but operational, I think that sounds
23 right.

24 MR. FREEDMAN: Okay. Thank you, I have
25 no further questions.

1 HEARING OFFICER WILLIAMS: Mr. Garbett.
2 Mr. Sedgewick, our public intervenor, Mr. Garbett,
3 is going to ask you some questions now.

4 MR. SEDGEWICK: That's fine.

5 MR. GARBETT: This is William Garbett
6 speaking on behalf of T.H.E.P.U.B.L.I.C.

7 The first question I have is you
8 anticipate perhaps within about three years you
9 would be operational then?

10 MR. SEDGEWICK: Well, we just went
11 through a timeline that has a contingent
12 beginning, but something like 12 to 18 months is a
13 reasonable expectation.

14 MR. GARBETT: Once construction is begun
15 and --

16 MR. SEDGEWICK: Right, and --

17 MR. SEDGEWICK: -- delays.

18 MR. SEDGEWICK: -- I may have
19 confused -- I may have sounded confused, myself.
20 I think I said three to five years would be an
21 expectation for completing the project.

22 MR. GARBETT: Yes. Thank you. With the
23 project Calpine C*Power now, having to be
24 converted in approximately three years to
25 cogeneration, would it not be practical for them

1 to build cogeneration into their facility at this
2 point in time so that they would be ready when you
3 would basically have a need for their power, and
4 you would have cheaper power because of their
5 greater efficiency?

6 MR. SEDGEWICK: I'm not qualified to
7 answer that, Mr. Garbett. I just am not informed
8 enough about the engineering issues.

9 MR. GARBETT: Okay, thank you.

10 HEARING OFFICER WILLIAMS: Okay, I think
11 unless we have anything further, Mr. Sedgewick, we
12 can allow you to resume your vacation.

13 MR. SEDGEWICK: Thank you very -- again,
14 I hope -- I do appreciate your accommodating me
15 this way, because I did want to participate, at
16 least in a minor way.

17 HEARING OFFICER WILLIAMS: Okay.

18 MR. SEDGEWICK: And thank you very much.

19 HEARING OFFICER WILLIAMS: You're
20 welcome, thank you.

21 MR. SEDGEWICK: Good bye.

22 HEARING OFFICER WILLIAMS: Bye bye.

23 Okay, next order of business is testimony. And we
24 will hear testimony as set forth in the attached
25 revised topic and witness schedule.

1 We are beginning with uncontested
2 topics. And afterwards we will move on to
3 contested topics.

4 Witnesses will testify under oath or
5 affirmation. During the hearing the party
6 sponsoring the witness shall establish the
7 witness' qualifications and ask the witness to
8 summarize their prepared testimony.

9 Relevant exhibits should be offered into
10 evidence at that time. At the conclusion of a
11 witness' direct testimony, the sponsoring party
12 should move in all relevant evidence, exhibits to
13 be received into evidence.

14 The Committee will next provide the
15 other parties an opportunity for cross-
16 examination, followed by redirect and recross
17 examination as appropriate. Multiple witnesses
18 may testify as a panel, and the Committee may also
19 question the witnesses.

20 Upon conclusion of each topic area we
21 will invite members of the public to offer unsworn
22 public comment. Public comment is not testimony
23 and the Committee finding cannot be based solely
24 on such comments. However, public comment may be
25 used to explain evidence in the record.

1 Are there any questions at this point?
2 Seeing none, have the parties had an opportunity
3 to look at the exhibit list?

4 MS. LUCKHARDT: Just briefly. It seems
5 to me at this point would you like us to move the
6 uncontested testimony, including sworn
7 declarations, into the record?

8 I haven't had a chance to go through the
9 exhibit list specifically to have specific
10 corrections one way or another, but I do know that
11 we have quite a few areas of uncontested
12 testimony. And that was all as agreed to at the
13 prehearing conference to come in by declaration.

14 And I'm just wondering if this was the
15 appropriate time to move all of that testimony
16 into evidence?

17 HEARING OFFICER WILLIAMS: Yeah, I think
18 it is the appropriate time. In addition, I would
19 ask staff to also move into the record the staff
20 analysis and --

21 MR. RATLIFF: Okay, we move then that
22 those portions of exhibit 1 and 1A that go to the
23 items that are uncontested be moved into evidence.

24 HEARING OFFICER WILLIAMS: Okay.

25 MS. LUCKHARDT: And applicant moves in,

1 it looks like it's exhibit 3, subexhibits 3A
2 through 3K of applicant's testimony.

3 HEARING OFFICER WILLIAMS: Any objection
4 to that?

5 MR. GARBETT: The objection is that we
6 would be allowed to cross-examine it, once it has
7 become a fact in the record that we would be
8 allowed a cross-examination of such testimony.

9 HEARING OFFICER WILLIAMS: Well, --

10 MR. GARBETT: We don't refute it, but we
11 need to amplify during cross-examination the true
12 merits of that testimony that's being moved.

13 HEARING OFFICER WILLIAMS: Well, Mr.
14 Garbett, these exhibits that we're taking into
15 evidence now are the matters that we discussed at
16 the prehearing conference that are uncontested.
17 So there won't be any opportunity for cross-
18 examination, since there was no preservation of an
19 opportunity to talk about these particular
20 matters.

21 MR. GARBETT: There has been, at one
22 point, as a question of fact. You say these are
23 not disputed as facts. Yes, there is a dispute as
24 to the facts. Even though they appeared
25 uncontested, I would say the more appropriate word

1 is not controversial.

2 But in amplifying the record for other
3 points of this hearing, we need references at some
4 point in time to the testimony in these pages to
5 basically bring forth material.

6 HEARING OFFICER WILLIAMS: Well, you
7 know, the Committee will allow you to comment
8 on --

9 MR. GARBETT: Refer back to these.

10 HEARING OFFICER WILLIAMS: -- to refer
11 back to it. That's not a problem.

12 MR. GARBETT: And the referring back, it
13 may -- if we refer back to it as fact, then we
14 perhaps don't need cross-examination, but it's in
15 the form of what you might call cross-examination
16 to bring out other factors.

17 HEARING OFFICER WILLIAMS: Well, as long
18 as you understand that this testimony will be in
19 the record and is received as evidence.

20 MR. GARBETT: Yes. Would you read or
21 have the applicant go and read in all those
22 particular exhibit by exhibit numbers off your
23 list?

24 HEARING OFFICER WILLIAMS: Do you have
25 the list in front of you?

1 MR. GARBETT: I have the list in front
2 of me.

3 HEARING OFFICER WILLIAMS: Yes, it's
4 beginning on page 4. Exhibit 3, 3A through K.
5 Those are the matters that are coming in. And the
6 applicant has prefiled that testimony.

7 MR. GARBETT: Yes. The witnesses, I
8 believe, will be testifying as to some of the
9 other points so that we can refer back to --

10 HEARING OFFICER WILLIAMS: No, no, these
11 witnesses, it's my understanding that these
12 witnesses are not --

13 MS. LUCKHARDT: They're not testifying.

14 HEARING OFFICER WILLIAMS: -- they're
15 not testifying. This evidence will be coming in
16 and will be received based upon our discussions at
17 the prehearing conference.

18 MS. LUCKHARDT: And based upon those
19 discussions, Mr. Garbett, --

20 (Parties speaking simultaneously.)

21 MS. LUCKHARDT: -- at the time we had
22 talked about other questions that you had, and we
23 have a lot of those individuals coming who
24 hopefully can answer those questions.

25 MR. GARBETT: Well, I'd like, for

1 instance, in the topic and the witnesses here
2 list, as opposed to the exhibit schedule, what has
3 happened is the top witness here that you have
4 under the topics under appendix A that you're
5 doing here is the applicant's Todd Stewart, for
6 instance, whereas his testimony is being entered
7 here.

8 HEARING OFFICER WILLIAMS: Yes, in terms
9 of appendix A that you're speaking to --

10 MR. GARBETT: I'm sorry, off the first
11 one at the top, and in fact these witnesses are
12 appearing in other ways, in which case we --

13 HEARING OFFICER WILLIAMS: Exactly.

14 MR. GARBETT: -- refer back to the facts
15 that you've already --

16 HEARING OFFICER WILLIAMS: Exactly, I'll
17 allow you to do that.

18 MR. GARBETT: Thank you.

19 HEARING OFFICER WILLIAMS: Okay.

20 So, with that, we will receive into
21 evidence exhibits 3, 3A through 3K, without
22 objection.

23 We will also, the Committee will also
24 receive into evidence for identification the staff
25 analysis and the supplement, exhibits 1 through

1 1A, in those areas that are uncontested. We will
2 receive those particular portions into evidence.

3 Also, we will receive, if there's no
4 objection we will receive the application for
5 certification document, exhibit 2, into evidence.

6 Seeing no objection, that's moved in.

7 And I think we'll hold on the others.

8 MS. LUCKHARDT: Okay.

9 HEARING OFFICER WILLIAMS: Until later.

10 MR. GARBETT: 2A, we have an objection
11 to that one.

12 HEARING OFFICER WILLIAMS: You have an
13 objection to -- okay, we're not going to -- we're
14 going to stop at exhibit 2 right now.

15 Okay. With that I think according to
16 our witness schedule, the first contested topic is
17 power plant efficiency.

18 MS. LUCKHARDT: That's correct.

19 HEARING OFFICER WILLIAMS: I think we're
20 prepared to swear your witness.

21 MS. LUCKHARDT: The witness on power
22 plant efficiency is Todd Stewart. And he has yet
23 to be sworn.

24 HEARING OFFICER WILLIAMS: Mr. Court
25 Reporter, we're ready to swear the witness,

1 please.

2 Whereupon,

3 TODD STEWART

4 was called as a witness herein, and after first
5 having been duly sworn, was examined and testified
6 as follows:

7 DIRECT EXAMINATION

8 BY MS. LUCKHARDT:

9 Q Mr. Stewart, do you have a copy of
10 applicant's exhibit 4A, which is the power plant
11 efficiency testimony?

12 A Yes, I do.

13 Q And was this testimony prepared by you
14 or at your direction?

15 A Yes, it was.

16 Q And does this testimony include a
17 description of your qualifications, and was your
18 r, sum, included with applicant's prehearing
19 conference statement?

20 A Yes, it was.

21 HEARING OFFICER WILLIAMS: Excuse me,
22 counsel, one second. Do the parties wish to have
23 the witness go through his or her qualifications,
24 or can we move along and skip that part? Okay.

25 MS. LUCKHARDT: Yeah, I think in this

1 instance that's not an issue.

2 HEARING OFFICER WILLIAMS: Unless
3 there's an objection raised we'll skip the
4 qualifications. The qualification statements are
5 on file. If there's an objection the party can
6 raise it and we'll address that. Otherwise, you
7 can just move right into your testimony.

8 MS. LUCKHARDT: Great, great, that'll
9 make it go faster.

10 BY MS. LUCKHARDT:

11 Q Do you have any corrections or
12 clarifications you'd like to make to your prefiled
13 testimony?

14 A No, I don't.

15 Q And do the opinions contained therein
16 represent your best professional judgment?

17 A Yes, they do.

18 Q And do you adopt this testimony on
19 efficiency in this proceeding?

20 A Yes, I do.

21 Q Okay. Because there were some questions
22 at the prehearing conference, for speed of moving
23 this forward I'll just ask a few questions instead
24 of waiting for a rebuttal opportunity.

25 I'd like you to please describe the

1 design of the facility to support the datacenter.

2 A The facility is comprised of four what
3 are called General Electric LM6000 Spring model
4 gas turbines. These turbines will be -- the
5 facility will be constructed as a simple cycle
6 facility under the proceedings that we're asking
7 for right now.

8 Q And isn't the design that you have
9 selected the most efficient design for this type
10 of application?

11 A For this specific type of application,
12 yes, it is.

13 Q And how does the design and the
14 efficiency of this facility compare to other
15 existing peaking plants that are in operation now?

16 A The design of this particular facility
17 actually is comparable or superior to most
18 facilities of this -- that are put in for peaking.
19 Older facilities such as are currently in service
20 in San Francisco and Oakland utilize an older
21 model Pratt-Whitney type combustion turbine with a
22 heat rate that is in excess of 14,000.

23 Q Thank you, Mr. Stewart.

24 MS. LUCKHARDT: The witness is available
25 for cross. Oh, actually, you know what, I should

1 move his testimony.

2 HEARING OFFICER WILLIAMS: Okay.

3 MS. LUCKHARDT: So at this point I would
4 like to move applicant's exhibit 4A, which is
5 power plant efficiency portion of applicant's
6 contested area filed testimony into the record.

7 HEARING OFFICER WILLIAMS: Any
8 objection?

9 MR. GARBETT: Just the fact that we have
10 not been served with all of this in advance. We
11 waited throughout the week to reply.
12 Unfortunately T.H.E.P.U.B.L.I.C. did not get
13 service by mail in a timely manner. So we have
14 not seen the testimony and so forth. So we assume
15 that it is accurate to the best of the ability,
16 but we do have a cross.

17 HEARING OFFICER WILLIAMS: Do you have a
18 copy of it now?

19 MR. GARBETT: No. I don't have a copy
20 of any of the testimony.

21 HEARING OFFICER WILLIAMS: Do you have
22 any extra copies?

23 MS. LUCKHARDT: I don't have extra
24 copies.

25 MS. McFARLIN: I do, I'll get them.

1 MS. LUCKHARDT: Okay.

2 HEARING OFFICER WILLIAMS: Okay, so
3 we'll see what we can do about getting the copies.
4 Mr. Stewart is going to be available.

5 MR. GARBETT: At least the mailman was
6 consistent with 9/11.

7 HEARING OFFICER WILLIAMS: Staff?

8 MR. RATLIFF: No questions.

9 HEARING OFFICER WILLIAMS: Okay, we'll
10 receive exhibit 4A into evidence.

11 MS. LUCKHARDT: All right.

12 HEARING OFFICER WILLIAMS: Cross-
13 examination?

14 MR. FREEDMAN: Thank you. We just have
15 a few questions for you.

16 CROSS-EXAMINATION

17 BY MR. FREEDMAN:

18 Q With respect to the heat rate of the
19 facility, what are your best estimates with
20 respect to the heat rate of these units?

21 A Best estimate of full load heat rate is
22 in the 9000 to 9100 Btus per kilowatt hour.

23 Q And would this be the same estimate you
24 would use if you were estimating based on summer
25 peak temperatures? Does the heat rate change

1 based on the ambient air temperature?

2 A I don't believe the heat rate changes
3 appreciably, but the output from the facility
4 would change.

5 Q What do you mean by that?

6 A As the temperature goes up the ability
7 for the machine to produce electric generation
8 would go down, and that is offset partially
9 through the introduction of air inlet chillers
10 which chills inlet air.

11 Q But you are saying that it becomes less
12 efficient at higher temperatures, is that fair to
13 say?

14 A I'm saying there's no appreciable
15 difference.

16 Q According to Calpine's air permit what's
17 the allowable heat rate?

18 A Sorry, could you restate that, please?

19 Q Under the terms of the air permit for
20 this facility, what would be the maximum allowable
21 heat rate?

22 MS. LUCKHARDT: I have to kind of raise
23 an objection here. Mr. Stewart has not offered
24 the air permit into the record, and I would want
25 to make sure that he would have an opportunity to

1 take a look at that, or have a better
2 understanding of it if he needs to.

3 HEARING OFFICER WILLIAMS: Maybe that's
4 better suited for air quality, perhaps, Mr.
5 Freedman.

6 MR. FREEDMAN: Well, fair enough except
7 that with respect to testimony about the
8 efficiency of the unit we've seen different
9 numbers in different applications, whether it be
10 this one or the DWR contract or the air quality
11 permit.

12 I'm just trying to reconcile various
13 numbers.

14 MS. LUCKHARDT: And I guess I'm trying
15 to understand whether there's a concern about
16 whether the project is efficient, or where this is
17 leading in light of the decisions that this
18 Commission has to make on this application.

19 MR. FREEDMAN: It's a question of
20 whether the facility is truly the most efficient
21 that could be utilized for its particular purpose.

22 HEARING OFFICER WILLIAMS: Why don't you
23 restate your question.

24 BY MR. FREEDMAN:

25 Q Are you familiar with the air permit

1 that Calpine is seeking for this facility?

2 A Yes, I am.

3 Q Does that air permit include -- does it
4 include a project capacity for the capacity of the
5 unit? Or rated kilowatt rated megawatt capacity?

6 A What I recall is that it shows a maximum
7 output for each of the gas turbines.

8 Q And how is that output denominated?

9 A Are you asking for the units?

10 Q Yes.

11 A In, I believe, megawatts.

12 Q Is there also -- is it possible to
13 derive a maximum possible heat rate from looking
14 at the data that's contained in the air quality
15 permit?

16 MS. LUCKHARDT: As we move along in this
17 area, Gary Rubenstein is here. He is our air
18 quality expert. And it may be more beneficial to
19 have Gary also -- Mr. Rubenstein also sworn in at
20 this time, because he may be better able to
21 respond to some of the questions asked.

22 HEARING OFFICER WILLIAMS: Why don't we
23 do that.

24 //

25 //

1 Whereupon,

2 GARY RUBENSTEIN

3 was called as a witness herein, and after first
4 having been duly sworn, was examined and testified
5 as follows:

6 MS. LUCKHARDT: So, I'm sorry, Matt --
7 Mr. Freedman, you may need to repeat it since I've
8 disrupted what it was that you were asking.

9 MR. FREEDMAN: We have some of these
10 issues actually covered in the testimony that Ms.
11 Schilberg is going to give, and I apologize for
12 having the witness sworn in. I actually want to
13 move on to some other questions. They may or may
14 not involve air quality topics.

15 HEARING OFFICER WILLIAMS: No harm done.
16 Air quality is next, so.

17 MS. LUCKHARDT: Yes.

18 BY MR. FREEDMAN:

19 Q Now, is it fair to say that the facility
20 would be more efficient if it were run in combined
21 cycle operation?

22 A That is correct.

23 Q And what is the estimated date for
24 conversion of this facility to combined cycle
25 operation?

1 A We intend to move forward immediately
2 with our application documents to convert to
3 combined cycle once we've received certification.
4 So it would be sometime in the year 2003
5 optimistically.

6 Q 2003 that the facility would be
7 converted, or that the permit would be acquired to
8 engage in the conversion?

9 A That the facility would be combined
10 cycle operation.

11 Q Prior to the conversion to combined
12 cycle how does Calpine anticipate that this
13 facility will be operated in connection as a
14 peaking unit? Is it your understanding and
15 expectation that it will operate during very
16 limited number of hours?

17 MS. LUCKHARDT: Mr. Rubenstein, who
18 understands the limits of the air quality permit,
19 may be in a better position to respond to the
20 number of operating hours that have been permitted
21 under the air permit.

22 HEARING OFFICER WILLIAMS: Counsel, do
23 you want to move the air permit into -- or at
24 least mark it for identification and have it
25 available?

1 MS. LUCKHARDT: Sure. It should be on,
2 oh, I guess -- Dick, is it on your list? I
3 thought, is staff sponsoring the --

4 MR. RATLIFF: Yes, exhibit 2A.

5 MS. LUCKHARDT: Is it 2A, is that what
6 it is? Maybe you can help me find it. Okay,
7 yeah, that would be exhibit 2A. That's the
8 exhibit we're referring to. It's usually entered
9 into evidence by staff via the Air District. We
10 can enter it at this point so that it would be in
11 the record. But what we're referring to is
12 exhibit 2A on the exhibit list.

13 HEARING OFFICER WILLIAMS: We might as
14 well enter it now.

15 MS. LUCKHARDT: Okay.

16 HEARING OFFICER WILLIAMS: Any objection
17 to the final determination of compliance from the
18 Air District?

19 MR. GARBETT: There is objection
20 basically to the Air District certification. On
21 that at the previous workshop basically we did not
22 participate to the fullest because we had
23 anticipated a separate hearing as requested under
24 the law with the Bay Area Air Quality Management
25 District. That hearing has never been held. And

1 therefore our objections were not tendered
2 previously, and at this point in time they may be
3 moot, but we do object to it.

4 HEARING OFFICER WILLIAMS: So noted,
5 sir. Staff, any objection?

6 MR. RATLIFF: No.

7 HEARING OFFICER WILLIAMS: No. Okay,
8 it's --

9 MR. RATLIFF: It's our exhibit.

10 HEARING OFFICER WILLIAMS: Okay, 2A is
11 in.

12 MR. RUBENSTEIN: Can I get a restatement
13 from someone as to what the question is that's
14 before me?

15 MR. FREEDMAN: The question was with
16 respect to the expectation of the number of hours
17 that this unit would be in operation.

18 So I guess the permit would be one basis
19 for making that expectation clear, but not the
20 only one.

21 MR. RUBENSTEIN: Right, the final
22 determination of compliance issued by the Bay Area
23 Air Quality District allows for 8760 full load
24 hours of operation by these turbines.

25 MR. FREEDMAN: So that would be every

1 single hour of the year, is that correct?

2 MR. RUBENSTEIN: That's what would be
3 allowed, that's correct.

4 MR. FREEDMAN: So this would allow the
5 facility to operate as what's commonly referred to
6 as baseload, is that correct?

7 MR. RUBENSTEIN: The permit would allow
8 that, yes.

9 MR. FREEDMAN: To return to Mr.
10 Stewart's testimony, Mr. Stewart, on page 35 you
11 mention the project's objective is to generate
12 peaking load following and/or baseload power, is
13 that correct?

14 MR. STEWART: Yes, that's correct.

15 MR. FREEDMAN: What's your expectation
16 of the utilization of this unit for each of those
17 three purposes that you identify?

18 MR. STEWART: That's really up to the
19 entity that calls for the power at the time that
20 they call for it.

21 MR. FREEDMAN: And who would that entity
22 be?

23 MS. LUCKHARDT: I don't think this
24 particular witness knows how power calls are made,
25 and whether they are from the ISO or how that

1 chain of command goes down to an actual power
2 plant.

3 There are typical ways. I don't claim
4 at all to be an expert on how the calls for power
5 come in, whether they come in from the ISO or
6 whether they come in under situations like this
7 where a project has a contract which is not the
8 subject of this proceeding, but I don't think he's
9 qualified to talk about how the orders come down
10 to direct a plant to operate.

11 MR. FREEDMAN: I guess my question comes
12 down to this, you've referred to this as a peaking
13 facility, you're comparing it to other peaking
14 units.

15 And I'm wondering whether this facility
16 could reasonably be expected to run similar to a
17 baseload plant in terms of its utilization. I
18 think this is relevant to the issue of efficiency.

19 MR. STEWART: Well, I guess it really
20 depends on market conditions as to what the demand
21 is for power in the area.

22 MR. FREEDMAN: And in the event that it
23 will run as a baseload facility, is it your
24 contention it's the most efficient configuration
25 that could be chosen for this particular purpose?

1 MR. STEWART: For the purpose that the
2 facility is built, yes.

3 MR. FREEDMAN: Which facility are you
4 referring to?

5 MR. STEWART: The Los Esteros Critical
6 Energy Facility.

7 MR. FREEDMAN: Just clarifying whether
8 this is a Dataport specific issue. So you don't
9 believe it's more efficient to construct the
10 facility originally as a combined cycle?

11 MR. STEWART: I'm having a tough time
12 with your questions, Mr. Freedman, I'm sorry.
13 What I believe I tried to answer, if I could
14 restate your question, is would this be the most
15 efficient generation that is --

16 MR. FREEDMAN: Gas fired generation.
17 Available for --

18 MR. STEWART: I'm going to have to ask
19 you to restate your question again, because you've
20 got me going against two ways. If you'd help me
21 out, please?

22 MR. FREEDMAN: Just wondering whether
23 the facility would be more efficient if it were
24 initially constructed as a combined cycle unit.

25 MR. STEWART: The facility would be more

1 efficient if it was initially constructed as a
2 combined cycle, yes.

3 MR. FREEDMAN: Just one more question.
4 The bottom of page 34 you mention that Los Esteros
5 will be a reliable source of clean, economical
6 electric power. I'm wondering what's the basis
7 for the statement that Los Esteros is a source of
8 economic power.

9 MR. STEWART: Based on the heat rate for
10 the facility and what power prices have been in
11 the past.

12 MR. FREEDMAN: How does the heat rate
13 translate into a power price?

14 MS. LUCKHARDT: Now, I'm going to have
15 to object because I would like to know what the
16 relevance of a power price is to the proceeding we
17 have going on today.

18 MR. FREEDMAN: If the witness is not
19 prepared to defend his statement, then I would ask
20 that it be stricken from the record with respect
21 to the economical nature of this particular
22 facility.

23 HEARING OFFICER WILLIAMS: What are you
24 reading from?

25 MR. FREEDMAN: The bottom of page 34,

1 section marked operational impacts. The first
2 sentence states that Los Esteros facility will be
3 a reliable source of clean economical electric
4 power.

5 If the applicant doesn't wish to discuss
6 the economics -- then should not be citing
7 economics benefits in his testimony.

8 MS. LUCKHARDT: We can strike economic
9 out of that sentence.

10 HEARING OFFICER WILLIAMS: I have that,
11 it's page 35, is that what you have, page 35?

12 MR. FREEDMAN: It shows page 34 on mine.
13 Perhaps there's another one issued.

14 HEARING OFFICER WILLIAMS: Okay.

15 MR. GARBETT: I think it's the internet
16 that probably most of these copies were taken
17 from.

18 HEARING OFFICER WILLIAMS: Okay, thank
19 you.

20 MR. FREEDMAN: I apologize for the
21 discrepancy between the numbers.

22 HEARING OFFICER WILLIAMS: Okay, so we'd
23 better strike the word economic.

24 MR. FREEDMAN: Just one second.

25 (Pause.)

1 MR. FREEDMAN: On the last page of your
2 testimony, again when talking about how the unit
3 will be utilized -- and I apologize if this goes
4 into a subject that the applicant feels shouldn't
5 be discussed -- under the category maximum thermal
6 efficiency of the facility, it says power will be
7 sold into the spot market or be a contract with
8 CDWR.

9 Do you see that sentence there?

10 MR. STEWART: Yes, I do.

11 MR. FREEDMAN: So is it the applicant's
12 expectation that there will be significant spot
13 market power sales from the unit?

14 MR. STEWART: That really determines on
15 what the market conditions are as we move forward.

16 MR. FREEDMAN: So if prices are high
17 maybe yes; and prices are low maybe not, is that
18 what you're saying?

19 MR. STEWART: Again, it just depends on
20 what the market demand is.

21 MR. FREEDMAN: And so this is consistent
22 with the first statement that you made there which
23 is the project's objective is to generate any one
24 of three types of power depending upon apparently
25 market conditions, is that fair to say?

1 MR. STEWART: Yes.

2 MR. FREEDMAN: Okay, thank you, I have
3 no further questions.

4 HEARING OFFICER WILLIAMS: Mr. Garbett.

5 CROSS-EXAMINATION

6 BY MR. GARBETT:

7 Q Mr. Stewart, with regards to the
8 efficiency previously stated that the cogeneration
9 version of a power plant is more efficient than a
10 peaker version, is that correct? You already
11 testified to that, is that correct?

12 MR. STEWART: Mr. Garbett, the combined
13 cycle version --

14 MR. GARBETT: Combined cycle, pardon me.

15 MR. STEWART: -- is more efficient than
16 the simple cycle, yes, version.

17 MR. GARBETT: With this particular
18 input, you go and call this a critical energy
19 facility for reliability, and the reliability that
20 you're trying to strive for is 100 percent, is
21 that correct? Or as close to it as you can get?

22 MR. STEWART: We're looking for a high
23 99 percent reliability, not 100 percent.

24 MR. GARBETT: Isn't that more
25 traditional of a baseload plant than a peaking

1 plant?

2 MR. STEWART: Not necessarily.

3 MR. GARBETT: With the directives by the
4 California Energy Commission for efficiency and
5 the eventual conversion to a cogeneration type
6 plant, or combined cycle power plant, this would
7 indicate that you would go and have to, you might
8 say, be a baseload plant rather than a peaking
9 plant?

10 MR. STEWART: I think I testified
11 earlier that the plant can provide power under any
12 of the three different conditions, peaking,
13 baseload or load following.

14 MR. GARBETT: Does U.S. Dataport require
15 a peaking plant use if you were to serve them?

16 MR. STEWART: U.S. Dataport requires a
17 consistent load and they require it to be very
18 very reliable.

19 MR. GARBETT: Is there a U.S. Dataport
20 at this point in time?

21 MR. STEWART: Yes.

22 MR. GARBETT: Is there a U.S. Dataport
23 facility that requires power at this time?

24 MR. STEWART: No, there is not.

25 MR. GARBETT: With the U.S. Dataport

1 facility you would require a particular contract
2 for service, would you not?

3 MR. STEWART: Are you talking about a
4 contract for service with U.S. Dataport?

5 MR. GARBETT: Yes.

6 MR. STEWART: Yes I would -- so.

7 MR. GARBETT: Is there any contracts in
8 place for future power for the Department of Water
9 Resources for this plant?

10 MS. LUCKHARDT: I would object to that
11 question as being outside the scope of this
12 proceeding.

13 HEARING OFFICER WILLIAMS: Sustained.

14 MR. GARBETT: Is there land use permits
15 required, in order to build this facility, from
16 the City of San Jose?

17 HEARING OFFICER WILLIAMS: Mr. Garbett,
18 really we're limited in this topic to efficiency
19 questions and --

20 MR. GARBETT: Yes.

21 HEARING OFFICER WILLIAMS: -- as I'm
22 reviewing my notes I don't really think you
23 preserved an opportunity for cross-examination
24 under this topic.

25 We're free to grant you some leeway, but

1 I'd ask you to restrict your questions to the
2 efficiency topic.

3 MR. GARBETT: Okay, I was trying to get
4 down to one of those things. Would an efficiency
5 topic be a restraint of trade?

6 HEARING OFFICER WILLIAMS: No. I'm not
7 sure where that would fit in, but --

8 MR. GARBETT: Okay. With the power
9 plant you have stated basically it's 180 megawatt
10 peaking plant, or baseload plant, whatever you may
11 choose to operate it at, is that correct?

12 MR. STEWART: Nominal 180 megawatts,
13 yes.

14 MR. GARBETT: Has the ISO done analysis
15 at other than 180 megawatts in their studies?

16 MS. LUCKHARDT: That's outside the scope
17 of his testimony, and would fit more accurately in
18 transmission system engineering.

19 HEARING OFFICER WILLIAMS: Sustained.

20 MR. GARBETT: When there are deviations
21 in numbers we go and regard the efficiency. What
22 is the efficiency at 195 megawatts as compared to
23 180 megawatts nominal? Less or more efficient?

24 MR. STEWART: I would expect the
25 efficiency to be slightly better at 190 than 180.

1 MR. GARBETT: Thank you. No more
2 questions.

3 HEARING OFFICER WILLIAMS: Okay. We
4 then will close out this topic.

5 MS. LUCKHARDT: Can I have just a couple
6 of questions of redirect?

7 HEARING OFFICER WILLIAMS: Sure.

8 MS. LUCKHARDT: Or am I pressing your --

9 HEARING OFFICER WILLIAMS: Sure, go
10 right ahead. I'm sorry.

11 MS. LUCKHARDT: I just have a couple
12 questions.

13 REDIRECT EXAMINATION

14 BY MS. LUCKHARDT:

15 Q Mr. Stewart, could you explain the
16 reason for selecting multiple engines for this
17 facility, as opposed to say using a single large
18 frame machine?

19 MR. STEWART: Yes. Given the nature of
20 the expected buildout of the Dataport datacenter,
21 we would expect that we would be running partial
22 full-plant loads such as one or two or three
23 turbines at any one time, as opposed to simply
24 running four all the time.

25 That way it allows us to better match

1 the load requirements of the datacenter
2 eventually.

3 MS. LUCKHARDT: And do the requirements
4 of the datacenter require that this project be
5 built before the datacenter?

6 MR. STEWART: It's advantageous to build
7 the energy facility prior to the datacenter, as it
8 then mitigates the need for the datacenter to have
9 other types of backup energy available, such as
10 diesel fired generators.

11 MS. LUCKHARDT: Okay, that's all I have
12 at this time.

13 HEARING OFFICER WILLIAMS: Go ahead.

14 MR. FREEDMAN: I have a question on
15 recross here.

16 RE-CROSS-EXAMINATION

17 BY MR. FREEDMAN:

18 Q You said that it's advantageous for the
19 facility to be built before U.S. Dataport is
20 constructed?

21 MR. STEWART: Yes.

22 MR. FREEDMAN: How long before? Six
23 weeks? Six months? Three years?

24 MS. LUCKHARDT: I've got a question. If
25 you could clarify whether you're talking about

1 market conditions such as Mr. Sedgewick was
2 talking about, indicating that in order for his
3 business perspective, or are you talking about
4 reliability, or could you clarify a little more
5 what you're asking for?

6 MR. FREEDMAN: Well, I'm just asking him
7 to explain his statement. His statement was that
8 it's advantageous for the facility to be built
9 before U.S. Dataport. I'm wondering how much
10 before is important. In his own expertise he can
11 answer it the way he wants.

12 MR. STEWART: Well, as my testimony on
13 efficiency, I guess the testimony that I would
14 give is that it's advantageous to have the energy
15 center in place as it would entice or provide a
16 foundation for tenants looking to locate in the
17 datacenter, that indeed, this is a genuine
18 opportunity for highly reliable power to be
19 supplied directly to them.

20 MR. FREEDMAN: So almost as a marketing
21 strategy for U.S. Dataport to have the facility in
22 the ground operating, is that what you're
23 suggesting?

24 MR. STEWART: I can't speak for U.S.
25 Dataport.

1 MR. FREEDMAN: With respect to the
2 question of efficiency, which is the topic of your
3 testimony, would the efficiency -- how is the
4 efficiency of the unit affected by the time gap
5 between its construction and the initial operation
6 of U.S. Dataport?

7 MR. STEWART: It's not affected at all.

8 MR. FREEDMAN: Okay, thank you.

9 REXCROSS-EXAMINATION

10 BY MR. GARBETT:

11 Q Mr. Stewart, isn't it true that since
12 U.S. Dataport is not in existence the primary
13 operation of this plant would be to supply power
14 to the grid for alleged energy crisis?

15 MR. STEWART: At this point power that
16 is supplied from the power plant would go to the
17 grid, yes.

18 MR. GARBETT: In your filings with the
19 City of San Jose did you not use dual letterheads
20 with both Calpine, not Calpine C*Power, but
21 Calpine on a letterhead with Dataport letterhead
22 on the same sheet, basically speaking for both,
23 with joint signatures?

24 MS. LUCKHARDT: Objection, this is
25 beyond the scope of the redirect.

1 HEARING OFFICER WILLIAMS: Sustained.

2 Okay, seeing nothing further we're going
3 to close out this topic. The topic of power plant
4 efficiency is now closed.

5 I see also that we have a new arrival.
6 Sir?

7 MR. BRECHER: I'm Joseph J. Brecher; I'm
8 an attorney representing the City of Milpitas, and
9 will be chiming in a bit later.

10 HEARING OFFICER WILLIAMS: Thank you. I
11 think we'll take a short recess so that we can
12 give Mr. Brecher copies that we've passed out
13 earlier, and make sure that he can follow along
14 with us.

15 We'll take five minutes.

16 (Brief recess.)

17 HEARING OFFICER WILLIAMS: To
18 accommodate a witness we're going to take
19 transmission system engineering next. Various
20 witnesses need to be elsewhere, so we're going to
21 try to accommodate people as the need arises.

22 So, with that, applicant, transmission
23 system engineering.

24 MS. LUCKHARDT: Our witnesses on
25 transmission system engineering are David

1 Solhtalab and Ali Amirali. They both need to be
2 sworn.

3 Whereupon,

4 DAVID SOLHTALAB and ALI AMIRALI
5 were called as witnesses herein, and after first
6 having been duly sworn, were examined and
7 testified as follows:

8 MS. LUCKHARDT: Okay, since we have two
9 individuals here I think I'll direct my -- for
10 efficiency I'll direct my questions to Mr.
11 Amirali.

12 DIRECT EXAMINATION

13 BY MS. LUCKHARDT:

14 Q I'll ask you if you have a copy of
15 applicant's transmission system engineering
16 testimony in front of you? That would be exhibit
17 4F on the exhibit list.

18 MR. AMIRALI: I do.

19 MS. LUCKHARDT: And was this testimony
20 prepared by you or at your direction?

21 MR. AMIRALI: It was.

22 MS. LUCKHARDT: And does this testimony
23 include a description of your qualifications,
24 including your r, sum,? Or was your r, sum
25 attached to the prehearing conference statement?

1 MR. AMIRALI: My r, sum, was provided.

2 MS. LUCKHARDT: Great. And since that
3 was previously filed we will not be going through
4 a description of their qualifications at this
5 time.

6 Do you have any corrections or
7 clarifications to make to your testimony?

8 MR. AMIRALI: I do. I'm also sponsoring
9 the facility cost report.

10 MS. LUCKHARDT: Great, thank you. And
11 with those changes are the facts contained in your
12 testimony true to the best of your knowledge?

13 MR. AMIRALI: They are.

14 MS. LUCKHARDT: And do the opinions
15 contained therein represent your best professional
16 judgment?

17 MR. AMIRALI: They do.

18 MS. LUCKHARDT: And do you adopt this as
19 your testimony in this proceeding?

20 MR. AMIRALI: I do.

21 MS. LUCKHARDT: And would you like me to
22 go through the same introduction with Mr.
23 Solhtalab, or when we have two witnesses, would
24 you like me to take one as representing --

25 HEARING OFFICER WILLIAMS: Why don't we

1 do them both at the same time.

2 MS. LUCKHARDT: Okay.

3 BY MS. LUCKHARDT:

4 Q Mr. Solhtalab, do you have a copy of
5 applicant's testimony on transmission system
6 engineering in front of you?

7 MR. SOLHTALAB: Yes, I do.

8 MS. LUCKHARDT: And was that testimony
9 prepared by you or at your direction?

10 MR. SOLHTALAB: It was basically in
11 conjunction with Ali's.

12 MS. LUCKHARDT: And does this testimony
13 include a description of your qualifications,
14 including your r, sum, ?

15 MR. SOLHTALAB: This doesn't, but my
16 qualifications were in the transmission line
17 safety and nuisance section, qualifications and
18 both, my r, sum, .

19 MS. LUCKHARDT: Okay, and those were
20 filed with the applicant's prehearing conference
21 statement.

22 And do you have any corrections or
23 clarifications to make to your testimony?

24 MR. SOLHTALAB: No.

25 MS. LUCKHARDT: And are the facts

1 contained in your testimony true to the best of
2 your knowledge?

3 MR. SOLHTALAB: Yes.

4 MS. LUCKHARDT: And do the opinions
5 contained therein represent your best professional
6 judgment?

7 MR. SOLHTALAB: Yes.

8 MS. LUCKHARDT: And do you adopt the
9 testimony on transmission system engineering as
10 your testimony in this proceeding?

11 MR. SOLHTALAB: Yes, I'm basically
12 adopting Steve Miller's testimony.

13 MS. LUCKHARDT: All right. And then I
14 have just a couple of questions.

15 Could you please describe the --
16 whichever of you would be more appropriate, could
17 you please describe the system improvements
18 currently contemplated by Pacific Gas and
19 Electric, the ISO and the applicant for this
20 project.

21 MR. AMIRALI: For this project or --

22 MS. LUCKHARDT: For this project. I
23 understand that there's been some iterations in
24 the system improvements required for this project.
25 Could you please describe what's currently --

1 MR. AMIRALI: What happened is back in
2 November PG&E did a draft facilities cost report.
3 And that is what I believe most of the witnesses
4 here and everyone else has.

5 And in there it had quite a bit of
6 reinforcement that was necessary based on their
7 studies.

8 Both Cal-ISO and PG&E have gone through
9 and Calpine went through the PG&E studies and
10 found a lot of different inconsistencies and flaws
11 that needed to be corrected.

12 And based on that a final report was put
13 out in the final report.

14 MS. LUCKHARDT: Okay. And could you
15 describe a couple of the things that changed that
16 revised that report?

17 MR. AMIRALI: I do not have with me the
18 version that was previously used, the draft
19 version, but I can describe as to what transpired
20 after where Dave left, Dave, Mr. Solhtalab, left.
21 His statement.

22 Initially, PG&E -- as David Solhtalab
23 mentioned, that initially PG&E had conducted a
24 study and a revised study was performed based on a
25 new set of assumptions that were worked together

1 by Calpine's consultant and PG&E.

2 And based on that the new information
3 was put out.

4 MS. LUCKHARDT: Okay. And did that
5 include -- in order to create the new information
6 were there certain assumptions that were changed
7 on other plants ahead in the queue, or other
8 things that may have been important in --

9 MR. AMIRALI: It was in the plans, but
10 it was some of the loading information that was
11 changed.

12 MS. LUCKHARDT: Okay. And then could
13 you please describe the voltage support benefits
14 from this project at this location, both before
15 and after installation of the proposed PG&E Los
16 Esteros substation?

17 MR. AMIRALI: Sure. Before I describe
18 this I would like to give about a 30-second
19 preview of voltage support and how voltage support
20 works in a transmission system.

21 In order for a power system to run
22 reliably we all know that it needs to have
23 reactive support, and reactive support is provided
24 by reactive power.

25 In a power system the real power, that

1 is the energy consumed by the load, can be
2 generated miles away and can be transported inside
3 to a local area.

4 The same is not generally true for
5 megawires or the reactive power. The reactive
6 power is best provided when generated locally.
7 And further, it is best provided when generated by
8 a spinning machine.

9 Los Esteros is located in the heart of
10 San Jose. From an electric loading perspective,
11 San Jose area contains, or the South Bay area
12 contains load that generally have a power
13 electronic front-end. And devices with power
14 electronic front-end drive or draw a lot of
15 reactive power.

16 In other words, this area requires a
17 very high amount of reactive power in order to
18 keep the voltage of this area up.

19 Since this project is located in the
20 heart of the San Jose area, it does provide
21 significant amount of voltage support. And since
22 that reactive power is generated locally, that's
23 why its benefit will stay, regardless of the
24 PG&E's transmission system being -- the PG&E
25 substation being built, or after.

1 MS. LUCKHARDT: Okay, thank you. I have
2 no further questions. At this time I'd like to
3 move applicant's testimony on transmission system
4 engineering into the record. That would be
5 exhibit 4F.

6 HEARING OFFICER WILLIAMS: 4F. Exhibit
7 4F will be received into evidence.

8 MS. LUCKHARDT: And I also need to move
9 the facilities cost report, which is 2B.

10 HEARING OFFICER WILLIAMS: 2B?

11 MS. LUCKHARDT: Oh, 2V, as in victor.

12 HEARING OFFICER WILLIAMS: Any
13 objection? Seeing none, 2V, as in victor, is
14 entered.

15 MR. FREEDMAN: Is the final facilities
16 cost report entered into the record? We only have
17 the draft report.

18 HEARING OFFICER WILLIAMS: Cost
19 facilities.

20 MS. LUCKHARDT: We only have the draft
21 in the record at this time. We realize that there
22 was a final later, and that no one had had an
23 opportunity to see it. So, we decided not to move
24 it in its present state into the record.

25 MR. FREEDMAN: Is the witness -- draft

1 the final?

2 MS. LUCKHARDT: Yes.

3 MR. FREEDMAN: Difficult for us to
4 evaluate the statements not having a copy of that
5 final report.

6 HEARING OFFICER WILLIAMS: Do you have a
7 copy of the final report?

8 MS. LUCKHARDT: I can ask.

9 HEARING OFFICER WILLIAMS: Is that an
10 extra copy?

11 MR. AMIRALI: Yes.

12 HEARING OFFICER WILLIAMS: Could you
13 provide that to Mr. Freedman.

14 MR. FREEDMAN: Thank you.

15 MS. LUCKHARDT: We would enter it into
16 the record if you're willing to accept it, but --

17 HEARING OFFICER WILLIAMS: We'll mark it
18 for identification as 2I. For identification.

19 EXAMINATION

20 BY HEARING OFFICER WILLIAMS:

21 Q Sir, I have one question. What is the
22 status of the Los Esteros substation?

23 MR. SOLHTALAB: PG&E's Los Esteros?

24 HEARING OFFICER WILLIAMS: Excuse me,
25 yes, PG&E's Los Esteros substation.

1 MR. SOLHTALAB: The last I understand is
2 that PG&E is planning to proceed with the project.
3 They have received the go-ahead from CPUC to do
4 so, but one of the issues is that they have given
5 certain amount of dollars to construct the
6 substation and the transmission lines. And that
7 is a bit lower than what they had for their -- in
8 their, I believe \$40 million lower than what they
9 had for their request.

10 Also, this would include a 230 kV lines
11 going from Los Esteros up to Newark substation in
12 Fremont; and also 115 kV lines down to San Jose
13 area. So basically PG&E needs to obtain right-of-
14 way for all these lines, especially the 230 kV
15 lines.

16 So, as far as I know they're proceeding,
17 but the timing is not known at this point due to
18 all these complications. But from my discussion
19 with their project manager, it's going to be
20 built. But when, --

21 HEARING OFFICER WILLIAMS: My other
22 question is, as I understand it, PG&E will be
23 building out the alternate route for the
24 connection to the grid?

25 MR. SOLHTALAB: Of the Los Esteros,

1 LECF?

2 HEARING OFFICER WILLIAMS: Yes, until
3 the substation gets built, the alternate line that
4 will connect to the grid.

5 MR. SOLHTALAB: Yes. We are planning,
6 and this has been a discussion with PG&E, to build
7 a 2000-foot transmission tap to the PG&E's Nortec-
8 Trimble line.

9 HEARING OFFICER WILLIAMS: Now, who will
10 build that?

11 MR. SOLHTALAB: PG&E will. PG&E is
12 designing it, will build it, and will own it.
13 Until PG&E's Los Esteros sub is built. And then
14 once it's built, then we will have the permanent
15 connection to it.

16 HEARING OFFICER WILLIAMS: What control
17 does the applicant have over how that gets built?
18 I mean can you --

19 MR. SOLHTALAB: What gets built? The
20 temporary?

21 HEARING OFFICER WILLIAMS: The 2000-foot
22 line, the TAP line.

23 MR. SOLHTALAB: We are in the process of
24 negotiating with the City of San Jose to obtain a
25 right-of-way easement, temporary easement. And

1 the City of San Jose has basically told us their
2 preferred direction that this line is going to
3 take. Actually they have told us what they will
4 give us easement for.

5 And we have been out in the field with
6 them, talked to them about what needs to be done.
7 And once the design is completed and once the
8 easement is done, we're going to be working
9 together to make sure this line is built.

10 HEARING OFFICER WILLIAMS: Approximately
11 how long, if you know, will this process take?

12 MR. SOLHTALAB: How long this takes?
13 It's a couple of months for the process -- for
14 construction or the right-of-way as it is --

15 HEARING OFFICER WILLIAMS: The whole
16 ball of wax. How long before -- your projection
17 of how long it'll be in place, in terms of the
18 easements and construction and everything.

19 MR. SOLHTALAB: I can't guess --

20 MS. LUCKHARDT: Mr. Stewart may need to
21 respond to that specific question -- if you're in
22 a better position. He's previously been sworn.
23 They're asking about the timing on the development
24 of the construction and the easement. You may
25 need to respond.

1 MR. STEWART: Actually I was going to
2 defer to our land use witness when she gets here.

3 MS. LUCKHARDT: Okay.

4 MR. SOLHTALAB: It all has to do with
5 PG&E's Los Esteros substation being built. So I
6 can't guess exactly how long it's going to be.

7 HEARING OFFICER WILLIAMS: Okay.

8 MS. LUCKHARDT: The land use witness I
9 think may be familiar with the easement
10 discussions with the City of San Jose, and may be
11 able to give you an update on the timing for
12 expectation of receiving the easements for the
13 temporary line.

14 HEARING OFFICER WILLIAMS: Okay.

15 MR. SOLHTALAB: And by the way, the
16 information about PG&E's substation is the best of
17 my knowledge. I'm no longer a PG&E employee.

18 HEARING OFFICER WILLIAMS: Okay, thank
19 you. Okay, those are my questions. Staff, do you
20 have any questions?

21 MR. RATLIFF: No.

22 HEARING OFFICER WILLIAMS: Cross-
23 examination?

24 MR. FREEDMAN: Thank you.

25 //

1 CROSS-EXAMINATION

2 BY MR. FREEDMAN:

3 Q Does Calpine currently have a signed
4 interconnection agreement with PG&E for the
5 temporary TAP?

6 MR. AMIRALI: We have an application in
7 there but we don't have an interconnection
8 agreement in place right now. We are working
9 towards the development of all the appropriate
10 agreements that are required for an
11 interconnection of generating project.

12 MR. FREEDMAN: And according to the
13 final facilities cost report is it fair to say
14 that there's something on the order of \$2.7
15 million of direct interconnection costs with about
16 \$27 million in downstream improvements that have
17 been estimated by PG&E?

18 MR. SOLHTALAB: I will talk about the
19 interconnection costs. The interconnection costs
20 that PG&E has provided includes -- provides that
21 they would obtain the easement for this line,
22 which they are not. Calpine is working with City
23 of San Jose to obtain the easement, so has that
24 assumption.

25 So part of that is not accurate. So

1 that \$560,000 that they have is only going to be
2 partial because once the easement, we have the
3 easement and they design the line, and it needs to
4 go through notice to construct at PUC. So that's
5 all it would have to pay for.

6 MR. FREEDMAN: I'm sorry, are you saying
7 that \$500,000-and-some-odd out of the \$2.7 million
8 is a cost that have not been incurred by PG&E?

9 MR. SOLHTALAB: Only part of it because
10 in this case they are assuming that they will
11 obtain the easement, while actually we are doing
12 that.

13 MR. FREEDMAN: And that's an offset of
14 about how much?

15 MR. SOLHTALAB: I couldn't exactly
16 guess.

17 MR. FREEDMAN: Okay.

18 MR. SOLHTALAB: It will be major -- like
19 a major portion of it.

20 Also the IDCC tax, I know I've talked,
21 always better to discuss that, that portion also
22 may not apply.

23 MR. AMIRALI: If you look at the
24 footnote at the base of page 5, it addresses the
25 IDCC tax issue. I believe it accurately addresses

1 the federal government and the State of California
2 rulings.

3 MR. FREEDMAN: I'm sorry, is there a
4 dispute between PG&E and Calpine with respect to
5 this 2.7 million and the allocation of costs?

6 MS. LUCKHARDT: I'm wondering what the
7 relevance of that is in this proceeding.

8 MR. FREEDMAN: It's relevant to --

9 HEARING OFFICER WILLIAMS: We'll allow
10 it.

11 MR. AMIRALI: Okay. No, there is a --
12 we believe that the costs are -- at the time the
13 costs were prepared some information was not
14 available which is becoming more clear. We
15 believe the costs that you see out there are
16 higher than what it will be. The 2.7 million is
17 not an accurate estimate. It's an inflated
18 estimate.

19 MR. FREEDMAN: And that's the position
20 of Calpine?

21 MR. AMIRALI: Position of Calpine, and
22 based on the facts that we have, as well as the
23 IDCC tax information, which is a federal ruling.

24 MR. SOLHTALAB: And if you look at sort
25 of the disclaimer that PG&E has here, these costs

1 were derived based on the unit cost value. So
2 they're not the final ultimate detailed estimate
3 cost that they usually do once the project goes
4 ahead.

5 MR. FREEDMAN: Is it fair to say that
6 PG&E has not agreed yet to the final number for
7 the interconnect listed as 2.77 million?

8 MR. AMIRALI: This is an initial
9 estimate PG&E goes through the detailed design.
10 That's the next step of the process that PG&E will
11 go through the detailed design whereby they will
12 iron out this number. And at that time all the
13 details will be fleshed out.

14 MR. FREEDMAN: With respect to the \$27.7
15 million downstream --

16 MS. LUCKHARDT: I have to raise a
17 continuing objection to the relevance of the costs
18 here.

19 MR. FREEDMAN: Okay, in the testimony
20 that was provided, I have it as page 52 under
21 transmission system engineering and transmission
22 interconnection, there's a statement here, it
23 says: PG&E has determined and the ISO has
24 concurred that no capital system upgrades are
25 necessary as a result of this project.

1 I'm reading the cost report that there
2 are some costs attached to the interconnection.
3 And I just wanted to clarify that.

4 MR. AMIRALI: I can address that. There
5 are two types of costs when it comes to a
6 transmission interconnection of a generation. One
7 is called a direct assignment cost; the other is
8 called a downstream upgrade cost.

9 What we are talking about here that PG&E
10 has mentioned is a direct assignment cost. That
11 means those are the costs associated with
12 connecting the generator to the grid with zero
13 megawatts.

14 Those include circuit breakers and the
15 direct connection from the plant to the first
16 point of interconnect of the transmission
17 facility.

18 The costs that you are referring to, the
19 \$2.7 million, are direct assignment costs. They
20 have nothing to do with the upgrades.

21 Does that answer the question?

22 MR. SOLHTALAB: Are you talking about
23 the upgrades or --

24 MR. FREEDMAN: Yeah, I'm trying to get
25 clarification here as to whether Calpine agrees

1 with the 27.7 million in downstream upgrades that
2 will be necessary.

3 MR. AMIRALI: Right now we are working
4 with PG&E. Okay, if you look at the report, if
5 you look at page 10 of the SCR, okay, you can see
6 that there's a table, table 2, which identifies
7 what kind of upgrades we are talking about for the
8 project.

9 This information is used in section
10 6.2.1, 6.2.2 of the report which provides you the
11 limitations on the project or the impacts of the
12 project on the grid.

13 The costs that you see out there would
14 be incurred if all the upgrades that are required,
15 everything that is out there would be performed.

16 However, if you look at the table you
17 can see that several of the overloads already
18 exist before the project. Also, the overloads are
19 contingent upon several assumptions coming
20 through.

21 For example, there is a project that has
22 been studied in the studies that was an FPL
23 project, 577 megawatt generation project, that was
24 studied to be online.

25 Based on the impacts of those projects

1 the study was performed. However, if that project
2 does not happen or does not materialize, several
3 of those impacts go away.

4 Based on all this knowledge, and the
5 fact that several of the overloads already exist
6 and the impact that is produced by Los Esteros
7 Critical Energy Facility is within a -- is a very
8 small percentage increase in the loading. PG&E
9 and Calpine is working on an agreement whereby we
10 will explore alternatives such as special
11 protection schemes, line rerates to mitigate the
12 overloads when they occur. And should they
13 transpire.

14 So we are working on a contingency plan
15 which basically is a what-if analysis saying that
16 what if, you know, this project does not get
17 built, then what are the impacts and what would be
18 the responsibility of the Los Esteros Critical
19 Energy Facility.

20 MR. FREEDMAN: I understand that's your
21 testimony.

22 MR. AMIRALI: Um-hum.

23 MR. FREEDMAN: I guess looking at the
24 final, this cost report which we just received
25 here, on page Roman numeral II, it references

1 about \$27,000 million of upgrades. And it says
2 three system mitigation measures are required as a
3 result of connecting Los Esteros.

4 Are you disputing that these mitigation
5 measures are required as a result of Los Esteros'
6 interconnection?

7 MS. LUCKHARDT: I believe that he's
8 already answered that question by explaining to
9 you that the several contingencies that have not
10 occurred, including this FPL plant, which I don't
11 believe they've even filed an application before
12 this Commission.

13 MR. SOLHTALAB: Might I add something
14 here. When these studies are done it is in PG&E's
15 best interests to put everything on the table, and
16 to put every onus on the applicant to upgrade
17 their system, upgrade the system because it's out
18 in the open, and it's open for discussion.

19 A lot of these, when we got the draft
20 FCR a lot of these overloads were already within
21 their system or caused by other generators that
22 were coming on line after Los Esteros. So that is
23 one of the reasons that we've looked at these and
24 said, even the ISO, and said well, are these truly
25 something that Calpine should be responsible for.

1 And that's how we are coming into a
2 conclusion on this special facilities agreement.

3 MR. FREEDMAN: I understand that Calpine
4 has a view about what share of those costs are
5 caused by Los Esteros. Does that issue have to be
6 resolved before interconnection agreement can be
7 signed?

8 MR. AMIRALI: That issue is resolved and
9 it becomes a part of the generation
10 interconnection agreement, yes. And we are
11 currently working towards resolving those.

12 MR. FREEDMAN: But it is not yet
13 resolved, is that correct?

14 MR. AMIRALI: It is the majority of --
15 it's going through its final iterations.

16 MR. FREEDMAN: Has this \$27 million
17 issue been resolved if it's referenced here in the
18 ISO's testimony and I don't see there being a
19 resolution from the testimony you've given so far,
20 rather a statement or objections to the estimate.

21 MS. LUCKHARDT: I think you're
22 mischaracterizing the testimony of the witness.

23 MR. AMIRALI: I'm going to refer back to
24 the comment that Dave made that facility cost
25 reports generally outline all the mitigation

1 alternatives. When the detailed facility cost
2 report is done it is at that time that PG&E will
3 formalize what will be done as far as what
4 alternatives are viable. And they will be made a
5 part of the generation interconnection agreement
6 between PG&E and Calpine.

7 We have shared the draft of what
8 mitigation or what proposed mitigation we have
9 talked about both with PG&E and the ISO. We are
10 in negotiation with the PG&E and ISO has already
11 seen -- ISO's operation department has seen the
12 draft and has basically given PG&E and Calpine the
13 go-ahead to work with each other on this matter.

14 MR. FREEDMAN: When do you expect that
15 the interconnection agreement will be finalized?

16 MR. AMIRALI: I cannot comment on the
17 exact date, but will be rather soon, within a
18 couple months.

19 MR. FREEDMAN: But after this Committee
20 has to determine whether or not a permit should be
21 granted, is that correct?

22 MR. SOLHTALAB: I believe it's going to
23 be sooner than that. Right now it's in the last
24 iteration, being kicked around by the lawyers on
25 the two sides, so it will be --

1 MR. FREEDMAN: It's not clear whether
2 the agreement will be concluded before or after
3 the Commission is asked to rule on the permit
4 application?

5 MR. SOLHTALAB: When is that --

6 (Laughter.)

7 MR. AMIRALI: We expect to have it
8 resolved before that.

9 MR. FREEDMAN: Now, in order for PG&E to
10 construct the temporary interconnection, do they
11 need to go to the Public Utilities Commission?

12 MS. LUCKHARDT: I think that's outside
13 the scope of these witness' testimony.

14 HEARING OFFICER WILLIAMS: Well, we'll
15 allow it if they have an answer for us.

16 MR. SOLHTALAB: Can I answer.

17 MS. LUCKHARDT: You've been asked to
18 answer.

19 MR. SOLHTALAB: What they need to do is
20 to file a notice to construct, which is a 30-day
21 notice to construct. Once the results have come
22 in. I mean it's no full-blown requirements; it's
23 just a notice to construct, a 30-day notice to
24 construct.

25 MR. FREEDMAN: So let me just clarify.

1 Once the interconnection agreement is signed, then
2 PG&E will submit a request to the Public Utilities
3 Commission to initiate construction on an
4 interconnection, is that correct?

5 MS. LUCKHARDT: Are you referring to the
6 temporary interconnection?

7 MR. FREEDMAN: Yes, the temporary
8 interconnection.

9 MR. SOLHTALAB: I don't know the exact
10 timing. I don't know whether it's when the GSFA
11 is signed, or is when the permit is obtained, the
12 CEC permit. I'm not sure which exact --

13 MR. FREEDMAN: Well, they wouldn't
14 submit an application to construct a line if there
15 was no interconnection agreement, isn't that fair
16 to say?

17 MS. LUCKHARDT: I'm not sure that this
18 witness is in a position to be able to answer this
19 line of questions. You're asking for expertise on
20 processes through the Public Utilities
21 Commission --

22 HEARING OFFICER WILLIAMS: If he knows
23 the answer he can answer it.

24 MR. SOLHTALAB: I'm not sure. But
25 you're asking about PG&E, right?

1 MR. FREEDMAN: I'm asking about the
2 timing of the interconnection being completely
3 constructed, and to the extent that there is a
4 relevant proceeding in another Commission, namely
5 the Public Utilities Commission, that's involved,
6 I think it's important to understand that at this
7 point in the process.

8 So you had said that there was a 30-day
9 process of the Public Utilities Commission. I'm
10 not asking for the details of that process, but
11 just for the understanding that there are a number
12 of steps that have to occur between now and that
13 line being actually built.

14 MR. SOLHTALAB: Yes. Are you asking me
15 what they are or --

16 MR. FREEDMAN: Yeah.

17 MR. SOLHTALAB: Well, you know, you have
18 the, the big thing is the one is signing the
19 special facilities agreement, it is true if you
20 don't have an agreement with PG&E and you have not
21 forwarded the money to them to build the line,
22 they're not going to build the line. That's a
23 given. I'm not sure why there is a question even
24 on that.

25 And, two, we need the CEC permit before

1 the line can be built. You can't build a line
2 without a CEC permit for the plant.

3 MR. FREEDMAN: And if there's a
4 contested process at the Public Utilities
5 Commission there could be additional substantial
6 delay, is that correct?

7 MR. SOLHTALAB: I believe it's only 15
8 days. It would be up to --

9 MR. FREEDMAN: Fifteen days?

10 MR. SOLHTALAB: -- 65 days, I don't
11 know.

12 MR. FREEDMAN: I'm not asking for -- if
13 you don't know the answer --

14 MS. LUCKHARDT: You know, you -- this is
15 way --

16 MR. RATLIFF: Commissioner, if I may,
17 could I --

18 MS. LUCKHARDT: -- way beyond the scope.

19 MR. RATLIFF: -- could I hopefully
20 intervene just to try to add, I think, a piece of
21 information which I think is critical to the
22 discussion.

23 The line that they're talking about is a
24 line that goes to the first point of
25 interconnection. That means that it is licensed

1 by this agency. It is not licensed by the PUC. I
2 hope that helps.

3 HEARING OFFICER WILLIAMS: Does that
4 help you?

5 MR. FREEDMAN: This was my understanding
6 they needed permission to connect from the PUC in
7 order for them to initiate construction, is that
8 not --

9 MR. RATLIFF: That permit is granted by
10 this agency.

11 MS. LUCKHARDT: Yes.

12 MR. FREEDMAN: For all aspects of the
13 PG&E activities -- cost recovery --

14 MR. RATLIFF: Not cost recovery, but
15 permission to build and interconnect is subject to
16 our permit.

17 MR. FREEDMAN: Just one second, please.

18 HEARING OFFICER WILLIAMS: All right.

19 (Pause.)

20 MR. FREEDMAN: In the section of your
21 testimony where you talk about transmission system
22 engineering, introduction section, you talk about
23 local system benefits. And then you stated the
24 project has positive impacts on electrical system.

25 Is the Commission here charged with

1 conducting a cost benefit analysis with respect to
2 transmission impacts? Is that part of its
3 mandate?

4 MS. LUCKHARDT: I think that's beyond
5 the scope of this witness' understanding of the
6 Energy Commission's mandates.

7 MR. FREEDMAN: Okay, let me rephrase.
8 Why did you feel that it was important to mention
9 transmission benefits in this section?

10 MR. AMIRALI: Because there are.

11 MR. FREEDMAN: Do you think that the
12 issue of benefits is relevant to this proceeding?

13 MS. LUCKHARDT: I think that's beyond
14 the understanding of this one witness to make
15 comments on whether some piece of information is
16 relevant or not to this proceeding.

17 It's been typical in Energy Commission
18 proceedings over time to present both the benefits
19 and the impacts of a facility so that the
20 Commission has an understanding of what the
21 facility will and will not do.

22 MR. FREEDMAN: Is there a witness who
23 can talk about this issue from Calpine?

24 MS. LUCKHARDT: You can talk about --

25 MR. FREEDMAN: There's repeated

1 references in various parts of the testimony to
2 benefits. And I'm just trying to understand how
3 they fit within the framework of this process.
4 Whether the benefits, themselves, are supposed to
5 be weighed against costs.

6 If the witness can't answer that
7 question --

8 MS. LUCKHARDT: Weight against what
9 costs?

10 MR. FREEDMAN: Possible adverse impacts,
11 how about that?

12 MS. LUCKHARDT: Under CEQA the
13 opportunity to evaluate, when you look at benefits
14 is if you have to do an override. In this
15 situation we don't have an override.

16 But, as the applicant, we feel it is
17 important for the Commission to have a full
18 understanding of both the benefits and the impacts
19 of any facility.

20 If there are benefits associated with a
21 project, we fully intend to bring them to the
22 attention of the Commission.

23 MR. FREEDMAN: But isn't it true that
24 the test on the statute is whether there's a
25 significant adverse effect?

1 MS. LUCKHARDT: That's the test under
2 the statute, but that doesn't mean that the
3 applicant is in a position where it is unable to
4 present the full range of the project. And
5 impacts can be both positive and negative. It's
6 your definition that says an impact is negative.

7 MR. FREEDMAN: All right, I'd like to
8 turn to the next page of the testimony. It's
9 titled, local system transmission benefits. I
10 have it as page 53; it may be differently titled.

11 You state here that the primary
12 transmission constraint impact in the South Bay is
13 the loss of one or both of the 500 kV lines
14 serving the Metcalf station, is that correct?

15 MR. AMIRALI: To the best of my
16 knowledge, yes.

17 MR. FREEDMAN: Now, are these two lines
18 on the same right-of-way, or are they located on
19 different rights-of-way?

20 MR. AMIRALI: I'm not sure. PG&E should
21 be able to answer, if they are there.

22 MR. FREEDMAN: Is there any witness who
23 knows that?

24 MS. LUCKHARDT: I'd like to know what
25 the relevance is, whether they're on the same

1 right-of-way or not.

2 MR. FREEDMAN: Well, with respect to
3 whether or not the constraints and risks and the
4 possible failure of those lines that has been
5 mentioned in your testimony, whether that is a
6 realistic scenario. I'm trying to get a sense of
7 this.

8 MR. AMIRALI: It is considered a
9 credible outage, and ISO can testify to that.
10 They do study it.

11 MR. FREEDMAN: They both would go out?

12 MR. AMIRALI: You got ISO witness right
13 there.

14 HEARING OFFICER WILLIAMS: You could ask
15 that question of Cal-ISO when she presents her
16 testimony.

17 MR. FREEDMAN: Okay. Going down further
18 in that section, you state that project's
19 generation that made a positive contribution to
20 the margin protecting against voltage collapse a
21 year ago had been delayed or damaged, and you
22 mention a couple of changes to the system.

23 Do you see that section?

24 Are you familiar with the 2001 PG&E
25 transmission analysis that's been done?

1 MR. AMIRALI: Yeah, um-hum. I've seen
2 it; I haven't reviewed it in detail.

3 MR. FREEDMAN: Are you aware as to
4 whether that analysis assumes that the retirement
5 of these units --

6 MS. LUCKHARDT: I'm wondering what the
7 relevance of this is, this PG&E 2001 study? We
8 haven't offered it into evidence. I don't gather
9 you are, since you don't have a witness.

10 MR. FREEDMAN: Fair enough. I'm trying
11 to just explore these claims about reliability and
12 benefits. It's difficult if I can't ask the
13 witness certain factual questions that underlie
14 his claims.

15 HEARING OFFICER WILLIAMS: Go ahead,
16 it's a professional report. He's seen it.

17 MR. FREEDMAN: Okay. Are you aware as
18 to whether or not PG&E has suggested that there
19 are reliability problems associated with the
20 retirement of these units?

21 MR. AMIRALI: I'm not aware of that.
22 I'm not aware if they have or they have not.

23 MR. FREEDMAN: On the next page you talk
24 about RMR issues to the Bay Area, still an RMR
25 area. And you mention that Los Esteros reduces

1 system losses sparing the environment needless
2 impacts from megawatts not generated and the
3 pocketbook expense of paying for these, is that
4 correct? Is that your testimony?

5 MR. AMIRALI: That is correct.

6 MR. FREEDMAN: Do you think that the
7 dollar impacts associated with RMR savings should
8 be considered by the Commission?

9 MR. AMIRALI: No, those are just
10 benefits that are provided by a project that is
11 located inside a heavy, a dense load pocket.
12 Those are mentioned just like the benefits of the
13 system.

14 MR. FREEDMAN: So the Commission should
15 not consider that portion of your testimony with
16 respect to pocketbook savings associated with
17 lower RMR costs?

18 MR. AMIRALI: I don't believe I have
19 said anyplace there would be lower RMR cost.

20 MR. FREEDMAN: Isn't that what I just
21 read there? That Los Esteros will reduce system
22 losses --

23 MR. AMIRALI: Um-hum.

24 MR. FREEDMAN: -- and that will reduce
25 the expense of paying for RMR units? Isn't that

1 your testimony?

2 MR. AMIRALI: Let me get that. Where
3 are you reading it, sir, please?

4 MR. FREEDMAN: The third-to-last
5 paragraph where you state even if the RMR
6 requirement is not eliminated, Los Esteros'
7 location makes is more effective than existing RMR
8 generation, reducing the amount of RMR generation
9 necessary.

10 MR. AMIRALI: Right.

11 MR. FREEDMAN: And then the next
12 sentence goes on to talk about pocketbook expenses
13 of paying for those RMR units, and how Los Esteros
14 will reduce those costs.

15 MR. AMIRALI: By pocketbook expenses of
16 paying for these. And it does not mean that --
17 the paragraph over here states that if you have
18 reduced losses that reduces the amount of both the
19 active requirement of the system. Thereby the
20 amount of RMR needed will be reduced.

21 Now, assuming that the RMR paradigm
22 continues beyond 2004, it reduces the amount of
23 RMR needed. That does not mean that it reduces
24 the amount of RMR cost.

25 It does reduce the amount of system

1 losses, which is a direct savings to the State of
2 California that they are getting for free.
3 Anytime you locate a generator within a load
4 pocket, you reduce losses. Those losses get paid
5 by everybody in the State of California.

6 If you locate them closer to the load
7 center, there are less amount of losses. That
8 means the State of California pays less. That's a
9 system benefit that whenever you strategically
10 locate a generator inside a load pocket, you
11 receive it.

12 MR. FREEDMAN: So it's your testimony
13 that savings to the State of California are
14 relevant to the issue of the transmission benefits
15 associated with this project?

16 MS. LUCKHARDT: I think that's beyond
17 what we're talking about here. I think what he's
18 simply referring to are transmission system
19 benefits in general, not dollar figures.

20 MR. FREEDMAN: Then I'd like to ask that
21 that section of the testimony be stricken. I'm
22 concerned that the witness is trying to have it
23 both ways here.

24 MS. LUCKHARDT: You know, as far as cost
25 savings go, I have no problem with striking

1 references to cost savings.

2 I think when we're talking about system
3 losses in relation to electric benefits, that
4 those are valid to be considered in this instance.

5 But I wouldn't want to get into a
6 discussion about relative costs one way or another
7 and try to quantify those here today.

8 HEARING OFFICER WILLIAMS: Okay, we'll
9 strike the reference to costs.

10 MR. FREEDMAN: Do you know, how does a
11 unit get designated as RMR?

12 MS. LUCKHARDT: In the --

13 MR. AMIRALI: I can answer.

14 MS. LUCKHARDT: I know you can, but I'm
15 just kind of, in the interest of time, I don't
16 know that this is relevant to the discussion we're
17 having here today. And so I guess it's your call
18 on whether you want to get into this --

19 MR. FREEDMAN: Not too much on this,
20 just one or two quick questions.

21 HEARING OFFICER WILLIAMS: Go ahead.
22 You're questioning about his testimony, right?

23 MR. FREEDMAN: That's correct. I'm
24 wondering is it your expectation, let me just cut
25 to the chase here, is it your expectation that Los

1 Esteros will be designated an RMR unit?

2 MR. AMIRALI: Los Esteros is located
3 inside the greater San Francisco Bay Area. In
4 addition it is located inside the San Jose load
5 pocket. It is close to the load center, and
6 provides transmission system benefits.

7 Based on how ISO designate RMR units,
8 that unit, if the RMR paradigm, again, I will
9 caveat that with the fact that if the RMR paradigm
10 continues, and based on the rules of the ISO for
11 designating the RMR units at that time, the unit
12 would have the potential of being an RMR
13 candidate.

14 MR. FREEDMAN: Which means that it may
15 or may not be designated RMR in the future?

16 MR. AMIRALI: That is correct. Again,
17 this is an if the ISO's RMR paradigm continues.

18 MR. FREEDMAN: Further up in that
19 section I guess the second paragraph on that page
20 starts with, "Delays in other South Bay
21 transmission projects" you see that paragraph
22 there?

23 You mention the inability to construct
24 Nortec to Kiefer 115 kV. Isn't the construction
25 of that facility necessary for the full operation

1 of Los Esteros?

2 MR. SOLHTALAB: I don't believe so,
3 but --

4 MR. FREEDMAN: Isn't that identified in
5 the ISO's testimony as being an important, if not
6 critical, mitigation strategy?

7 MR. SOLHTALAB: Well, I think you should
8 ask that to the ISO.

9 MR. FREEDMAN: So you're not aware as to
10 whether the construction of that line has any
11 effect on Los Esteros' ability to operate?

12 MR. AMIRALI: The Los Esteros project
13 will be operating before the line is constructed.
14 And I'm assuming that the answer will be no or
15 minimum.

16 MR. FREEDMAN: Okay, I'll ask additional
17 questions of the ISO witness on that point.

18 HEARING OFFICER WILLIAMS: What are we
19 going to do with this final cost report? Are you
20 going to move it into evidence?

21 MS. LUCKHARDT: I'm willing to offer it
22 into evidence, the final cost report.

23 MR. FREEDMAN: We have no further
24 questions, thank you.

25 HEARING OFFICER WILLIAMS: Did you want

1 to move the final cost report into evidence?

2 MR. FREEDMAN: Sure.

3 MR. GARBETT: And be served.

4 HEARING OFFICER WILLIAMS: Okay, --

5 MR. FREEDMAN: We have only the copy
6 we've just been provided, and I've already started
7 marking it up, so --

8 HEARING OFFICER WILLIAMS: I believe
9 that's yours to keep, right?

10 MS. LUCKHARDT: Um-hum, that's the only
11 one I have.

12 HEARING OFFICER WILLIAMS: Okay, let's
13 receive it under the draft one, so we'll make it
14 2V-1; it's received into evidence as 2V-1.

15 Okay, staff?

16 MR. RATLIFF: Yes, staff has two
17 witnesses; we're sponsoring the testimony of the
18 ISO, Independent System Operator, that's Ms. Irina
19 Green. And the staff witness is Mark Hesters.
20 They need to be sworn.

21 HEARING OFFICER WILLIAMS: Mr. Court
22 Reporter, could we swear those witnesses, please.

23 //

24 //

25 //

1 Whereupon,

2 IRINA GREEN and MARK HESTERS

3 were called as witnesses herein, and after first

4 having been duly sworn, were examined and

5 testified as follows:

6 MR. RATLIFF: I'll start with

7 Mr. Hesters.

8 DIRECT EXAMINATION

9 BY MR. RATLIFF:

10 Q Mr. Hesters, did you prepare the staff
11 testimony in the staff assessment and the staff
12 supplement that were filed in this proceeding?

13 MR. HESTERS: I did.

14 MR. RATLIFF: Is that testimony true and
15 correct to the best of your knowledge and belief?

16 MR. HESTERS: Yes.

17 MR. RATLIFF: Do you have any changes to
18 make in it at this time?

19 MR. HESTERS: I do not.

20 MR. RATLIFF: Could you summarize it
21 very briefly?

22 MR. HESTERS: Yes. Basically the
23 purpose of the staff's testimony is to evaluate
24 the power plant switchyard, output line,
25 termination and potential downstream facilities.

1 Based on our analysis of this power
2 plant, the switchyard, the TAP and cables
3 connecting the Los Esteros Critical Energy
4 Facility temporarily to the Nortec-Trimble 115 kV
5 line, and permanently to the Los Esteros
6 substation, will be adequate, and will comply with
7 appropriate laws, ordinances, regulations and
8 standards, assuming the proposed conditions of
9 certification for the TSE1-7 are met.

10 The analysis of potential downstream
11 facilities was a little more complicated. Partly
12 because of proposed and planned facilities by PG&E
13 and other power plant developers.

14 Based on our analysis the need for
15 downstream facilities is extremely uncertain and
16 at this time we don't think the applicant should
17 be required to deal with those. And if they are
18 required in the future, they will come under CPUC
19 jurisdiction, and will be analyzed under that
20 process.

21 MR. RATLIFF: Ms. Green, did you prepare
22 the ISO testimony filed in this proceeding?

23 MS. GREEN: Yes, I did.

24 MR. RATLIFF: And are you sponsoring
25 also exhibit 2FF, which is the interconnection

1 system impact studies from the Cal-ISO?

2 MS. GREEN: Yes.

3 MR. RATLIFF: Is your testimony in this
4 proceeding true and correct to the best of your
5 knowledge and belief?

6 MS. GREEN: Yes.

7 MR. RATLIFF: Do you have any changes to
8 make in it at this time?

9 MS. GREEN: No.

10 MR. RATLIFF: Could you summarize it
11 briefly?

12 MS. GREEN: The primary role of the ISO
13 is to insure that this system -- reliably with
14 engineering -- there may be some adverse impacts.
15 So we reviewed studies done by PG&E and do some
16 studies of our own to insure that there are no
17 adverse impacts. If there are, they are
18 successfully mitigated.

19 We looked at several scenarios because
20 now it is very uncertain what facilities will be
21 there. So we looked at the temporary
22 interconnection. Studies were done by PG&E. Then
23 I also did some studies, myself, from scenario
24 when Nortec-Kiefer line is not built. Then
25 reviewed studies for 2005, other new generation

1 projects. And I also did studies for 2003 before
2 all the new generation projects are built, but
3 when Los Esteros transmission project is built.

4 What I can say now that I find no system
5 upgrades are needed until Los Esteros transmission
6 project, -- project is built by PG&E. After that
7 it is rather certainly depends what other
8 generation projects will be developed in the area,
9 what -- there will be.

10 So we gave final approval for Calpine's
11 Los Esteros Critical Energy Facility, but this
12 approval is conditional --

13 MS. LUCKHARDT: Excuse me, could we ask
14 the witness to speak more into the microphone?

15 MS. GREEN: ISO gave final approval to
16 the Los Esteros Critical Energy Facility, but this
17 approval is conditional because there are a lot
18 of uncertainties; and we believe that some
19 additional studies will be needed, depending what
20 other generation projects will develop in the
21 area.

22 But for the operation of the Los Esteros
23 project before -- transmission project is built,
24 no downstream facilities are needed.

25 MR. RATLIFF: Does that complete your

1 summary?

2 MS. GREEN: Completes my summary.

3 MR. RATLIFF: The witnesses are
4 available for cross-examination.

5 HEARING OFFICER WILLIAMS: Applicant, do
6 you have anything of this --

7 MS. LUCKHARDT: No questions.

8 HEARING OFFICER WILLIAMS: Go ahead.
9 Ma'am, you might want to move that microphone even
10 closer so we can --

11 SPEAKER: Also it might not be on.
12 Maybe it's not on.

13 MR. RATLIFF: Is it on?

14 (Off-the-record discussion.)

15 CROSS-EXAMINATION

16 BY MR. FREEDMAN:

17 Q Ms. Green, did you hear the testimony
18 that was just given by the witness from Calpine?

19 MS. GREEN: Yes.

20 MR. FREEDMAN: That witness has
21 testified that Los Esteros -- let me rephrase.

22 Do you believe that the Los Esteros
23 facility is needed for voltage support?

24 MS. GREEN: What our studies -- what I
25 did in my studies, and what I did in my study

1 review was to insure that there will be no
2 negative impact. We didn't evaluate any benefits
3 of the project because what is more important that
4 we have the ability to not degrade.

5 So I personally didn't do any studies
6 for voltage support.

7 MR. FREEDMAN: But you did find some
8 negative impact from the Los Esteros facility, is
9 that correct?

10 MS. GREEN: It very much depend what
11 else will be in the area, what other projects will
12 be built or not. Because now many things are very
13 uncertain.

14 MR. FREEDMAN: But you do propose a
15 series of mitigation measures, correct?

16 MS. GREEN: Yes, but is mitigation
17 measures depend mainly on the other generation
18 projects in the area.

19 MR. FREEDMAN: So how will the applicant
20 know whether or not the mitigation is necessary
21 prior to interconnection? We're talking about a
22 fairly short period of time, are we not?

23 MS. GREEN: Well, temporary connection
24 no mitigation measures are needed. They may be
25 needed later if Florida Power and Light project

1 comes online.

2 MR. FREEDMAN: So no upgrades, no
3 reconductoring is necessary for the temporary
4 interconnection?

5 MS. GREEN: With the temporary
6 connection, no. But it also depends whether
7 Nortec-Kiefer line is built. For now it is not
8 built yet, but even if also on the section from --
9 to -- junction, which PG&E plans to reductor.
10 For now, from this time is not reconducted yet.
11 If they reductor this section before Los
12 Esteros Critical Facility comes online, then no
13 mitigation measures will be needed. If not, then
14 maybe some will be, but it can be achieved by
15 special protection system.

16 MR. FREEDMAN: And are you familiar with
17 the reconductoring effort that you just mentioned?

18 MS. GREEN: PG&E is. They have project
19 to reductor -- junction.

20 MR. FREEDMAN: And do you know what the
21 estimated completion date of that is?

22 MS. GREEN: It was supposed to be
23 completed by summer, but I talked to PG&E and they
24 said that probably will be no sooner than October
25 of this year.

1 MR. FREEDMAN: No sooner. And
2 construction of the Nortec-Kiefer line, do you
3 know the status of that?

4 MS. GREEN: Now PG&E says there were
5 some difficulties with rights-of-way for this
6 line, so it is very unclear. Hopefully this year,
7 but nobody knows when.

8 MR. FREEDMAN: So there's no estimate as
9 to when that project would be completed. Is there
10 a date no earlier than?

11 MS. GREEN: It's --

12 MR. FREEDMAN: And so if the Nortec-
13 Kiefer line is not constructed and the
14 reconductoring is not completed, then what would
15 the applicant need to do to interconnect?

16 MS. GREEN: Then they will need to
17 install a special protection schemes -- and then
18 make it reduce output during peak summer
19 condition. But it depends on load to the area.
20 If this line is overloaded, they will need to
21 reduce their output.

22 MR. FREEDMAN: During certain
23 conditions?

24 MS. GREEN: During certain conditions.
25 But since it is temporary, I don't believe that

1 they need to do some upgrades; they can wait till
2 PG&E reconductors --

3 MR. FREEDMAN: So the mitigation is not
4 necessary for the temporary interconnection even
5 if the reconductoring and the Nortec-Kiefer line
6 are not built?

7 MS. GREEN: The mitigation will consist
8 of special protection schemes and just reducing
9 output.

10 MR. FREEDMAN: And that would be
11 required?

12 MS. GREEN: Yes.

13 MR. FREEDMAN: And are you familiar with
14 the status of the interconnection agreement? Is
15 that something that you've looked at?

16 MS. GREEN: No, it is not considered. I
17 don't look at interconnection agreement. I review
18 studies and mitigation measures for
19 interconnection, not agreements.

20 MR. FREEDMAN: But in your testimony you
21 do reference the \$27 million cost estimate that's
22 provided final FCR.

23 MS. GREEN: Yes, I can explain. This 27
24 million was the cost of reconductoring all
25 facilities which may overload, but this study was

1 done for year 2005 with other generation projects.
2 Which this projects were ahead in the generation
3 interconnection queue PG&E. They have generation
4 interconnection queue, and they assumed that the
5 project which is late in the queue is responsible
6 for upgrades, even if this projects come on line
7 sooner than other projects.

8 MR. FREEDMAN: That is the policy?

9 MS. GREEN: This is PG&E policy. This
10 is why they did study for year 2005 where they
11 modeled other generation projects which have
12 dates, generation dates later than Calpine Los
13 Esteros. But who are ahead in the queue because
14 they applied to PG&E before Calpine Los Esteros.

15 And the studies show to overload of
16 several transmission lines, which PG&E make cost
17 estimates to reconductor these lines. And this is
18 included in 27 million.

19 MR. FREEDMAN: So it's your
20 understanding that because Calpine would be the
21 first to connect of those on queue that under
22 PG&E's existing policy they would be responsible
23 for those costs?

24 MS. GREEN: Is not because they're first
25 to connect, but because they're later in the

1 queue.

2 MR. FREEDMAN: Oh, because they're later
3 in the queue?

4 MS. GREEN: Yes, but it depends very
5 much on if other generation project will be there
6 or not.

7 MR. FREEDMAN: Okay. Question for the
8 staff witness.

9 You mentioned in your direct testimony
10 that there was no analysis done of the downstream
11 impacts for purposes of -- by the Commission
12 Staff. They did analyze the possible impact of
13 downstream facilities being constructed as a
14 result of this --

15 MR. RATLIFF: Could we have a reference
16 to where you're looking?

17 MR. FREEDMAN: Yeah, this is on page
18 5.5-9. Second paragraph. Do you see that section
19 there?

20 MR. HESTERS: Yes, I do.

21 MR. FREEDMAN: And I thought of your
22 opening remarks, you said that the downstream
23 impacts weren't analyzed, and have to be approved
24 by the PUC.

25 MR. HESTERS: In reference to this

1 section here, it basically has to do with the fact
2 that these facilities downstream are potential
3 downstream facilities, at this point, at least,
4 extremely uncertain. And they're very dependent
5 on whether or not this Florida Power and Light
6 project, but it hasn't come before the Energy
7 Commission. The only reference we have of it is
8 that it is before Los Esteros Critical Energy
9 Facility in PG&E's queue.

10 And it's scheduled, based on PG&E's
11 queue, to be online in 2005. If that project
12 doesn't come into -- isn't built, then these
13 overloads don't happen. That's basically what I
14 was saying.

15 MR. FREEDMAN: At what point, or before
16 which agency would those downstream impacts be
17 considered?

18 MR. HESTERS: Well, at this point,
19 because they come later, they would have to go
20 before -- if they occur, they have to go before
21 the PUC.

22 MR. FREEDMAN: At the very beginning of
23 your testimony on the very first page, you, in the
24 third paragraph you say that under CEQA the
25 Commission has to conduct a review of the whole of

1 the action that may include facilities not
2 licensed by the Energy Commission.

3 How do you reconcile that statement with
4 the one that you just made with respect to the
5 downstream impacts?

6 MR. HESTERS: The downstream impacts
7 are, we feel, are speculative, and to require any
8 kind of analysis of speculative impacts at this
9 point doesn't seem reasonable.

10 MR. FREEDMAN: So the assumption being
11 there are zero downstream impacts, isn't that
12 really the default assumption that you reach?

13 MR. HESTERS: I don't understand what
14 you mean by default assumption.

15 MR. FREEDMAN: Well, if you're assuming
16 that the impacts are speculative, doesn't that
17 mean you're assuming they simply don't exist for
18 purposes of this analysis?

19 MR. HESTERS: Basically if they're --
20 well, the reason I'm saying, is they're
21 speculative; and because they're speculative we
22 can't see them as a foreseeable consequence of
23 this project.

24 And beyond that, if somehow they happen
25 to be needed in 2005, because of another project

1 that comes on line, they are also reviewed
2 somewhere else. That's what I said.

3 MR. FREEDMAN: So to the extent that an
4 action is speculative it's not within the scope of
5 the review?

6 MR. RATLIFF: Are you asking him as a
7 legal matter, or are you asking --

8 MR. FREEDMAN: Well, he could at least
9 testify as to the remarks --

10 MR. RATLIFF: -- He's --

11 MR. FREEDMAN: -- of CEQA, that's all
12 I'm trying to understand -- the connection between
13 the whole of the -- test that the witness
14 mentions, and what was or was not considered to be
15 within the scope of the testimony, the analysis.

16 MR. RATLIFF: Are you asking him for a
17 legal conclusion or are you asking him a question
18 of fact? That's my question. I don't understand
19 your question.

20 MR. FREEDMAN: Well, -- not a lawyer,
21 and so I'm not asking for a conclusion of law.
22 I'm just trying to understand what basis you use
23 in your work when you prepare testimony like this
24 for looking at --

25 (Fire alarm.)

1 HEARING OFFICER WILLIAMS: We don't have
2 to evacuate. We've already been told that there's
3 a fire alarm happening. It's a drill. So we
4 don't -- no panic necessary.

5 MR. FREEDMAN: Now you tell us.

6 (Laughter.)

7 HEARING OFFICER WILLIAMS: Counsel,
8 can't we just leave it at speculative? I mean is
9 this really something we need to spend a lot of
10 time on?

11 MR. FREEDMAN: Well, I'm just trying to
12 establish what was or was not in based on the
13 level of speculation involved.

14 MR. RATLIFF: Perhaps it would help if I
15 redirect the witness on this very issue to try to
16 clarify it, and then we can have recross on that
17 very point if it's necessary. I think it's an
18 important issue to get straight, make sure
19 everyone understands it.

20 HEARING OFFICER WILLIAMS: Okay, let's
21 do that.

22 MR. FREEDMAN: I'll stipulate that. I
23 have a few more questions before that point.

24 Just one moment, please. I'm sorry.

25 (Pause.)

1 HEARING OFFICER WILLIAMS: I think we'll
2 move exhibit 2FF into evidence if there's no
3 objection, which is the interconnection system
4 impact studies report.

5 That will be moved into evidence.

6 MR. FREEDMAN: Question's for -- let me
7 go back to Ms. Green for a moment.

8 Ms. Green, did you look at the situation
9 where there would be a loss of 100 percent of the
10 Los Esteros generation that would potentially
11 result in what could be considered an ISO category
12 B contingency?

13 MS. GREEN: The study category B means
14 outage of a single transmission line or single
15 transmission line and generation. We did a study
16 of this Los Esteros project in regard to compare
17 impacts --

18 (Fire alarm drill.)

19 HEARING OFFICER WILLIAMS: Ms. Green,
20 could you move that mike a little closer, please.

21 MR. FREEDMAN: Have you done any
22 analysis as part of that whether the single line
23 TAP connecting Los Esteros will change the load
24 serving capabilities of the San Jose area?

25 MS. GREEN: I studied it awhile ago when

1 I studied -- transmission project. I looked at
2 impact of different generation, and I looked at
3 impact of this generation, too. But it was not in
4 the scope of this study.

5 MR. FREEDMAN: So you're not sure
6 whether or not it would increase the load serving
7 capabilities in the San Jose area?

8 MS. GREEN: I believe it would increase
9 if there would be no Los Esteros transmission
10 project, I believe it would increase. But I can't
11 tell exact number because I did the study awhile
12 ago.

13 MR. FREEDMAN: Question for the staff
14 witness. Are you familiar with the status of the
15 interconnection agreement that was mentioned in
16 the conversation with the Calpine witness?

17 MR. HESTERS: Only for discussions here
18 today.

19 MR. FREEDMAN: Is it your understanding
20 that there's a dispute about the cost
21 responsibility associated with that
22 interconnection agreement?

23 MR. RATLIFF: Objection on the grounds
24 it's been asked and answered.

25 MR. HESTERS: Only by what I've heard

1 today.

2 MR. FREEDMAN: So you're not familiar
3 with it outside of the scope of this hearing here?

4 MS. LUCKHARDT: I object to Mr.
5 Freedman's characterization of there being a
6 dispute between PG&E and applicant.

7 HEARING OFFICER WILLIAMS: So noted.

8 MR. FREEDMAN: I'd ask you to turn, I
9 think it's page 5.5-6 of your testimony. At the
10 very bottom of the page you mention update of the
11 2005 studies be done by PG&E with respect to load
12 forecast, the San Jose area. You see that, those
13 sentences there?

14 MR. HESTERS: I do.

15 MR. FREEDMAN: And you mentioned that
16 the load forecast used in the facility's cost
17 report is approximately 200 megawatts more in 2005
18 than the current forecast. Could you explain that
19 a little bit more?

20 MR. HESTERS: Basically PG&E has
21 transmission assessments annually to identify the
22 need for new facilities. Some of the facilities
23 we discussed in this report, including the
24 reconductor of the San Jose -- they redo those
25 studies every year and they update because the

1 loads change because power plants change.

2 The last one was done with a load
3 forecast that was assumed to be going higher than
4 they now think load will be in 2005. If things
5 change in San Jose and it looks like loads will
6 increase the next study will change the load
7 forecast.

8 But one thing we usually know about load
9 forecasts is they're not right, and they try to
10 cover for this by updating the studies as often as
11 they can.

12 MR. FREEDMAN: Is it your opinion that
13 PG&E's estimate is conservative?

14 MR. HESTERS: Usually for the studies
15 they try to be not conservative. They're trying
16 to stress the system as much as they can. I'm not
17 a load forecaster, but generally they're trying to
18 determine worst case scenarios.

19 I don't know whether 200 megawatts is a
20 worst case or not.

21 MR. FREEDMAN: In the event that there
22 is a reduced load of about 200 megawatts that come
23 to pass, would the chances of lower voltage
24 problem load -- be reduced as compared to a
25 baseline case?

1 MR. HESTERS: I haven't testified to
2 anything about low voltage problems in San Jose.

3 MR. FREEDMAN: Is it your understanding
4 that there is low voltage problems in San Jose?

5 MR. RATLIFF: I think he's testified --
6 I object on the grounds that it's outside the
7 scope of his testimony. I think that's what his
8 answer was. He's not testified on voltage support
9 in his testimony.

10 HEARING OFFICER WILLIAMS: Sustained.

11 (Pause.)

12 HEARING OFFICER WILLIAMS: Counsel, is
13 it okay if staff does its redirect right now?

14 MR. FREEDMAN: Sure, sure. Please.

15 MR. RATLIFF: Well, are you finished?

16 MR. FREEDMAN: Well, --

17 HEARING OFFICER WILLIAMS: If you're not
18 we can come back.

19 MR. RATLIFF: I'd rather you finish and
20 then do it --

21 MR. FREEDMAN: Okay.

22 MR. RATLIFF: -- once.

23 MR. FREEDMAN: Okay, please move to the
24 redirect.

25 //

1 REDIRECT EXAMINATION

2 BY MR. RATLIFF:

3 Q Mr. Hesters, and this was also, by the
4 way, an issue that was, I think, testified to by
5 Ms. Green, but I'm going to ask Mr. Hesters these
6 questions because it came up, the confusion came
7 up in his responses.

8 There's been discussion today repeatedly
9 over \$27 million of downstream upgrades, is that
10 correct?

11 A I wouldn't call it a dispute, but yes,
12 there's been some discussion of it.

13 Q Did I say dispute? I meant discussion,
14 there's been discussion.

15 A There has been a discussion.

16 Q And that \$27 million of downstream
17 upgrades, if the Los Esteros project comes on
18 line, are any of those things required by the Los
19 Esteros project by itself?

20 A Some parts of them will be. Part of
21 those costs are a system protection scheme. We
22 get system protection schemes which basically
23 automatically drop the load of Los Esteros in case
24 there are line outages. And there are costs
25 associated with those. They're not anywhere near

1 \$27 million.

2 Q Are most of those costs, though,
3 associated with upgrades that result from the
4 Florida Power and Light project which is in the
5 queue ahead of Los Esteros in PG&E's planning
6 studies?

7 A Yes. Yes, there's that; and overloads
8 that PG&E identifies and tells -- and originally
9 estimates require mitigation, which is
10 reconductoring, but then later -- well, a lot of
11 those overloads are due to line outages, N-1 and
12 N-2 conditions, and those can often be mitigated,
13 and usually are. And in this case will be
14 mitigated with system protection schemes.

15 Q Can you describe the PG&E queue and how
16 it's developed, and how do you get an order in the
17 queue?

18 A Basically PG&E creates this queue of
19 power plants which wish to be interconnected. A
20 plant or a project that is basically data adequate
21 for PG&E's process gets a place in the queue;
22 there's also some fees involved.

23 But as soon as they're data adequate for
24 this, their interconnection study analysis, that's
25 when they get their place in the queue.

1 A lot of times those projects aren't
2 developed, but they get a place in the queue
3 anyway; and they hold that place sometimes for a
4 long time.

5 Q So is the queue developed based on when
6 they ask you to study the project?

7 A Yes.

8 Q And is that how PG&E assesses costs?

9 A Yes.

10 Q Has Florida Power and Light filed an
11 application with the Energy Commission for that
12 project?

13 A No, they haven't.

14 Q To your knowledge has Florida Power and
15 Light done any pre-filing activity with regard to
16 that project?

17 A No, they haven't.

18 MR. RATLIFF: I have no further
19 questions.

20 MR. FREEDMAN: Just a little recross on
21 that.

22 REXCROSS-EXAMINATION

23 BY MR. FREEDMAN:

24 Q You said that of the \$27.7 million that
25 some amount of that would be required regardless

1 of whether the Florida Power and Light project is
2 constructed. Do you know how much?

3 A I don't, offhand.

4 Q So there's some amount? Do you even
5 know the magnitude of the costs?

6 A The problem with the 27 million is the
7 27 million includes the reconductor of a lot of
8 line, a lot of power lines that won't be
9 reconducted with or without Florida Power and
10 Light.

11 PG&E's first estimates, they always
12 include reconductoring lines that are overloaded
13 under contingency conditions. We, and generally
14 the Cal-ISO, don't feel that those are a
15 reasonable way to mitigate; that you don't need to
16 reconductor for outages.

17 Outages don't happen very often. To
18 spend millions of dollars to maintain full output
19 of the power plant under -- well, under conditions
20 that don't occur very often is unreasonable.

21 And so what ends up being -- the
22 mitigation for those ends up being operating
23 procedures, which basically reduce the output of
24 the power plant when the contingencies occur.

25 MR. FREEDMAN: So you disagree with PG&E

1 in this respect?

2 MR. HESTERS: Yes.

3 MR. FREEDMAN: And whose policy prevails
4 with respect to the assignment of costs? Isn't
5 there --

6 MR. RATLIFF: I object on the grounds
7 that I don't think the question is certain enough.
8 Could you clarify the question, please.

9 MR. FREEDMAN: Who sets the policies
10 with respect to assignment of costs for these
11 types of interconnections and any upgrades that
12 would be required?

13 MR. HESTERS: Basically what I've seen
14 happen is the applicants, --

15 (Fire Alarm Drill.)

16 MR. HESTERS: -- PG&E, and the ISO tend
17 to argue quite a bit. FERC has something to say
18 about it. I don't know who has final authority
19 over it. It generally comes to some agreement,
20 and I don't -- reconductoring is a very rare
21 requirement for contingency of overloads.

22 MR. FREEDMAN: And if the reconductoring
23 is ultimately required, which party would be
24 responsible for those costs?

25 MR. RATLIFF: I object on the grounds of

1 relevance.

2 MR. FREEDMAN: We're talking about
3 assignment of costs here, trying to understand.

4 MR. RATLIFF: How is that relevant?

5 MR. FREEDMAN: Whether the applicant is
6 going to pay the costs, or whether PG&E invests
7 the money. There's been, what I think appears to
8 be a dispute about cost assignment here, which
9 could endanger the interconnection agreement. I'm
10 trying to get some clarification as to who is
11 supposed to pay if certain upgrades are required.

12 MR. RATLIFF: Costs may be relevant to
13 TURN, but they aren't relevant to the decision in
14 this case, unless there is some offer of proof to
15 show why.

16 HEARING OFFICER WILLIAMS: Yeah, I'll
17 sustain the --

18 MR. FREEDMAN: It's relevant to the
19 schedule.

20 HEARING OFFICER WILLIAMS: Excuse me?

21 MR. FREEDMAN: It's certainly relevant
22 to the schedule by which this facility can be up
23 and running. For example, if it seeks approval
24 under the four-month process, it has to be
25 operational by the end of this year, if I'm not

1 mistaken.

2 So if there's a material dispute that
3 threatens the ability of that project to be online
4 by December 31st, I think it's extremely relevant.

5 MS. LUCKHARDT: You know, I think that
6 that's a matter actually that's the applicant's
7 risk. And it doesn't really matter to this
8 Commission, I mean, to a certain extent.

9 If we can't reach an agreement with
10 PG&E, the project can't go forward, and it dies
11 its own death. But that doesn't impact the
12 Commission's decision on this project.

13 The Commission is looking at
14 environmental impacts on this project, not whether
15 any independent power producer can come to some
16 agreement or not with PG&E.

17 And I have to say on every single one
18 I've worked on they've come to an agreement.

19 HEARING OFFICER WILLIAMS: I'm going to
20 sustain the objection.

21 MR. FREEDMAN: Okay. Okay, thank you.

22 HEARING OFFICER WILLIAMS: Is there
23 anything further on this topic? Do we have all
24 the exhibits in that you need to?

25 MS. LUCKHARDT: I believe so.

1 MR. GARBETT: I'd like to object to the
2 testimony of the Calpine witness because most of
3 his testimony had to do with the reality of the
4 Los Esteros substation, where temporary
5 interconnect was only a couple words on his last
6 page.

7 And because the Los Esteros substation
8 is not a fact in evidence, the testimony should be
9 discredited except for those couple words where he
10 said about a temporary interconnect, which was the
11 majority of his opinion that he related later.

12 HEARING OFFICER WILLIAMS: Your
13 objection is noted for the record, Mr. Garbett.

14 MR. RATLIFF: Staff would move its
15 exhibits from the last testimony into evidence, to
16 the extent that they have not already been
17 admitted.

18 HEARING OFFICER WILLIAMS: So moved.
19 Staff, while you mention it, your efficiency
20 exhibit is in, as well.

21 MR. RATLIFF: That would be also exhibit
22 2HH -- no, I'm sorry, 2GG, which was the ISO's
23 testimony.

24 HEARING OFFICER WILLIAMS: Right.
25 That's in.

1 And we also received 2FF, is that right?

2 MR. RATLIFF: Yes. I think you

3 already --

4 HEARING OFFICER WILLIAMS: Okay.

5 MR. RATLIFF: -- already moved that in.

6 HEARING OFFICER WILLIAMS: Okay. So
7 then we're going to close out the topic of
8 engineering. And transmission system engineering
9 is now closed.

10 And let's take a ten-minute break before
11 we move on to air quality.

12 (Brief recess.)

13 MS. LUCKHARDT: -- on both air quality
14 and public health together. Applicant's witness
15 for air quality is Mr. Gary Rubenstein, who has
16 previously been sworn. For public health,
17 applicant also adds John Lowe, who needs to be
18 sworn.

19 HEARING OFFICER WILLIAMS: Mr. Court
20 Reporter.
21 Whereupon,

22 JOHN LOWE
23 was called as a witness herein, and after first
24 having been duly sworn, was examined and testified
25 as follows:

1 MS. LUCKHARDT: Okay, I'll start with
2 Mr. Lowe.

3 DIRECT EXAMINATION

4 BY MS. LUCKHARDT:

5 Q Do you have a copy of applicant's
6 testimony on public health?

7 MR. LOWE: Yes, I do.

8 MS. LUCKHARDT: And was that testimony
9 prepared by you or at your direction?

10 MR. LOWE: Yes, it was.

11 MS. LUCKHARDT: And does the testimony
12 include a description of your qualifications and
13 your r, sum,, or was your r, sum, filed with
14 applicant's prehearing conference statement?

15 MR. LOWE: Yes.

16 MS. LUCKHARDT: And do you have any
17 corrections or clarifications to make to your
18 testimony?

19 MR. LOWE: No, I do not.

20 MS. LUCKHARDT: Are the facts contained
21 in your testimony true to the best of your
22 knowledge?

23 MR. LOWE: Yes, they are.

24 MS. LUCKHARDT: And do the opinions
25 contained therein represent your best professional

1 judgment?

2 MR. LOWE: Yes.

3 MS. LUCKHARDT: And do you adopt this
4 public health testimony as your testimony in this
5 proceeding?

6 MR. LOWE: Yes.

7 MS. LUCKHARDT: And, Mr. Rubenstein, do
8 you have a copy of applicant's testimony on air
9 quality?

10 MR. RUBENSTEIN: Yes, I do.

11 MS. LUCKHARDT: And was this testimony
12 prepared by you or at your direction?

13 MR. RUBENSTEIN: Yes, it was.

14 MS. LUCKHARDT: And does this testimony
15 include a description of your qualifications, and
16 was your r, sum, filed with applicant's prehearing
17 conference statement?

18 MR. RUBENSTEIN: Yes, it was.

19 MS. LUCKHARDT: And do you have any
20 corrections or clarifications to make to your
21 testimony?

22 MR. RUBENSTEIN: Yes, I have one
23 correction to make. I need to add to the list of
24 prior filings, which is attachment 1 to my
25 testimony, one additional document.

1 That is exhibit 2N, like in Nancy, which
2 is a document entitled, technical specifications
3 EEH101 heat recovery steam generators and
4 accessories. That was docketed before the
5 Commission on December 21st, docket number 23696.

6 And that concludes the corrections to my
7 testimony.

8 MS. LUCKHARDT: Okay, and with those
9 changes are the facts contained in your testimony
10 true to the best of your knowledge?

11 MR. RUBENSTEIN: Yes.

12 MS. LUCKHARDT: And do the opinions
13 contained therein represent your best professional
14 judgment?

15 MR. RUBENSTEIN: Yes, they do.

16 MS. LUCKHARDT: And do you adopt this
17 air quality testimony as your testimony in this
18 proceeding?

19 MR. RUBENSTEIN: Yes, I do.

20 MS. LUCKHARDT: Okay. And then I have
21 just a couple of questions --

22 HEARING OFFICER WILLIAMS: Counsel, is
23 that attachment something he's going to be
24 testifying about? Do you have copies of it?

25 MS. LUCKHARDT: The attachment that he's

1 talking about is marked in the tentative exhibit
2 list as exhibit 2N; it was previously filed in the
3 proceeding.

4 HEARING OFFICER WILLIAMS: Okay.

5 MS. LUCKHARDT: So that's 2N, as in
6 Nancy. And then the specific testimony we're
7 referring to is exhibit 4B on air quality and 4C
8 on public health.

9 And so, Mr. Rubenstein, I have just a
10 couple of questions. Did you hear Mr. Stewart's
11 discussion of the limits contained in the air
12 permit?

13 MR. RUBENSTEIN: Yes, I did.

14 MS. LUCKHARDT: And do you have any
15 clarifications to that?

16 MR. RUBENSTEIN: Yes. During Mr.
17 Stewart's testimony I believe he indicated that
18 there was, in response to a question from Mr.
19 Freeberg -- Freedman, my apologies, I believe that
20 Mr. Stewart indicated that there was a limit on
21 the capacity of the gas turbine contained in the
22 air permit.

23 And that is not correct. There is no
24 limit on the capacity of the gas turbines in the
25 air permit. Rather there is a limit on the heat

1 input to the gas turbines. And that's an
2 important distinction. No limit on megawatts,
3 just on how much fuel can be fired.

4 And that's the extent of the
5 clarification I have.

6 MS. LUCKHARDT: Okay, thank you.

7 These witnesses are available for cross-
8 examination.

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

11 MR. RATLIFF: No.

12 MR. FREEDMAN: Just a few questions. I
13 promise.

14 SPEAKER: Heard that before.

15 (Laughter.)

16 CROSS-EXAMINATION

17 BY MR. FREEDMAN:

18 Q I'd like to ask you about the issue of
19 construction impacts that are mentioned in your
20 testimony. What I have is page 9, I hope it's
21 also what you have as page 9.

22 The last two sentences talk about triple
23 shifts for construction, and some of the expected
24 air quality impacts. Do you see that section?

25 MR. RUBENSTEIN: Yes, I do.

1 MR. FREEDMAN: So it's your testimony
2 that a tripling of the, for example, the 24-hour
3 average PM10 concentrations, you say it would
4 still indicate the project doesn't cause a
5 violation of state or federal air quality
6 standards, but would contribute to existing
7 violations.

8 Could you please explain that a little
9 more?

10 MR. RUBENSTEIN: Certainly. The state
11 ambient air quality standard for particulate
12 matter is violated regularly in every county in
13 California except for Lake County.

14 Consequently, any activity that results
15 in an increase in PM10 emissions anywhere in the
16 state is going to contribute to preexisting
17 violations.

18 And the point of that comment I made is
19 that that was true for our analysis based on the
20 assumption that construction occurred using one
21 shift per day, and that would remain true if
22 construction, in fact, proceeded with three shifts
23 per day.

24 MR. FREEDMAN: What is the ambient air
25 quality standard for PM10?

1 MR. RUBENSTEIN: The state or federal
2 standard, or both?

3 MR. FREEDMAN: The applicable state
4 standard, the 24-hour standard that you
5 referenced.

6 MR. RUBENSTEIN: The 24-hour state
7 standard for PM10 is 50 mcg/cubic meter.

8 MR. FREEDMAN: So with a triple shift
9 you're saying that it would be approximately 40
10 mcg/cubic meter in terms of incremental impact, is
11 that correct, 39.6?

12 MR. RUBENSTEIN: At the worst case
13 location, that's correct.

14 MR. FREEDMAN: So that's four-fifth of
15 the ambient standard --

16 MR. RUBENSTEIN: That's correct.

17 MR. FREEDMAN: -- 80 percent?

18 MR. RUBENSTEIN: That's correct.

19 MR. FREEDMAN: Which would mean that in
20 order for these activities not to cause a
21 violation, that the background levels would need
22 to be at 10 mcg/cubic meter or lower, is that
23 correct?

24 MR. RUBENSTEIN: That's correct.

25 MR. FREEDMAN: So where would that --

1 are there any locations in California that have an
2 ambient air quality concentration that is below 10
3 mcg/cubic meter?

4 MR. RUBENSTEIN: Not that I'm aware of.
5 The background concentrations that we report in
6 the AFC on page 8.1-40 for this area is 114
7 mcg/cubic meter, well in excess of the state
8 standard.

9 MR. FREEDMAN: So these activities would
10 result in an increase in concentrations, in a
11 worst case scenario something on the order of 30
12 to 35 percent over background levels, is that
13 correct? Ballpark.

14 MR. RUBENSTEIN: That's correct, on a
15 worst case basis. That's, in my experience that's
16 not uncommon for construction activities.

17 MR. FREEDMAN: Is it common that
18 construction activities work on triple shifts?

19 MR. RUBENSTEIN: No, but this impact is
20 not unique to triple shifts. It is in the case of
21 this particular project, but a construction impact
22 of 40 mcg/cubic meter of PM10 is comparable to
23 what I've seen for other projects with single
24 shifts, for example.

25 MR. FREEDMAN: In your opinion what

1 would represent a significant impact with respect
2 to PM10 concentrations?

3 MR. RUBENSTEIN: Oh, I think a
4 concentration of 40 mcg/cubic meter would
5 represent a significant impact if there were no
6 mitigation.

7 But as my testimony goes on to indicate,
8 I believe the mitigation measures that are being
9 required by the Energy Commission will reduce that
10 impact to a level of less than significant.

11 MR. FREEDMAN: Could you just quickly
12 summarize those mitigation measures?

13 MR. RUBENSTEIN: No, because there's
14 about three pages of them. If you want, I could
15 direct you to where they're located.

16 MR. FREEDMAN: Perhaps I can ask you a
17 different question about the mitigation impacts.
18 Are you suggesting that with mitigation there will
19 not be an increase in concentrations as high as
20 39.6 mcg/cubic meter?

21 MR. RUBENSTEIN: That's correct.

22 MR. FREEDMAN: And what would the impact
23 be with mitigation?

24 MR. RUBENSTEIN: I don't know. I've not
25 quantified that.

1 MR. FREEDMAN: You have no idea?

2 MR. RUBENSTEIN: My suspicion based on
3 my professional experience is that with this
4 mitigation that there will be no detectable
5 increases in PM10 levels off the project site.

6 MR. FREEDMAN: Because the mitigation
7 will reduce other ambient concentrations?

8 MR. RUBENSTEIN: No, because the
9 mitigation will substantially reduce the PM10
10 concentrations attributable to construction of
11 this project.

12 MR. FREEDMAN: So the net impact will be
13 approximately zero from the triple shifts?

14 MR. RUBENSTEIN: I wouldn't want to
15 quantify it. All I said is that it will be less
16 than significant.

17 MR. FREEDMAN: But what is significant,
18 again? I'm trying to get to what's the benchmark
19 for significant.

20 MR. RUBENSTEIN: There is no established
21 benchmark for significance for air quality. A
22 number of people, including myself, have different
23 opinions. If you're asking for my opinion as to
24 what would constitute significant impact in this
25 particular case, I could give it. But like I

1 said, there is no established benchmark for that.

2 MR. FREEDMAN: So, are you willing to
3 testify to a maximum increase in PM10
4 concentrations resulting from construction with
5 mitigation in place? Are you willing to make any
6 estimate of what that could result in?

7 MS. LUCKHARDT: I think that's been
8 asked and answered. You asked him before what
9 the, you know, whether he had quantified it. And
10 he said no. You asked him whether it was
11 mitigated or not, and he said yes, it was
12 mitigated.

13 And you asked him whether he thought it
14 was mitigated to a point beyond significance, and
15 he said, yes, I believe it's been mitigated to a
16 point beyond significance.

17 MR. FREEDMAN: Right, there's no
18 definition of significance. I'm just kind of
19 confused that there's numbers in here about worst
20 case impacts, but the witness is testifying that,
21 in fact, these numbers are basically meaningless
22 because there will be some different number that
23 really occurs. But we have no idea what that
24 number might be.

25 MR. RUBENSTEIN: Actually, I never used

1 the word meaningless, and I never said that they
2 were meaningless.

3 MR. FREEDMAN: Then what's the
4 importance of those concentration increases that
5 you reference in your testimony if, through
6 mitigation, they won't actually occur?

7 MR. RUBENSTEIN: Those concentrations
8 represent the maximum worst case concentrations
9 expected during construction using EPA approved
10 modeling techniques, which are quite conservative.

11 And those impacts are of a nature that
12 they logically lead the Energy Commission, as they
13 do in all other cases, to impose mitigation
14 requirements on construction activities.

15 Those mitigation requirements are
16 spelled out in conditions AQSC-1, AQSC-2, AQSC-3
17 of the -- shown in the staff assessment pages,
18 looks like 4.1-31 through 4.1-34.

19 MR. FREEDMAN: Does Calpine agree with
20 those mitigation measures?

21 MR. RUBENSTEIN: I believe in our
22 comments on the staff assessment we had some
23 comments regarding the timing of submission of
24 certain plans, but in substance, yes, we agree
25 with those conditions.

1 HEARING OFFICER WILLIAMS: Counsel, have
2 you had a chance to see those comments? Because
3 they are listed as in the exhibit list, trying to
4 find it --

5 MS. LUCKHARDT: The number is 2L.

6 HEARING OFFICER WILLIAMS: -- 2L, yeah.
7 Those are the comments to the -- Calpine's
8 comments to the staff assessment.

9 MS. LUCKHARDT: Right. Those are
10 referred to on most all subject areas in the
11 exhibits, and I thought I would move those at the
12 end of the testimony; move the entire comments at
13 the end.

14 HEARING OFFICER WILLIAMS: Have you had
15 a chance to see those, counsel? Have you had a
16 chance to see those?

17 MR. FREEDMAN: The comments that were
18 submitted?

19 HEARING OFFICER WILLIAMS: The comments
20 they're going to be referring to.

21 MR. FREEDMAN: I'm not sure, I may have
22 a copy of those.

23 HEARING OFFICER WILLIAMS: Okay.

24 MS. LUCKHARDT: They were filed on the
25 staff assessment quite awhile ago. Do you

1 remember the date? January 31st is when they were
2 filed.

3 HEARING OFFICER WILLIAMS: Well, do you
4 need a copy to work with? Do you all have an
5 extra copy?

6 MS. LUCKHARDT: I didn't bring extra
7 copies of everything.

8 MR. FREEDMAN: I don't have any
9 additional questions, if that helps this process
10 out.

11 HEARING OFFICER WILLIAMS: Okay.
12 Continue.

13 MR. FREEDMAN: That's it, actually, for
14 this witness.

15 HEARING OFFICER WILLIAMS: Okay. Mr.
16 Garbett.

17 CROSS-EXAMINATION

18 BY MR. GARBETT:

19 Q Yes. On your project at the very
20 beginning of it, reflected in your documents,
21 there was deposits of pesticides upon the
22 property. What hazard is that to the workers, for
23 instance, that were there when these things were
24 being moved around earlier or later on --

25 HEARING OFFICER WILLIAMS: Mr. Garbett,

1 I think that's probably a different topic, worker
2 safety. That's coming down the pike. Could you
3 hold that --

4 MR. GARBETT: Okay, well, this is public
5 health because it affects anyone around the area.

6 HEARING OFFICER WILLIAMS: Yeah, I know,
7 but I'd prefer to deal with it under worker
8 safety.

9 MR. GARBETT: Under worker safety, okay.
10 In regards to the particulate matter from this,
11 the PM10 emissions, does it consist mostly of
12 PM2.5 and below?

13 MR. RUBENSTEIN: Most of the combustion
14 particulates would be PM2.5 and below.
15 Particulates from other sources such as the
16 cooling tower might have a different size
17 distribution.

18 MR. GARBETT: With a cooling tower, as
19 such, you use a fairly small amount of water in
20 this because you don't have a combined cycle power
21 plant, is that correct, at this point in time?

22 MR. RUBENSTEIN: I'm not sure what you
23 mean by fairly small. There is a number which is
24 described in the AFC for --

25 MR. GARBETT: There's a smaller amount

1 associated with this peaking generator as to the
2 usage of water and which would be later in a
3 combined cycle power plant?

4 MR. RUBENSTEIN: That's correct.

5 MR. GARBETT: With this the cooling
6 towers, themselves, because you're reusing
7 recycled water, what is the public health hazard
8 that you believe constitutes from this use of the
9 recycled water?

10 MR. LOWE: This is John Lowe speaking on
11 public health. I'll respond to that question.

12 As stated in my testimony there would be
13 no public health hazard associated with the use of
14 recycled water.

15 MR. GARBETT: Does that mean that the
16 recycled water is treated as zero health hazard?

17 MR. LOWE: My understanding is that the
18 recycled water is tertiary treated water.

19 MR. GARBETT: Are you aware that there's
20 litigation on the Metcalf project upon this very
21 fact that it is not what it is supposed to be?

22 MS. LUCKHARDT: I don't know if the
23 witness is capable of testifying on that specific
24 issue, but as far as whatever is or is not being
25 litigated under the Metcalf proceeding, I don't

1 see that as being relevant to this proceeding.

2 HEARING OFFICER WILLIAMS: Sustained.

3 MR. GARBETT: Is the recycled water
4 coming from the same source as the Metcalf
5 project?

6 MR. LOWE: I don't know.

7 HEARING OFFICER WILLIAMS: You might
8 want to pursue that under water quality, Mr.
9 Garbett.

10 MR. GARBETT: With the emissions in the
11 PM2.5 area, can individuals perceive the fact that
12 they're breathing these emissions?

13 MR. LOWE: I'm not sure I understand
14 your question.

15 MR. GARBETT: The exhaust products, even
16 though they may be in the PM2.5 category, are
17 people capable of sensing these emissions?

18 MR. LOWE: At the concentrations in air
19 that are projected, there wouldn't be any
20 perception of things such as odor or irritations,
21 no.

22 MR. GARBETT: Is that because PM2.5
23 particles get lodged deep within the lungs and
24 can't be coughed out, so you would not perceive
25 these?

1 MR. LOWE: That has nothing to do with
2 perception of sensory irritation or odor.

3 MR. GARBETT: Does it have something to
4 do with public health hazards?

5 MR. LOWE: Yes, the ambient air quality
6 standards for particulate matter which are
7 intended to protect public health take into
8 account the types of respiratory effects that fine
9 particulate matter could cause.

10 MR. GARBETT: Does the public perceive,
11 for instance, the ionic balance of a combustion
12 process?

13 MR. LOWE: I don't know if I understand
14 your question.

15 MR. GARBETT: Can people tell if
16 something is burning in most respects like this
17 when we have a fire alarm here, we didn't smell
18 smoke earlier.

19 MR. LOWE: I'm not sure I understand
20 when you say ionic balance. Can you clarify that
21 a little more?

22 MR. GARBETT: Okay. Ionic balance is a
23 term used when you have an excess of either
24 positive or negative ions. It does affect
25 people's perception of their health.

1 For instance, ionic balance, if you have
2 an excess of ions is quite frequently used in fire
3 protection devices, for instance the standard
4 smoke alarms, for instance, in people's homes.

5 One of the most common methods other
6 than photoelectric, is ionization detecting the
7 ionization. These are ions which are products of
8 combustion.

9 The ionic balance I'm referring to is
10 either the excess of positive or negative ions and
11 its effect upon public health. And the perception
12 that people have towards this.

13 MR. RUBENSTEIN: I guess there are two
14 parts to that question. One is related to the
15 ionic balance associated with combustion and, Mr.
16 Garbett, I still have absolutely no idea what
17 you're talking about.

18 The other part related to public health
19 I'll let Mr. Lowe respond to.

20 (Fire Alarm Drill.)

21 MR. RUBENSTEIN: And I'm quite certain
22 that that alarm has nothing to do with ionic
23 balance.

24 MR. GARBETT: And I don't smell smoke.

25 (Laughter.)

1 MR. LOWE: What I can say is ionic
2 balance doesn't represent any of the adverse
3 health effects associated with the emissions that
4 were addressed in the health risk assessment. So
5 it's not something I can comment on.

6 MR. GARBETT: You do not basically
7 assess any psychological effects on people based
8 upon ionic balance then?

9 MR. LOWE: No.

10 MR. GARBETT: Okay. If there were an
11 excess of negative ions would people feel better?

12 MS. LUCKHARDT: I believe that this line
13 of questioning is something beyond the scope of
14 the witness' testimony, and they have expressed
15 their own inability to quite grasp the issue. And
16 I think that it would better served if we moved on
17 to a different line of questioning.

18 HEARING OFFICER WILLIAMS: I don't think
19 anybody is quite grasping what you're talking
20 about, Mr. Garbett.

21 MR. GARBETT: Okay. Is this because
22 there is no relatively quantifying standard that
23 is legally in effect at this point in time?

24 HEARING OFFICER WILLIAMS: Yeah, I think
25 that's right.

1 (Fire Alarm Drill.)

2 MR. GARBETT: Okay. Can the Commission
3 take note of things that are not relevant
4 standards in the decision making process?

5 HEARING OFFICER WILLIAMS: Well, you are
6 free to present whatever, you know, you wanted to
7 present to inform the Committee. But I haven't
8 seen anything that you've filed --

9 MR. GARBETT: Well, if you recall on
10 February 25th I asked you about subpoenaing
11 witnesses, the fact that I would be unable to
12 basically get that before the full Commission
13 before this hearing, and therefore I'm not able to
14 present witnesses regarding some of these factors.

15 HEARING OFFICER WILLIAMS: Right, I
16 recall the conversation.

17 MR. GARBETT: In which case I'm going to
18 go and defer to the published comment sections of
19 this meeting and appear as quote, -- witnesses,
20 intervenor with another hat.

21 HEARING OFFICER WILLIAMS: That you can
22 do. Sure.

23 MR. GARBETT: And I hope I will be
24 granted a little bit of time there --

25 HEARING OFFICER WILLIAMS: Sure.

1 Absolutely.

2 MR. GARBETT: -- to avoid some cross-
3 examination at this point in time.

4 In the treated water being used, do
5 treatment processes normally treat, for instance,
6 and eliminate such pathogens such as anthrax or
7 preons?

8 MS. LUCKHARDT: I don't know if the
9 witness is going to be able to respond to that. I
10 don't think that standard water treatment issues
11 in the -- I don't know --

12 HEARING OFFICER WILLIAMS: Let's save it
13 for water quality. I don't think these witnesses
14 have any special expertise in this area.

15 (Fire Alarm Drill.)

16 HEARING OFFICER WILLIAMS: So if we
17 could save that for water quality.

18 MR. GARBETT: I'll save my other
19 questions for another section.

20 HEARING OFFICER WILLIAMS: Thank you,
21 sir. Staff?

22 MR. RATLIFF: The staff has a witness on
23 public health, a witness on air quality and we
24 also sponsor the Air District's witness who is
25 responsible for the FDOC.

1 MS. LUCKHARDT: Dick, before you do that
2 I need to move all our testimony into the record.
3 And I was going through the exhibit list and a lot
4 of the items that are listed in Mr. Rubenstein's
5 testimony are listed separately here, so I'd just
6 like to go through and check them all off.

7 HEARING OFFICER WILLIAMS: Okay.

8 MS. LUCKHARDT: Starting on the first
9 page, it includes exhibit 2B and 2C, both dealing
10 with PM10 mitigation plans. Exhibit 2E which is
11 the SCR design. Exhibit 2J, air quality
12 responses. Exhibit 2M on PM10 mitigation.
13 Exhibit 2N as specified by Gary in his
14 corrections.

15 Exhibit 2BB, the application for the
16 authority to construct. Exhibit 2CC, CDs.
17 Exhibit 2 -- no, now we're on to exhibit 3 -- no,
18 exhibit --

19 HEARING OFFICER WILLIAMS: Did you say
20 2DD? No, no, that wouldn't -- go ahead.

21 MS. LUCKHARDT: Yeah. Exhibit 2BB and
22 2CC.

23 HEARING OFFICER WILLIAMS: Right.

24 MS. LUCKHARDT: And then exhibits 4B and
25 4C which are applicant's testimony on air quality

1 and public health.

2 I'd like to move all those.

3 HEARING OFFICER WILLIAMS: Okay. Those
4 will be moved into evidence subject to any further
5 questions.

6 Staff.

7 MR. RATLIFF: Yes, in the order that I
8 propose for the witnesses that I have would be to
9 have air quality go first; and then public health;
10 have them each present their direct testimony, and
11 then have them all be available for cross-
12 examination, if that's --

13 HEARING OFFICER WILLIAMS: Is that
14 acceptable to everybody? Okay.

15 MR. RATLIFF: First witness is Gabriel
16 Behymer. He needs to be sworn.

17 HEARING OFFICER WILLIAMS: Yes. Mr.
18 Court Reporter.

19 Whereupon,

20 GABRIEL BEHYMER
21 was called as a witness herein, and after first
22 having been duly sworn, was examined and testified
23 as follows:

24 HEARING OFFICER WILLIAMS: Can we just
25 swear them all at the -- I'm sorry, let's just

1 swear them all in all now.

2 (Fire Alarm Drill.)

3 Whereupon,

4 DICK WOCASEK and ALVIN GREENBERG

5 were called as witnesses herein, and after first

6 having been duly sworn, were examined and

7 testified as follows:

8 DIRECT EXAMINATION

9 BY MR. RATLIFF:

10 Q Mr. Behymer, did you prepare the portion
11 of the staff assessment and the supplement to the
12 staff assessment that appear under the Los Esteros
13 project?

14 MR. BEHYMER: Yes.

15 MR. RATLIFF: And is that testimony true
16 and correct to the best of your knowledge and
17 belief?

18 MR. BEHYMER: Yes, it is.

19 MR. RATLIFF: Do you have any changes to
20 make in it at this time?

21 MR. BEHYMER: I do have two changes to
22 make. I have memoranda that I sent to the project
23 manager, Bob Worl. There's one dated February
24 8th, and one dated March 4th.

25 MR. RATLIFF: Would you just describe

1 those briefly?

2 MR. BEHYMER: Yes, the memorandum dated
3 February 8th details some slight changes to AQSC-
4 4; that's the condition of certification that
5 details the PM10 mitigation required by the Energy
6 Commission for the project.

7 These changes are merely to improve the
8 manner in which the condition will be implemented.
9 They do not effectively change the intent of the
10 condition. It's a wording change that was agreed
11 to, or that came about because of discussions with
12 the Bay Area Air Quality Management District and
13 the applicant and the Commission Staff. They're
14 basically corrections.

15 MR. RATLIFF: Okay.

16 MR. BEHYMER: And the second memorandum
17 is again; The Bay Area Air Quality Management
18 District commented on staff's addendum. And noted
19 that three conditions of certification that were
20 detailed in the District's final determination of
21 compliance --

22 (Fire Alarm Drill.)

23 MR. BEHYMER: -- had been left off the
24 staff's addendum. This is because these
25 conditions had pertained to public health and

1 there was a misunderstanding in the air quality,
2 again, and on which section of the staff
3 assessment they would be included in.

4 MR. RATLIFF: So you're saying there was
5 an oversight that left out certain conditions that
6 were in the FDOC that were not included in the
7 staff conditions?

8 MR. BEHYMER: That is correct.

9 MR. RATLIFF: Okay.

10 MR. BEHYMER: Upon further review, those
11 should be included in the proposed set of
12 conditions, so they are listed here. They are
13 identical to the conditions as they were listed in
14 the District's final determination of compliance.

15 MR. RATLIFF: Do you know if these
16 documents have been docketed for the
17 Committee's --

18 MR. BEHYMER: I know that the memo from
19 February 8th has been docketed. I'm not positive
20 the from March 4th has been docketed.

21 HEARING OFFICER WILLIAMS: Do you have
22 any extra copies?

23 MR. BEHYMER: Yes, I do.

24 MR. WORL: It was submitted for
25 docketing on Thursday, I believe, or possibly it

1 might have gone in Friday morning.

2 HEARING OFFICER WILLIAMS: Can you pass
3 out some extra copies, if you have them.

4 MR. RATLIFF: I don't know how you want
5 to handle this. It's conditions which are already
6 in the FDOC --

7 HEARING OFFICER WILLIAMS: FDOC.

8 MR. RATLIFF: -- but are not in --

9 HEARING OFFICER WILLIAMS: And they're
10 identical?

11 MR. RATLIFF: Identical, yes. And the
12 removal of certain language from one condition
13 that we strike out of the condition. Otherwise,
14 that's all.

15 HEARING OFFICER WILLIAMS: Yeah, if you
16 just have an extra copy you can provide to the
17 intervenors.

18 MR. RATLIFF: Okay, thank you.

19 (Pause.)

20 (Off-the-record discussions.)

21 HEARING OFFICER WILLIAMS: Okay.

22 MR. RATLIFF: Mr. Behymer, did you
23 conclude in your testimony that the project, as
24 proposed, and with the mitigation that you've put
25 into your proposed -- your proposed mitigation in

1 your testimony, that it would comply with all of
2 the Air District's rules and requirements?

3 MR. BEHYMER: Yes.

4 MR. RATLIFF: And did you conclude that
5 the project, with that mitigation, would also have
6 impacts that are less than significant?

7 MR. BEHYMER: Yes.

8 MR. RATLIFF: Could you summarize your
9 testimony briefly, please.

10 MR. BEHYMER: Yes, I can. I'd like to
11 discuss real quickly the process that staff uses
12 to prepare the air quality portion of the analysis
13 for power projects such as this.

14 This can be essentially broken down into
15 three steps. The first step is a review and
16 verification of the emissions that are generated
17 by the project. The staff reviews vendor data,
18 this is data --

19 (Fire Alarm Drill.)

20 MR. BEHYMER: -- from the manufacturer
21 of the equipment in question. And operating data
22 from similar projects in order to verify the
23 emissions calculations that the applicant submits.

24 In addition, at this time the staff will
25 review the best available control technology which

1 is required by law on the facility, on the
2 equipment in question, to make sure that the
3 emissions are as low as is possible.

4 The second step that staff uses, that
5 staff goes through is to verify the impacts that
6 the facility will cause. And then to determine
7 the significance of those impacts.

8 It's important to note that there is a
9 difference between emissions and impacts. The
10 emissions from the power plant will be the actual
11 criteria pollutants that come out of the stacks.
12 But the impacts from the power plant are the
13 quantity --

14 (Fire Alarm Drill.)

15 MR. BEHYMER: -- of the pollutants and
16 concentration of pollutants that people may be
17 exposed to.

18 These impacts are calculated using air
19 quality modeling programs, computer modeling
20 programs. These programs use input data,
21 including the emissions parameters from the power
22 plant, these include the temperature and the
23 velocity of the emissions from the power plant,
24 among other things. And also hourly
25 meteorological data from at least three years,

1 which include wind direction, wind speed,
2 temperature.

3 And these are all input and then a worst
4 case number is generated. Basically the ground
5 level impact of each pollutant over certain
6 averaging periods.

7 The significance of these impacts are
8 measured against the state standards for each
9 criteria pollutant on various averaging periods.

10 The background data that is used is the
11 worst measurement period from at least three years
12 worth of data, in this case. And the impact from
13 the power plant is then added to the background
14 data to come up with a worst case possible impact.

15 That is compared to the standard and
16 determined -- in order to determine significance
17 of the plant's impacts.

18 The final step, the third step that
19 staff takes, and this is very general, is an
20 evaluation of the mitigation proposed for the
21 power plant. This can include some negotiations
22 in terms of the appropriateness of the mitigation,
23 as well as comparing some of the mitigation to the
24 laws, ordinances, regulations and standards, or
25 LORS that requires certain types of mitigation.

1 In this project, in the Los Esteros
2 project, there was an additional particulate
3 matter, less than 10 microns PM10 mitigation that
4 was required by the CEC, that was not required by
5 other LORS. And so this is what I was referring
6 to when I said the negotiations.

7 This mitigation was originally proposed
8 I believe last October, and through numerous
9 workshops and a substantial amount of
10 correspondence, the mitigation was resolved to the
11 current package.

12 That's all I have at this moment.

13 MR. RATLIFF: Okay, thank you. Second
14 witness, Mr. Greenberg, Alvin Greenberg -- Dr.
15 Greenberg, actually.

16 HEARING OFFICER WILLIAMS: Air quality?

17 MR. RATLIFF: Okay. I'm sorry, I
18 haven't actually talked with Mr. Wocasek. Mr.
19 Wocasek, is there anything you would like to add
20 in terms of the FDOC?

21 MR. WOCASEK: No real changes. I wanted
22 to clear up something. Actually we, in this
23 process, we do four documents. We do the PDOC,
24 which is the preliminary determination of
25 compliance. These are essentially an engineering

1 evaluation to see if the plant complies with all
2 the rules and regulations.

3 We do that document; put it out for
4 public comment. We get the comments back and
5 incorporate those into the FDOC, the final
6 determination of compliance.

7 And then after the CEC makes their
8 determination and we receive the offsets
9 certificates, we will issue the true permit, which
10 is the authority to construct. The document that
11 allows them to construct.

12 And then after the plant is constructed
13 and started, we issue a permit to operate. So we
14 actually have four documents.

15 The other thing I wanted to clear up a
16 little bit, this thing about heat rates. In the
17 FDOC there are megawatt ratings, but they are
18 nominal megawatt ratings.

19 The fuel input, which is the only thing
20 we truly limit, is for the maximum, which is a
21 cold day type condition. So, you kind of got
22 apples and oranges; you shouldn't take those two
23 numbers and try to determine a heat rate, because
24 they're for different temperature condition.

25 That's it.

1 MR. RATLIFF: Thank you, Mr. Wocasek.
2 The third witness is Dr. Alvin Greenberg, who's
3 now been sworn.

4 Dr. Greenberg, did you prepare the
5 portion of the staff assessment and staff
6 supplement for this case in exhibits 1 and 1A?

7 DR. GREENBERG: Yes, the public health
8 section.

9 MR. RATLIFF: Yes, and are those true
10 and correct to the best of your knowledge and
11 belief?

12 DR. GREENBERG: Yes, they are.

13 MR. RATLIFF: Do you have any changes to
14 make in that testimony?

15 DR. GREENBERG: One minor change; it's a
16 typographical error. On page 4.7-9 we are looking
17 at the last paragraph, this would be the third
18 line. It reads: Low sulfur diesel fuel or the
19 installation of soot filters. That word "or"
20 should be "and".

21 And, of course, that's reflected in
22 proposed condition of certification AQSC-2. So
23 instead of or it should be the word and. That's
24 the only change I found.

25 MR. RATLIFF: Okay. With those changes,

1 is your testimony true and correct to the best of
2 your knowledge and belief?

3 DR. GREENBERG: Yes.

4 MR. RATLIFF: And could you summarize it
5 briefly?

6 DR. GREENBERG: Yes. The California
7 Energy Commission separates out public health
8 issues from air quality issues really based on
9 whether pollutant emitted is a criteria pollutant
10 or noncriteria pollutant.

11 We have air quality standards for the
12 criteria pollutants. But the noncriteria
13 pollutants, which are actually all toxic air
14 contaminants, do not have standards that are
15 health based. So instead we need to conduct a
16 human health risk assessment to determine whether
17 an individual is going to be exposed to a harmful
18 level of these toxic air contaminants.

19 Staff's procedure is essentially three
20 steps. First, we will assess the risk of cancer
21 and the hazard of noncancer health effects, but
22 acute and chronic, of all the sources.

23 That brings us to the second step, the
24 sources that were assessed for this particular
25 project were stack emissions, the cooling tower

1 drift, the diesel fire pump, which is a backup
2 fire pump, and the emergency generator that uses
3 natural gas. That's the 600 kilowatt emergency
4 natural gas generator. So, all four of those
5 sources were assessed.

6 Finally, in step number three, staff
7 conducts an independent calculation of the risks
8 and hazards to the maximally exposed individual
9 that is found and presented in the AFC by the
10 applicant.

11 So, we do an independent calculation of
12 those to assure ourselves that they have
13 calculated those risks correctly.

14 The cancer risk calculated, which we
15 confirm as being accurately calculated pursuant to
16 the guidelines set forth by the California EPA.
17 The cancer risk is 0.02 in a million; the standard
18 is 10 in one million. So this is significantly
19 below the standards.

20 The acute hazard index, the maximum
21 hazard index, is 0.02. Hazard index of 1 is the
22 standard. And the chronic hazard index is 0.003.
23 Again, 1 is the standard.

24 Let me explain also that these are
25 theoretical maximum risks and hazards. They are

1 not meant to project what would be the most likely
2 scenario. The risk would be somewhere between
3 zero, if there's absolutely no exposure to any of
4 the contaminants released from those four emission
5 sources and this number.

6 So this is an upper bound number. The
7 true risk is somewhere in between. However, we do
8 this, we have a standardized procedure so that you
9 can review each and every health risk assessment
10 regardless of whether it's an energy project or
11 any other source, by the same standard of
12 measurement.

13 Everybody follows this procedure; looks
14 at the maximum impact at the maximum location,
15 regardless of whether there is somebody living
16 there or not.

17 And, in fact, at these locations with
18 the maximum impact there are no people living
19 there; and there would not be people living there.
20 One of the locations is right at the fenceline.

21 And so one can assure oneself that the
22 real risks are less than this. And the risk to
23 someone living in their home is going to be much
24 less than this value.

25 After completing this analysis for the

1 Los Esteros Critical Energy facility I found, and
2 could conclude, that no significant health impacts
3 are expected due to emissions from this proposed
4 facility.

5 MR. RATLIFF: One further question. Mr.
6 Greenberg, a few minutes ago there were questions
7 concerning ions and negative ions and so forth,
8 and I was wondering if you could help
9 T.H.E.P.U.B.L.I.C. get an answer to that question
10 at all, and could briefly summarize any answer
11 that you might have?

12 DR. GREENBERG: Yes, briefly. If I
13 understand the intervenor's questions correctly,
14 he was asking about the effect of negative ions
15 and positive ions and what might be the balance of
16 emissions from any one of these sources.

17 The body of scientific evidence on the
18 effect of negative or positive ions is somewhat of
19 a state of turmoil. I have asked the intervenor
20 at workshops to provide me with some scientific
21 evidence about his theories on this and other
22 subjects. I haven't seen anything.

23 But my own familiarity with the
24 scientific literature shows that there may or may
25 not be a positive effect on a person's emotional

1 well being from the release of negative ions.

2 I have to tell you, though, that based
3 upon my scientific experience, and my adjudication
4 experience -- I am Chairman of the Bay Area Air
5 Quality Management District Hearing Board, and I
6 have been for six years, and so I do adjudicate
7 air quality issues. And I have taught courses on
8 scientific evidence and admissibility -- that the
9 issue of any positive or negative effect of these
10 ions would, in my professional opinion and
11 experience, not pass either the Fry test nor the
12 Doward standard for admissibility in a courtroom.

13 I realize this is quasijudicial and not
14 fully judicial, but what I mean to get at is that
15 there is no standardization of the reports
16 reproducibility. It's not commonly accepted in
17 the scientific community. And there's no error
18 rate. And those are the four Doward standards
19 that one must apply to see if this is truly
20 scientific evidence.

21 Nevertheless, I hope I've given you some
22 idea as to, you know, the state of flux in the
23 scientific community on these issues. And there
24 could be a positive effect on someone's well being
25 with the presence of negative ions.

1 But there have been no truths in
2 scientific studies that have been controlled to
3 demonstrate this. If there are some I would hope
4 that the intervenor would provide them to us so
5 that we could review and comment and cross-examine
6 him on them.

7 MR. RATLIFF: Does that conclude your
8 summary?

9 DR. GREENBERG: Yes, it does.

10 MR. RATLIFF: Thank you. The witnesses
11 are available.

12 HEARING OFFICER WILLIAMS: Thank you.
13 Those two documents that were addressed in staff's
14 presentation, we're going to mark those as 1B and
15 1C. And we'll mark them by date. What's the
16 first date? I don't have a copy of it.

17 MS. SCHILBERG: February 8th.

18 HEARING OFFICER WILLIAMS: And what's
19 that one called?

20 MS. SCHILBERG: It's a memo to Mr.
21 Robert Worl from Gabriel Behymer, February 8,
22 2002, re Los Esteros changes to staff assessment
23 addendum, condition of certification AQSC-4.

24 HEARING OFFICER WILLIAMS: Okay. What's
25 the next one? That will be 1B.

1 MS. SCHILBERG: The next one is also a
2 memo to Bob Worl from Gabriel Behymer, dated March
3 4, 2002, re Los Esteros staff assessment addendum.

4 HEARING OFFICER WILLIAMS: Okay, that'll
5 be 1C. And those have been docketed already?
6 Okay. So those being moved in as 1B and 1C.

7 Okay, we're ready for cross-examination.
8 Do you have questions?

9 MS. LUCKHARDT: No questions.

10 HEARING OFFICER WILLIAMS: Okay.

11 CROSS-EXAMINATION

12 BY MR. FREEDMAN:

13 Q Question to start about construction
14 impacts, I'm not sure who is the right witness to
15 answer these questions.

16 According to the staff assessment
17 construction emissions were modeled, were they
18 not?

19 MR. BEHYMER: Yes.

20 MR. FREEDMAN: And what was the modeling
21 based on? What was the assumption with respect to
22 the duration and intensity of construction
23 activity?

24 MR. BEHYMER: Do you mean in terms of
25 hours or in terms of shifts?

1 MR. FREEDMAN: Well, on page 4.1-12 it
2 says facility construction is expected to take
3 about 12 months.

4 MR. BEHYMER: Yes.

5 MR. FREEDMAN: Is that correct? So that
6 was based on the assumption that there would be a
7 12-month construction period, perhaps with single
8 shift operations, is that fair to say?

9 MR. BEHYMER: I don't have the data in
10 front of me for the length of the shift or the
11 number of shifts, but 12 months is correct.

12 MR. FREEDMAN: And you found that even
13 under those conditions that mitigation is
14 warranted through a series of conditions, is that
15 correct?

16 MR. BEHYMER: Because virtually the
17 entire State of California is out of compliance
18 with the state standard for particulate matter,
19 virtually every project before the Commission
20 requires mitigation for construction.

21 MR. FREEDMAN: But you do conclude on
22 page 4.1-18 that the emissions from the
23 construction of the project could have a
24 significant impact, isn't that true? That's at
25 the very top of the page.

1 MR. BEHYMER: Staff believes that
2 emissions from the construction of the project
3 could have a significant impact and must be
4 mitigated.

5 MR. FREEDMAN: And based on this
6 assumption that there would be a 12-month
7 construction process, and then the resulting
8 conclusion that there would be a significant
9 impact that must be mitigated, the testimony goes
10 on to state that the mitigation should be to the
11 maximum extent feasible, is that correct?

12 MR. BEHYMER: That is correct.

13 MR. FREEDMAN: Now, the estimates that
14 are provided here on the preceding page 4.1-17
15 look at a modeled impact of 13.2 mcg/cubic meter
16 on the 24-hour PM10 standard, do you see that?

17 MR. BEHYMER: Yes.

18 MR. FREEDMAN: With the mitigation
19 measures that are proposed what is your estimate
20 of the reduction in the impact to the ambient
21 concentrations?

22 MR. BEHYMER: I could not give an
23 estimate of the reduction with a reasonable error
24 level.

25 MR. FREEDMAN: You couldn't even give an

1 order of magnitude, 50 percent, 20 percent, 80
2 percent?

3 MR. BEHYMER: I could not.

4 MR. FREEDMAN: So what was your basis
5 for concluding that those mitigation measures were
6 the maximum feasible and would have mitigated a
7 significant impact? I guess that's two questions.

8 MR. BEHYMER: That's two questions. Can
9 you restate the questions one --

10 MR. FREEDMAN: Sure. Let's start with
11 what is the basis for concluding that the
12 mitigation measures are sufficient to mitigate the
13 substantial impact?

14 MR. BEHYMER: The mitigation measures
15 will reduce the PM10 emissions from the
16 construction project to the maximum extent
17 feasible. They should reduce them substantially.

18 MR. FREEDMAN: So the test isn't really
19 the amount of reduction, it's simply feasibility?

20 MR. BEHYMER: No, it's the total level
21 of reduction.

22 MR. FREEDMAN: But you say you don't
23 know the total level of reduction from these
24 mitigation measures?

25 MR. BEHYMER: That's correct.

1 MR. FREEDMAN: So isn't it then the
2 maximum extent feasible, is that really what
3 you're looking at when you're designing measures?

4 MR. BEHYMER: Just a moment, please.

5 DR. GREENBERG: Mr. Freedman, --

6 MR. FREEDMAN: Sure.

7 DR. GREENBERG: If you don't mind, I'd
8 like to respond also from personal experience with
9 actual monitoring at locations that have used
10 these types of mitigation measures.

11 MR. FREEDMAN: Just a threshold
12 question. Did you sponsor this part of the
13 testimony?

14 DR. GREENBERG: No.

15 MR. FREEDMAN: Okay. Please continue.

16 DR. GREENBERG: What we are is a panel,
17 and this does go directly. Forgive me if I'm
18 anticipating a question in the future about public
19 health impacts of this.

20 But I can cite you a number of cases and
21 in particular one that I was involved in. This
22 was in the town of Avila Beach. You may know
23 about this, but the town of Avila Beach, which is
24 near San Luis Obispo, had pipelines running
25 underneath it, and the subsurface was contaminated

1 with over 450,000 gallons of crude petroleum,
2 gasoline and diesel.

3 The EIR suggested digging up the whole
4 town, and that's what Unocal paid to do, to dig up
5 the whole town.

6 There was an incredible amount of, I
7 mean a very great potential of PM10, PM2.5 being
8 formed. And they established a mitigation
9 monitoring program, similar to ones that I have
10 set up for other cities during remediation at
11 sites in construction.

12 So, this also applies to construction
13 activities because some of the soil is
14 contaminated that was removed, and some of the
15 soil was not contaminated. And there were upwind
16 and downwind monitoring stations.

17 And halfway through the project there
18 was no difference found using some of these same
19 mitigation measures such that they stopped the
20 monitoring project because the downwind levels of
21 particulate matter were the same as the upwind of
22 particulate matter. In other words, the site was,
23 during remediation activities, was contributing
24 nothing.

25 So, many of -- and these --

1 MR. FREEDMAN: Which agency conducted
2 the mitigation --

3 DR. GREENBERG: San Luis Obispo County
4 Air Pollution Control District oversaw the
5 monitoring conducted by San Luis Obispo County
6 Health Department, which hired an independent
7 contractor to do that.

8 And that's consistent with many of the
9 monitoring activities that I have seen at
10 construction sites, and other hazardous waste
11 sites remediation efforts.

12 MR. FREEDMAN: Allow me to ask you a
13 question about that. Are you then proposing that
14 no mitigation is necessary because it would
15 provide no measurable benefit?

16 DR. GREENBERG: No, no. I'm saying it's
17 because of the mitigation. I said the mitigation
18 done in Avila Beach is similar to the mitigation
19 here. And it's very effective mitigation. And --

20 MR. FREEDMAN: In that case you're
21 saying that the mitigation resulted in no net
22 impacts downwind?

23 DR. GREENBERG: That could be measured.

24 MR. FREEDMAN: Right. So is it your
25 belief that the mitigation measures that are

1 proposed here would have the result of providing
2 no net impact in PM10 concentrations?

3 DR. GREENBERG: One could arrive at that
4 conclusion, that the mitigation will be very very
5 successful, as my fellow witness has testified.
6 He couldn't quite put a real life experience on
7 it, and that's what I'm trying to do.

8 If I told you that it was 90 percent --
9 if it were 90 percent effective in the Avila Beach
10 case, I would tell you that. But it was so
11 effective that the upwind and downwind could not
12 tell the difference. And so they even stopped the
13 monitoring halfway through the project.

14 MR. FREEDMAN: And have you studied the
15 mitigation measures proposed by the staff here?

16 DR. GREENBERG: Yes, I have. That's
17 what I'm saying, they're very similar. One
18 hundred percent the same, I can't say that. But I
19 do know what they were down in Avila Beach and I
20 do know what they are here.

21 MR. FREEDMAN: Um-hum. So allow me to
22 ask again whether you believe that the type of
23 mitigation that the staff is proposing is based on
24 an objective of reaching no net impact, or minimal
25 net impact, or whether it's the maximum extent

1 feasible?

2 MR. BEHYMER: It is a feasibility
3 criterion and where I was confused before, it's a
4 very subjective term. And feasibility is usually
5 determined by individual -- and that's where I was
6 confused. In this case the feasibility would be
7 determined by the CPM, compliance project manager,
8 for the CEC. And that's written into all the
9 conditions of certification that are proposed by
10 staff, as opposed to feasibility being determined
11 by the project owner or some other agency.

12 MR. FREEDMAN: Okay.

13 MR. BEHYMER: And I believe that is a
14 significant difference.

15 MR. FREEDMAN: Now, to get back to the
16 original question I asked, you modeled the 12-
17 month construction process. What is your
18 understanding now with respect to the proposed
19 construction timeline that the applicant seeks?

20 MR. BEHYMER: My understanding is they
21 may accelerate the timeline.

22 MR. FREEDMAN: Has the applicant not
23 proposed doing triple shifts to condense their
24 construction process into a period of somewhere
25 around five months, is that fair to say?

1 MR. BEHYMER: I haven't seen
2 documentation to that effect.

3 MR. FREEDMAN: But you have heard
4 testimony from the witnesses, I mean this is not a
5 secret, right?

6 MR. BEHYMER: Correct.

7 MR. FREEDMAN: So you are aware they're
8 proposing to do triple shifts?

9 MR. BEHYMER: That's possible.

10 MR. FREEDMAN: Now, have you modeled the
11 impact of triple shifts?

12 MR. BEHYMER: No.

13 MR. FREEDMAN: Now, are you --

14 MR. BEHYMER: However, I believe the
15 data for that possibility was submitted in earlier
16 testimony today.

17 MR. FREEDMAN: You're referring to
18 testimony by the applicant?

19 MR. BEHYMER: Yes.

20 MR. FREEDMAN: But the Commission Staff,
21 itself, has not run any sort of analysis of this
22 change in the construction activities?

23 MR. BEHYMER: That's correct, however if
24 there was an increase in time spent in the
25 construction length, the number of shifts and

1 such, the increase should be linear. So I can't
2 comment, but that sounds approximately correct.

3 MR. FREEDMAN: So the staff hasn't
4 modeled those impacts resulting from the triple
5 shifts and the staff is not proposing any new
6 mitigation measures that go beyond those that were
7 premised on the assumption of a 12-month
8 construction period, is that right?

9 MR. BEHYMER: That's incorrect. If you
10 were to review AQSC-1 and AQSC-2, all of those
11 mitigation, and AQSC-3, all of those mitigation
12 measures are proposed to specific activities. And
13 they're proposed to specific pieces of equipment,
14 including catalyzed soot filters, road watering,
15 gravel, wheel washing, things of that sort. All
16 of those things will take place during all
17 construction activities regardless of they occur
18 for one hour or 24 hours per day.

19 Therefore their effectiveness should be
20 linearly, could be linearly applied. I don't have
21 the real world experience that Dr. Greenberg has
22 here, however, per his comment and also from what
23 experience I do have, these construction
24 mitigation efforts can be very effective if
25 they're applied currently, and under the

1 supervision of appropriate agency.

2 MR. FREEDMAN: But you're not willing to
3 make a prediction with respect to the actual
4 reductions from the mitigation measures, we've
5 already established that, right?

6 MR. BEHYMER: I'm not willing to make a
7 prediction based on data. I don't have data at my
8 disposal right now. I'm comfortable with the
9 prediction that they'll be very effective.

10 MR. FREEDMAN: Has the staff considered
11 proposing that construction be limited to single
12 shifts as part of the mitigation strategy?

13 MR. BEHYMER: I don't think that would
14 substantially change the impacts.

15 MR. FREEDMAN: Why do you say that?

16 MR. BEHYMER: Because the mitigation
17 measures proposed will mitigate the project to a
18 level of insignificance.

19 MR. FREEDMAN: Which we have established
20 is some unknown reduction from the maximum
21 theoretical impact, right?

22 MR. BEHYMER: It's a substantial
23 reduction from the maximum theoretical impact.

24 MR. FREEDMAN: So, mitigation measures,
25 themselves -- has the Commission ever limited

1 construction practices by an applicant? Has the
2 ever been a mitigation measure that's been used?

3 MR. RATLIFF: If you know.

4 MR. BEHYMER: I don't know.

5 MR. FREEDMAN: Was it even considered in
6 this case?

7 MR. BEHYMER: I haven't seen
8 documentation of the proposal for multiple shifts.
9 If that is proposed I assume I'll see
10 documentation in the compliance phase if this
11 project is permitted. And we'll have to provide
12 analysis of that.

13 MR. FREEDMAN: Okay. I have just one
14 more line of questions on NOx emissions. Who
15 would be the right witness for that?

16 Is it correct to say that the Los
17 Esteros NOx emissions are to be controlled 5 parts
18 per million?

19 MR. BEHYMER: That's not correct.

20 MR. FREEDMAN: What's the control level
21 or the limit that's being proposed?

22 MR. BEHYMER: The proposed limit is a
23 2.5 annual limit; and a 5 ppm short-term limit.
24 It's a one-hour limit.

25 MR. FREEDMAN: So what's the effect of

1 having there be a different one-hour limit from an
2 annual limit?

3 MR. BEHYMER: Overall on an annual basis
4 they will be able to emit at a 2.5 on average
5 level. However, from hour to hour they will be
6 allowed to have fluctuations of up to twice that
7 annual average.

8 MR. FREEDMAN: Do you know what the
9 actual emissions are expected to be during a
10 typical hour of operation of this facility?

11 MR. BEHYMER: The actual or the
12 permitted maximum?

13 MR. FREEDMAN: The actual.

14 MR. BEHYMER: My analysis is based on a
15 worst case maximum, which I compared to the
16 standards, appropriate standards, and found to be
17 insignificant.

18 So I don't know what the maximum -- what
19 the annual, excuse me -- can you restate the
20 question?

21 MR. FREEDMAN: The actual expected
22 emissions from the unit. Were they expected to be
23 in actual operation above 2.5 for any given hour?

24 MR. BEHYMER: Don't know.

25 MR. FREEDMAN: What would be the

1 reduction in emissions if the facility were
2 permitted as a combined cycle plant?

3 MR. BEHYMER: At what short-term
4 average?

5 MR. FREEDMAN: I'm just wondering the
6 differences in the standards that would be
7 approved between a single cycle turbine and a
8 combined cycle turbine.

9 MR. BEHYMER: Again, at what short-term
10 average ppm concentration limit are you proposing?

11 MR. FREEDMAN: I'm just wondering if
12 that limit would change based on the technology
13 that's used.

14 MR. BEHYMER: To my knowledge it would
15 not change. The short term would be 2.5. That
16 would not change their annual emissions limit.

17 MR. FREEDMAN: And are you familiar with
18 the actual difference between operating a single
19 cycle turbine and a combined cycle turbine in
20 terms of NOx impacts?

21 MR. BEHYMER: I don't think that's a
22 question here.

23 MR. FREEDMAN: There's no difference in
24 the NOx emissions from either of those two units?

25 MR. RATLIFF: Could you clarify your

1 question, please. I don't understand it.

2 MR. FREEDMAN: Well, I'm sort of
3 wondering the difference between NOx emissions
4 from a single cycle turbine and NOx emissions from
5 a combined cycle unit.

6 MR. RATLIFF: I think your question
7 assumes facts not in evidence. We don't know that
8 they are intrinsically different. It may be
9 possible to apply SCR such that a single cycle
10 unit has the same emissions that a combined cycle
11 unit does, for all I know. And, in fact, that's
12 actually something that I think we've seen.

13 So, I think you're assuming facts that
14 are not in evidence.

15 MR. FREEDMAN: Okay. Thank you. I have
16 no further questions.

17 HEARING OFFICER WILLIAMS: Mr. Garbett,
18 before you begin, is the City of Milpitas going to
19 have any questions here? Okay.

20 Mr. Garbett.

21 CROSS-EXAMINATION

22 BY MR. GARBETT:

23 Q Yes, the staff has referred previously
24 to LORS in the testimony and the conversation
25 today. And on February 25th we had a conference,

1 preconference meeting and the applicant has stated
2 that all approvals had been met.

3 And one of these things such as
4 ordinances that would be needed to go and place
5 the plant and such as ordinance number 26579 of
6 the City of San Jose. I just recently obtained a
7 copy of it.

8 In this ordinance it requires an
9 emergency ordinance to mean it would go into
10 effect almost right away. However, in the
11 ordinance they have facts constituting the
12 urgency. In which case the urgency is the
13 Governor's emergency order which expired December
14 31st.

15 Since this was passed after that, the
16 urgency would be assumed not to exist. This would
17 go and place the urgency ordinance in a nonurgent
18 category, which would mean it would not go into
19 effect until January 1st of 2002.

20 Would that affect the impact of the
21 project on your LORS?

22 MR. BEHYMER: The air quality impact of
23 the project?

24 MR. GARBETT: All impacts with regard to
25 LORS.

1 MR. BEHYMER: Can you restate the
2 question again, the final --

3 HEARING OFFICER WILLIAMS: Mr. Garbett,
4 does anybody have a copy of what you're holding
5 here? Is it just something that you --

6 MR. GARBETT: I played hell getting a
7 copy of this. I just got it, so --

8 HEARING OFFICER WILLIAMS: What exactly
9 is it?

10 MR. GARBETT: This is the ordinance of
11 the City of San Jose regarding PDC SH0109088, the
12 Dataport/Los Esteros project. Yes, it's a
13 rezoning ordinance.

14 HEARING OFFICER WILLIAMS: Okay. Again,
15 I think that's probably something we should take
16 up under land use.

17 MR. BEHYMER: In terms of air quality
18 impacts my understanding is a timing issue. Is
19 that your question, sir?

20 MR. GARBETT: Well, first of all timing;
21 and second of all, an integral part of the
22 ordinance here in the ordinance, one of the things
23 which is a fact not in evidence is the agreement
24 with Calpine and the City. Third line from the
25 bottom it says: Whereas prior to February 19,

1 2002, the applicant has agreed and shall have
2 executed a hold-harmless release, an indemnity
3 agreement in a form acceptable to the City
4 Attorney and so forth.

5 HEARING OFFICER WILLIAMS: Mr. Garbett,
6 I hate to interrupt you, but again, it's something
7 we should probably take up under land use. I
8 don't see a connection here to air quality.

9 So, if there is, we'll deal with it
10 under land use.

11 MR. GARBETT: Okay. Next question is
12 there was comments submitted to the Air District
13 regarding a necessity for a public hearing. Was
14 any of these comments included within the FDOC?

15 MR. RATLIFF: Objection, that's not part
16 of his testimony.

17 MR. GARBETT: He has stated here on
18 introducing himself today that they had considered
19 public comments in writing the FDOC.

20 MR. RATLIFF: Is there a question about
21 public comments on the FDOC?

22 MR. GARBETT: Were any of those public
23 comments that were introduced as a necessity for
24 asking for a hearing incorporated within the FDOC?
25 Yes or no?

1 MR. RATLIFF: If you know.

2 MR. WOCASEK: No, I don't believe so,
3 but we did write you a letter saying these CEC
4 hearings were sufficient for public meetings.

5 MR. GARBETT: Was there any other public
6 comments included that were submitted for the
7 FDOC?

8 MR. WOCASEK: I believe so, but I don't
9 have them.

10 MR. GARBETT: Did any make it to the
11 final cut into the FDOC?

12 MR. WOCASEK: Yeah, but I don't recall,
13 you know.

14 MR. GARBETT: Thank you.

15 HEARING OFFICER WILLIAMS: Applicant, do
16 you have anything further?

17 MS. LUCKHARDT: We have nothing further.

18 HEARING OFFICER WILLIAMS: Staff?

19 MR. RATLIFF: I'm sorry?

20 HEARING OFFICER WILLIAMS: Anything
21 further?

22 MR. RATLIFF: No.

23 HEARING OFFICER WILLIAMS: Okay, I
24 think, subject to receipt of all the exhibits, we
25 can close out air quality.

1 MS. LUCKHARDT: Oh, you know what, I
2 have one more exhibit that I forgot in that long
3 list of things. It's exhibit 2P, as in Pam, which
4 is PM10 mitigation filing. It was docketed and
5 filed and served on all parties.

6 HEARING OFFICER WILLIAMS: Okay, we'll
7 receive that.

8 I think there's some questions from the
9 dais.

10 MR. SMITH: I do have a clarifying
11 question, if you will, for Mr. Behymer.
12 Earlier you mentioned, and I believe it was in
13 response to a question regarding the difference
14 between a single shift and a triple shift in terms
15 of the impacts, PM impacts.

16 And I thought I heard you say that you
17 hadn't modeled them, but you -- and these weren't
18 your words, but you presumed or you saw no reason
19 why they wouldn't be linear. Could you explain
20 that?

21 MR. BEHYMER: I would say that if the
22 applicant proposed multiple shifts that the
23 increase in impacts would most likely be linear.
24 This is just off the top of my head.

25 However, with the mitigation proposed I

1 believe that the impacts would still be mitigated
2 to a level of insignificance.

3 However, if a accelerated construction
4 schedule is proposed, I assume that in the
5 construction phase of the project the CEC would be
6 involved in the compliance -- through compliance.
7 And that the air quality staff would have a chance
8 to review any changes to the construction
9 emissions that are proposed different from what is
10 proposed right now.

11 MR. SMITH: I'm still not clear on what
12 you mean by the use of the term linear.

13 MR. BEHYMER: I'm sorry. The current
14 assumption is that there is a one, or however
15 many, certain number of hours of construction
16 occurring. And because it's a 24-hour standard,
17 there's an assumption of a certain amount of PM10
18 that would be emitted during that time period,
19 averaged over 24 hours.

20 Again, just off the top of my head, and
21 I haven't done these calculations, so I don't
22 commit to these, but I would propose that the
23 quantity of emissions would go up linearly; so
24 that if the amount of time spent in construction
25 would double, then the emissions would be double.

1 However, with the suitable mitigation
2 the amount of emissions would be substantially
3 reduced. And, again, I'm sorry, I can't comment
4 to -- could you hold just a moment, please, to
5 confer?

6 MR. SMITH: Sure.

7 MR. RATLIFF: Could our other witnesses
8 also address this, as well?

9 MR. SMITH: Oh, sure.

10 HEARING OFFICER WILLIAMS: Do we have
11 any other scheduling issues. We're set next to
12 move into hazardous materials and worker safety.
13 Is that what we're going to do?

14 MS. LUCKHARDT: I believe so.

15 HEARING OFFICER WILLIAMS: Any witness
16 problems? I know we have the City of Milpitas
17 coming in at 3:30, so --

18 MR. RATLIFF: You're asking if we --

19 HEARING OFFICER WILLIAMS: Is that
20 acceptable?

21 MR. RATLIFF: -- hazardous materials?

22 HEARING OFFICER WILLIAMS: Right, worker
23 safety and --

24 MR. RATLIFF: We have a witness who is
25 going to have to leave soon for soil and water,

1 so --

2 HEARING OFFICER WILLIAMS: And you said
3 you had a witness who has to leave at 3:00?

4 MR. RATLIFF: Right.

5 HEARING OFFICER WILLIAMS: Who is that?

6 MR. RATLIFF: Mr. Kessler, I believe.
7 He's got an appointment this evening that requires
8 him to leave as soon as possible, I think. So I
9 was thinking maybe we could do that, if you
10 desire, whenever we finish with air.

11 HEARING OFFICER WILLIAMS: Is that
12 acceptable? Do you all have your water people?

13 MS. LUCKHARDT: I think we have
14 everyone.

15 HEARING OFFICER WILLIAMS: Okay, so
16 we'll do water. We'll start water so we can try
17 and get Mr. Kessler out of here.

18 MR. RATLIFF: We hope it won't take very
19 long, so --

20 (Laughter.)

21 MR. BEHYMER: I'm sorry, is that all the
22 questions for air quality?

23 HEARING OFFICER WILLIAMS: No, I think
24 we're waiting for some clarification on the linear
25 question.

1 MR. RATLIFF: Dr. Greenberg, did you
2 want to help?

3 MR. BEHYMER: We had some question on
4 which averaging period and whether or not the
5 shifts were assumed to be concurrent or in serial.
6 In other words, were they occurring at the same
7 time, three times as many manpower on the site, or
8 rather 24 hours a day.

9 And there would be a difference in terms
10 of the maximum impact, but over a 24-hour
11 averaging period that would average out.

12 So, again, the mitigation measures
13 proposed by staff are substantially above and
14 beyond what are, on average, proposed for this
15 type of project in the State of California, and we
16 believe that these will mitigate the project to a
17 level of insignificance.

18 Any changes to the construction schedule
19 construction proposal that is different from what
20 is proposed in the AFC would need to come
21 before -- would need to be reviewed by staff.

22 REXCROSS-EXAMINATION

23 BY MR. FREEDMAN:

24 Q Just a follow up. Isn't the
25 construction schedule that the applicant proposes

1 now different from what was originally submitted?

2 MR. BEHYMER: I still haven't seen
3 documentation to this effect.

4 MR. FREEDMAN: Let's assume for the
5 purposes of this question that it is different.
6 Are you saying that the Commission needs to review
7 and approve that?

8 MR. BEHYMER: I believe so, I'll have to
9 defer to counsel.

10 MR. RATLIFF: Yeah, the compliance unit
11 will have to approve any construction schedule, I
12 believe. I haven't checked the conditions for
13 that, but I assume they would.

14 MR. FREEDMAN: And just to follow on,
15 one more follow on on the question that was asked
16 a minute ago.

17 You're hypothesizing about possible
18 impacts of mitigation and the triple shift issue.
19 Just to clarify, you have not studied this and
20 it's not in the testimony that has been submitted,
21 is that correct?

22 MS. LUCKHARDT: It's in our testimony.

23 MR. FREEDMAN: In the Energy
24 Commission's Staff testimony?

25 MR. BEHYMER: That is correct.

1 MR. FREEDMAN: Okay.

2 HEARING OFFICER WILLIAMS: I'm unclear
3 on this whole scheduling question. Staff, could
4 you educate me on what clearances are required
5 and --

6 MR. RATLIFF: Well, you know, I'm not
7 sure I understand, myself. I don't know if we
8 have any condition as to clear the construction
9 schedule with us or not. I know typically the
10 compliance people are very involved in overseeing
11 construction schedules, but I don't know what
12 exists here, what is required. I'm sorry.

13 I mean it's certainly within the purview
14 of the Committee to impose such a condition. I
15 don't know if we've recommended one.

16 (Pause.)

17 MR. RATLIFF: I think what we have is a
18 situation where we have performed an analysis
19 originally; our original air quality analysis was
20 based on an eight-hour construction schedule. The
21 applicant has indicated a desire to use 24-hour
22 construction schedule.

23 When we realized that we discussed
24 whether or not that would actually change the
25 impacts significantly, construction impacts. Our

1 conclusion was that it would not. That, as you've
2 heard today, that is also the applicant's
3 conclusion.

4 There's no restriction in law that we
5 are aware of from the City of San Jose that
6 restricts that schedule. So we would not impose a
7 requirement on it.

8 But, like I say, I don't know if we have
9 any condition in our proposed conditions that goes
10 to that schedule.

11 HEARING OFFICER WILLIAMS: Okay.

12 MR. GARBETT: The City of San Jose has
13 typical construction hours in their zoning
14 ordinance.

15 MR. RATLIFF: Do you know what they are?

16 HEARING OFFICER WILLIAMS: Okay. Well,
17 I think it's something we can revisit on land use.

18 Let's take a break and come back in
19 maybe ten minutes.

20 (Brief recess.)

21 HEARING OFFICER WILLIAMS: Staff's air
22 quality and public health sections of the staff
23 assessment and the supplement into evidence. And
24 I think with that we're going to close out air
25 quality and move on to water quality at this

1 point.

2 Applicant, are you prepared to -- well,
3 wait a second, --

4 MS. LUCKHARDT: Yes, we are prepared to
5 go forward with water.

6 HEARING OFFICER WILLIAMS: -- where is
7 the Coalition?

8 MS. LUCKHARDT: I don't believe they
9 have anything on water.

10 HEARING OFFICER WILLIAMS: Okay.

11 MS. LUCKHARDT: Okay, applicant calls --
12 let's see, we've got Chuck Vosicka -- you can't
13 hide -- Chuck and Dave Richardson; I guess we also
14 have our biological resource experts up here, EJ
15 Koford, in case questions roll over into biology,
16 to testify on water resources.

17 I don't believe any of them have been
18 sworn, so they can all be sworn in unison.
19 Whereupon,

20 CHARLES VOSICKA, DAVE RICHARDSON

21 and EJ KOFORD

22 were called as witnesses herein, and after first
23 having been duly sworn, were examined and
24 testified as follows:

25 MS. LUCKHARDT: Okay, and I will, since

1 it's basically joint testimony I will direct my
2 introductory questions to Dave Richardson.

3 DIRECT EXAMINATION

4 BY MS. LUCKHARDT:

5 Q Mr. Richardson, do you have a copy of
6 applicant's testimony on soil and water resources?

7 MR. RICHARDSON: I do.

8 MS. LUCKHARDT: And was this testimony
9 prepared by you or at your direction?

10 MR. RICHARDSON: Yes.

11 MS. LUCKHARDT: And does this testimony
12 include a description of your qualifications?

13 MR. RICHARDSON: Yes, it does.

14 MS. LUCKHARDT: And was your testimony
15 filed with either applicant's prehearing
16 conference statement or your testimony there?

17 MR. RICHARDSON: Yes.

18 MS. LUCKHARDT: And do you have any
19 corrections or clarifications you'd like to make
20 to your testimony today?

21 MR. RICHARDSON: No.

22 MS. LUCKHARDT: And are the facts
23 contained in this testimony true to the best of
24 your knowledge?

25 MR. RICHARDSON: Yes.

1 MS. LUCKHARDT: And are the opinions
2 contained therein represent your best professional
3 judgment?

4 MR. RICHARDSON: Yes.

5 MS. LUCKHARDT: And do you adopt this
6 testimony on soil and water resources as your
7 testimony in this proceeding?

8 MR. RICHARDSON: Yes.

9 MS. LUCKHARDT: Okay, so then I'll turn
10 to Mr. Vosicka.

11 BY MS. LUCKHARDT:

12 Q Do you have a copy of applicant's
13 testimony on soil and water?

14 MR. VOSICKA: Yes, I do.

15 MS. LUCKHARDT: And was this testimony
16 prepared by you or at your direction?

17 MR. VOSICKA: What this --

18 MS. LUCKHARDT: Yes. Or did you -- are
19 you simply adopting Dave's testimony as yours?

20 MR. VOSICKA: Yes.

21 MS. LUCKHARDT: All right, then we'll
22 just finish with Dave sponsoring the testimony in,
23 and we'll be fine.

24 I don't believe that I have any specific
25 questions for these witnesses. I would ask Mr.

1 Richardson to give a short summary of our
2 testimony on soil and water resources.

3 MR. RICHARDSON: Effectively what we are
4 proposing here is the use of recycled water as
5 water for the facility for cooling, cooling tower,
6 as well as for process water use.

7 There are no significant environmental
8 impacts associated with the use of recycled water.
9 Likewise, there are no significant construction-
10 related impacts relative to the soil and water
11 resources.

12 And the only cumulative impacts that are
13 addressed in our analysis that were of potential
14 concern have to do with the salinity of the
15 recycled water; the concern that with the
16 wastewater from the cooling process, that it will
17 increase the salinity of the South Bay water
18 recycling water product.

19 We analyzed that, the increase in
20 salinity associated with the water for this
21 project, less than 1 percent of the South Bay
22 Water recycling recycled water product. And
23 therefore, combined with other salinity increases
24 from other projects, it was found not significant
25 and was being addressed by the City of San Jose

1 with their -- salinity program.

2 The project complies with all laws,
3 ordinances, regulations and standards associated
4 with the project. So we concluded our analysis at
5 that point.

6 MS. LUCKHARDT: Great. At this point I
7 would like to move applicant's exhibit 4L on soil
8 and water resources into the record.

9 HEARING OFFICER WILLIAMS: Okay, 4L is
10 admitted subject to cross-examination.

11 MS. LUCKHARDT: And the witnesses are
12 available for cross.

13 HEARING OFFICER WILLIAMS: Any
14 questions, staff?

15 MR. RATLIFF: No.

16 HEARING OFFICER WILLIAMS: Mr. Garbett.

17 CROSS-EXAMINATION

18 BY MR. GARBETT:

19 Q Although the applicant's application
20 basically says it was going to use recycled water,
21 was there sufficient fresh water available onsite
22 at the existing wells prior to any implementation
23 of any construction or demolition activities?

24 MR. RICHARDSON: We analyzed the water;
25 it appeared in our judgment to be the most

1 appropriate water resource as judged by the
2 applicant and by the City of San Jose.

3 MR. GARBETT: I understand that you're
4 reiterating the applicant's position in this
5 application, but I asked at the time that the
6 application was filed was there adequate fresh
7 water available through the existing wells on site
8 for the applicant's needs, had he chose fresh
9 water?

10 MS. LUCKHARDT: You can respond if you
11 know.

12 MR. RICHARDSON: I don't know.

13 MR. GARBETT: At this point in time with
14 the existing wells that are on the site is there
15 sufficient fresh water if the applicant would make
16 another choice at this time?

17 MR. RICHARDSON: The answer is no.

18 MR. GARBETT: Okay. What is the
19 requirement in the gallonage of this project, in
20 the amount of water usage?

21 MR. RICHARDSON: The water use for the
22 project as proposed to be characterized both in
23 water needs, as well as maximum daily use average,
24 these are approximately .5 million gallons per
25 day; and maximum .82 million gallons per day.

1 MR. GARBETT: Since there is a surplus
2 of surface water in the area where the project is
3 being built, would it not seem practical, and as
4 an economics lesson, to basically use available
5 fresh water rather than to pay for recycled water
6 for the project?

7 MR. RICHARDSON: I just testified that
8 there is not sufficient groundwater or other
9 potable water at the site for use. There is
10 sufficient recycled water available for use at the
11 site.

12 MR. GARBETT: I didn't ask about the
13 sufficient recycled water, I asked about the fresh
14 water.

15 MS. LUCKHARDT: I think we're marching
16 down a line -- we've indicated that the project
17 does not propose to use fresh water. It proposes
18 to use recycled water. And so the applicant did
19 not do a complete analysis of using groundwater on
20 site. And so I don't know how much more, how many
21 more questions --

22 HEARING OFFICER WILLIAMS: Does that
23 answer your question, Mr. Garbett? In other
24 words, the applicant is saying --

25 MR. GARBETT: Well, --

1 HEARING OFFICER WILLIAMS: -- they
2 didn't analyze the availability of fresh water.

3 MR. GARBETT: Well, he's avoiding the
4 question. Okay.

5 Since the City of San Jose has a flow
6 cap on water flowing to the Bay, the only way to
7 break this cap effectively is to use recycled
8 water. And the use of this project of recycled
9 water, is this growth-inducing under CEQA?

10 MS. LUCKHARDT: I think we're beyond the
11 scope of this individual's testimony. He was
12 analyzing the impacts of using the recycled water
13 on the site, not the overall growth in the San
14 Jose Greater Bay Area.

15 HEARING OFFICER WILLIAMS: Yeah, I think
16 that's outside the scope of his testimony.

17 MR. GARBETT: Okay. In addition to the
18 particular salinity of the recycled water, is
19 there also not an excess of heavy metals in this
20 water, as opposed to fresh water?

21 MR. RICHARDSON: No.

22 MR. GARBETT: The public analysis in the
23 newspapers of general circulation the City has put
24 out indicates that problem. And in the Metcalf
25 hearings that was an issue. It is no longer an

1 issue now?

2 MR. RICHARDSON: I don't see there being
3 an issue of excess of heavy metals in this water
4 supply.

5 MR. GARBETT: Okay. Would this be a
6 particulate matter that would condense out of the
7 air as part of the risk factors of this project
8 from your cooling towers?

9 MR. RICHARDSON: Would -- I don't
10 understand the question.

11 MR. GARBETT: Would there be heavy metal
12 particulates, as well as salinity particles, that
13 would condense out of the drift from your cooling
14 towers?

15 MS. LUCKHARDT: We just had our public
16 health, air quality folks up here to answer those
17 kinds of questions, and they were the ones who
18 have the expertise and had completed the analysis,
19 and had the ability to answer that kind of
20 question. This is a water resources panel, soil
21 and water resources experts. And they did not
22 conduct the same kind of analysis of the cooling
23 tower drift that is typically done for air quality
24 and public health.

25 So, this is beyond the scope of these

1 witnesses' testimony.

2 MR. GARBETT: Would any factors in the
3 recycled water contribute to PM10 emissions?

4 MS. LUCKHARDT: Again, that's along the
5 same line. That would have been a question that
6 would have been addressed to our air quality
7 experts and our public health experts who analyzed
8 cooling tower drift and PM10 emissions from the
9 cooling tower. Not the soil and water folks who
10 are here.

11 MR. GARBETT: What is the level of
12 pathogens, I'm going to include fungus, bacteria,
13 preons and so forth, in the water? What is the
14 level that is acceptable for this project?

15 MR. RICHARDSON: I think I hear two
16 questions. What is the level of those potential
17 pathogens in the recycled water?

18 The Department of Health Services, State
19 Department of Health Services, identifies the
20 water treated by the City of San Jose at their
21 treatment plant for unrestricted reuse under Title
22 22, as effectively pathogen free effluent.

23 MR. GARBETT: Okay. And why has a
24 required public hearing never been conducted by
25 that Department?

1 MS. LUCKHARDT: Beyond the scope of this
2 individual's testimony.

3 MR. GARBETT: The City of San Jose has
4 had the use of recycled water in other activities.
5 Are you familiar with the cases of athletes in
6 contact sports at San Jose State University having
7 amputations and other major infections that caused
8 extensive hospitalizations, are you familiar with
9 those?

10 MS. LUCKHARDT: Again, this sounds like
11 more of a public health concern rather than a
12 water quality question, or a water use question.
13 And I can say it's absolutely outside the scope of
14 this witness' testimony.

15 MR. GARBETT: I'll ask these questions
16 again under public health, thank you.

17 HEARING OFFICER WILLIAMS: We've already
18 closed the record on public health.

19 MR. GARBETT: Well, that's how you're
20 avoiding them. You avoided them under public
21 health, and now you're avoiding them here in the
22 water issues. At what point in time do these
23 questions get asked and answered?

24 HEARING OFFICER WILLIAMS: Well, I don't
25 know. It's either I'm hearing them differently

1 now, or you're asking them differently now, one of
2 the two. So they were certainly appropriate
3 questions for the public health folks.

4 MR. RATLIFF: Mr. Williams, we still
5 have our public health expert here. He can
6 attempt to answer those questions if the Committee
7 wants to repose them to Mr. Greenberg.

8 HEARING OFFICER WILLIAMS: Let's do
9 that. Let's do that.

10 MS. LUCKHARDT: Okay.

11 HEARING OFFICER WILLIAMS: Does that
12 conclude?

13 MS. LUCKHARDT: That concludes our
14 testimony.

15 HEARING OFFICER WILLIAMS: Okay, then
16 let's move on to staff.

17 MR. RATLIFF: Staff witness for soil and
18 water resources is John Kessler, who has not been
19 sworn.

20 And if I may, I would like to recall
21 Alvin Greenberg specifically to answer the
22 questions that Mr. Garbett seeks answers to, to
23 the extent that he may be able to help answer
24 them.

25 Please have Mr. Kessler sworn, and

1 then --

2 HEARING OFFICER WILLIAMS: Okay. Mr.

3 Court Reporter.

4 Whereupon,

5 JOHN KESSLER

6 was called as a witness herein, and after first
7 having been duly sworn, was examined and testified
8 as follows:

9 MR. RATLIFF: Mr. Williams and
10 Commissioner, I wanted to point out one problem
11 that we have here. We have, since the filing of
12 the final staff assessment and the supplement, we
13 have, at the request of water agencies this week,
14 added additional language to soil and water
15 condition 3.

16 It has been substantially rewritten and
17 I think we've been trying to get copies for
18 parties to look at it. It was written at the
19 request of the Regional Water Quality Control
20 Board to impose the possibility of additional
21 restrictions.

22 And we want to make sure you have that
23 language and make you aware of it. The applicant
24 has seen it today.

25 HEARING OFFICER WILLIAMS: Okay, this

1 will be received as 1D, d as in delta.

2 DIRECT EXAMINATION

3 BY MR. RATLIFF:

4 Q Mr. Kessler, did you prepare the staff
5 testimony for soil and water resources that is a
6 part of exhibits 1 and 1A?

7 A Yes.

8 Q Is that testimony true and correct to
9 the best of your understanding and belief?

10 A Yes.

11 Q Can you describe any changes you might
12 have to that testimony?

13 A Only the change to soil and water-3.

14 Q The one that was just distributed?

15 A Yes.

16 Q And can you, hopefully in no more than
17 two or three sentences, explain what, in essence,
18 that change is? Or what the reason, what the
19 purpose for that change is?

20 A As you indicated, Mr. Ratliff, we had
21 some further discussions with the Regional Water
22 Quality Control Board and we wanted to just
23 further delineate what the permitting, the scope
24 of permitting may include.

25 That permitting is still up in the air

1 depending on the applicant's final plans for
2 design of the stormwater outfall into Coyote
3 Creek.

4 And so we have proposed a qualification
5 of that language that should get through the
6 permitting process as site specific NPDES permit
7 is required for the design and construction of the
8 storm water outfall, itself. It leaves the
9 regional board the latitude to permit that as it
10 may so choose.

11 Q With those changes, is your testimony
12 complete?

13 A Yes.

14 Q Could you summarize it very briefly,
15 please?

16 A We looked at a number of aspects under
17 water and soils, the first of those being would
18 there be any change in the water quality standards
19 or the discharge to waters of the state. And as
20 Mr. Richardson suggested, we did look more closely
21 at the salinity increase of that discharge and
22 what it would mean to the overall permitted
23 discharge allowances of the water pollution
24 control plan.

25 And we agree with the applicant's

1 assessment that it would be an increase on the
2 order of about 3.4 mg/liter, or about a half
3 percent increase over the current program.

4 We also had discussions with the City
5 and the Santa Clara Valley Water District and
6 talked about their overall program to reduce
7 salinity and agreed that that program to further
8 decrease salinity and to further create a market
9 for the wastewater to help limit the discharge was
10 in the interest, and thus was not a significant
11 impact.

12 We looked at groundwater because the
13 applicant was only proposing the use of
14 groundwater for supporting construction in minimal
15 amounts. We didn't believe there would be any
16 depletion and proposed to put the well to
17 completion or to destroy the well, the one
18 remaining well of six original wells, upon
19 completion of construction.

20 As far as erosion siltation, we looked
21 over the draft on stormwater pollution prevention
22 plans and erosion control plans, and believe that
23 there's adequate measures to assure that there
24 will not be a discharge of silt from the project
25 or change in water quality as a result of the

1 stormwater runoff.

2 I believe those were the primary issues
3 we addressed.

4 Q Thank you, Mr. Kessler.

5 MR. RATLIFF: The witnesses are
6 available.

7 HEARING OFFICER WILLIAMS: Do you have
8 any --

9 MS. LUCKHARDT: No questions.

10 HEARING OFFICER WILLIAMS: Mr. Garbett.

11 MR. GARBETT: Yes, a few questions.

12 CROSS-EXAMINATION

13 BY MR. GARBETT:

14 Q The standard City policy is that
15 recycled water will be required during
16 construction activities. In this case the
17 Commission seems to be promoting an exception to
18 this by allowing them to use groundwater, but
19 whereas groundwater would be clean for shall we
20 say the operation of the facility, whereas
21 recycled water may be hazardous, don't you seem to
22 have the tables reversed on this, as promoting
23 groundwater during construction, when in fact the
24 City code basically goes to specify that recycled
25 water should be used?

1 A We reviewed the City's comments on our
2 staff assessment and there was no point made
3 expressing concern of use of groundwater during
4 construction.

5 Q Was there a concern when they basically
6 filled one of the wells with debris, some of the
7 hazardous materials on the site, before they
8 capped it? And has this come to your attention?

9 MS. LUCKHARDT: We object to this
10 question. There's no facts in evidence to show
11 the accusation made by Mr. Garbett has any truth.
12 And in fact, all the wells were closed -- all
13 except for the one well to be used for
14 construction were closed in accordance with local
15 review and permits.

16 MR. GARBETT: I beg to say there is
17 facts in evidence on the permits that were filed
18 with the Santa Clara Valley Water District that go
19 and show this to be a true statement. And we will
20 try to docket those with the Commission at an
21 appropriate time.

22 BY MR. GARBETT:

23 Q With your particular deletions in your
24 major changes here, is this primarily because
25 there's new regulations being imposed by the feds

1 under NPDES requirements as to pretreatment before
2 discharge? Is that some of the reasons why?

3 A No, the primary reason is that the
4 regulators are still up in the air as to what the
5 final design of the stormwater outfall will be.
6 And they are just, for the most part, reserving
7 their options in terms of selecting the
8 appropriate permitting for that construction
9 process until such time as they have a design in
10 hand.

11 Q The City of San Jose passed a new
12 ordinance or resolution concerning how they should
13 go and handle the NPDES in relationship to the
14 Regional Water Quality Control Board. And in this
15 they basically tried to go and justify not doing
16 any pretreatment or anything else prior to
17 discharge, but just go along the same old ways.

18 Did that effect of this most recent
19 resolution passed by the City Council have an
20 effect upon your change here?

21 A Again, what stimulated the change was
22 the unknown about the design, itself; and the
23 unknown as to how to permit it and what the
24 effects might be of -- in particularly the
25 sidebank of Coyote Creek in terms of could there

1 be any degradation to the water quality as a
2 result of that discharge down the sidebank of
3 Coyote Creek.

4 Q With this discharge from the facility
5 into the Coyote Creek, which basically has an
6 extremely short flow until it is in the Bay, is
7 this effectively one and the same thing as a
8 discharge from the treatment plant for all
9 practical purposes?

10 A It's eligible to be permitted with the
11 separate waste discharge requirements, or to be
12 permitted under a general permit.

13 Q It just barely gets by, but the intent
14 is the City to basically, by using this facility
15 to go and massage the water and discharge it into
16 the Creek basically avoids direct discharge to the
17 Bay is what it amounts to --

18 MR. RATLIFF: Objection, that's not the
19 applicant's testimony. It's not the witness'
20 testimony.

21 MS. LUCKHARDT: It's not ours, either.

22 (Laughter.)

23 HEARING OFFICER WILLIAMS: Sustained.

24 Do you want to ask another question, Mr. Garbett?

25 //

1 BY MR. GARBETT:

2 Q A couple years ago the City of San Jose
3 first started to go and allow recycled water to be
4 used in cooling towers at San Jose State
5 University. There was an epidemic of the flu
6 where all hospital emergency rooms and all
7 hospital beds were filled for a matter of a few
8 weeks there until they got some things in order
9 when there was no flue epidemic.

10 Was this a result of the cooling tower
11 drift causing the so-called pathogen-free water
12 effect upon the population? Was this an epidemic
13 caused by that?

14 A First of all I am not aware of the exact
15 specifics of this particular event. This, again,
16 was something that was brought up at staff
17 workshop, and I've been unable to find any other
18 information.

19 And so I would say that it was highly
20 unlikely that there would be these type of
21 symptoms as a result of cooling tower drift.

22 We have reviewed and evaluated cooling
23 tower drift at any number of California Energy
24 Commission certified power plants around the
25 state. There have been absolutely no reports

1 similar to this incident, in fact, no reports at
2 all of any type of illness associated with it.
3 Nor could we find any reason that there would be
4 any type of public health impact.

5 Q These reports were printed in the
6 newspaper circulation called The San Jose Mercury
7 News. And it is more than mere coincidence that
8 the startup of the use of recycled --

9 HEARING OFFICER WILLIAMS: Mr. Garbett,
10 you're starting to testify now.

11 MR. GARBETT: Yes.

12 HEARING OFFICER WILLIAMS: We don't have
13 any evidence in the record to support the incident
14 that you're talking about. You're free to produce
15 such evidence, and then we can address it. But
16 until you do so, I'm going to have to ask you to
17 move on.

18 BY MR. GARBETT:

19 Q Were you familiar with the articles
20 printed in The Mercury News regarding contact
21 sports at San Jose State regarding the amputations
22 and the other infections of athletes on those
23 fields watered with recycled water?

24 A Once again, I have heard about those.
25 And, again, as a scientist, with all due respect

1 to The San Jose Mercury News, I rely on
2 conversations with the Public Health Department or
3 writeups in scientific journals as opposed to the
4 newspapers.

5 I'm sure you've come across some
6 instances where there has been a lack of due
7 diligence on behalf of reporters, and sometimes
8 they do a very good job. But, once again, I've
9 been unable to find out anything about it other
10 than what you have told us at a staff assessment.

11 Q Was the comments of the athletes
12 themselves and their doctors that were quoted in
13 the newspaper articles of any significance?

14 A Well, they certainly would be anecdotal
15 significance, but the doctors did not really opine
16 with any surety as to the cause of any of these
17 rashes.

18 And I could only speculate as to what it
19 would be. But it would not be -- it would be
20 highly highly unlikely that it would be due to
21 using reclaimed water.

22 And I'd certainly be glad to answer your
23 question as to why I think that.

24 Q Are you familiar with the term germ
25 warfare?

1 A Yes, I am.

2 Q Are you familiar that most of the germ
3 warfare is done by the airborne distribution of
4 aerosols?

5 A I'm not sure the relevance of that, but,
6 yes, that which has been done in past wars or
7 conflicts has involved the airborne distribution
8 of aerosols. However, the one attempt of a germ
9 terrorism or biological terrorism in the United
10 States was not an application by air, but rather
11 by food ingestion.

12 Q Are you familiar with certain studies
13 the government has released, for instance that
14 pathogens were distributed in instances in the
15 past like over San Francisco Bay Area, such as flu
16 bugs?

17 A No, I'm not familiar with that, and I
18 still don't see the relevance of it. Perhaps
19 you'll ask me a question that will demonstrate the
20 relevance to the issue at hand today.

21 Q You think I might have been one of the
22 guys involved in that?

23 (Laughter.)

24 MR. GARBETT: I guess I will conclude my
25 questions.

1 MR. KESSLER: Thank you. With the
2 Hearing Officer's permission I'd like to answer
3 the question which he didn't ask me, and that is
4 why do I feel that the use of reclaimed water does
5 not present a human health hazard, either on an
6 application to a football field for irrigation or
7 at this facility, which is more relevant to the
8 point, in a cooling tower or use as firefighting
9 water.

10 HEARING OFFICER WILLIAMS: Go right
11 ahead.

12 MR. KESSLER: Thank you. Because the
13 intervenor has indeed brought this up at staff
14 workshop I did research the issue. And I had a
15 conversation last week with Dr. David Spath of the
16 California Department of Health Services. And we
17 spoke at great length on this issue.

18 Dr. Spath is Chief of the drinking water
19 and environmental health division of the
20 California Department of Health Services. And he
21 is the person in Sacramento who is in charge of
22 making sure that the standards for drinking water,
23 and also other water for other purposes, is
24 treated to the appropriate standard and making
25 sure those standards are adequate.

1 His statement to me was that recycled
2 water, treated to tertiary treatment standards, as
3 defined in the California Code of Regulations
4 Title 22, is safe to use for the purposes that
5 this project proposes to use.

6 In other words, using this tertiary
7 treated water is safe for firefighting, for
8 cooling and if they want to use it for irrigation
9 purposes, as well.

10 Now, treated water is essentially
11 pathogen free. Now that does not mean that
12 there's not a single pathogen in the water. But
13 what it does mean is there's not a sufficient
14 number of them.

15 And this is the concept once again of
16 dose response. If you have a large number of
17 pathogens that can overwhelm your system then you
18 will get a response. A small number of pathogens,
19 biological in the air, you can inhale them -- in
20 fact, we're exposed to them right now. There is
21 no doubt this air is not pathogen free. There are
22 viruses in the air right now, and there are
23 bacteria, and we are exposed to them. But we're
24 exposed to such a low number that we will not get
25 a disease from them.

1 Dr. Spath is confident that if any
2 treatment facility in the State of California that
3 treats to Title 22 regulations will be essentially
4 pathogen free, and not result in any harm to
5 humans.

6 MR. BRECHER: Mr. Chairman, excuse me.
7 I have to move to strike all of this. If Dr.
8 Spath wants to testify he can come here and do it,
9 but this witness -- this is clearly hearsay. This
10 witness has reached out to present this material
11 not in response to any question.

12 So I really think it's irrelevant, and
13 it certainly is not competent --

14 MR. KESSLER: Mr. Hearing Officer, if I
15 may respond, --

16 HEARING OFFICER WILLIAMS: No, no, no
17 response necessary.

18 MR. KESSLER: Okay.

19 HEARING OFFICER WILLIAMS: We're going
20 to receive the testimony. We'll accord it the
21 weight that it's due. We understand that he is an
22 expert in the field, he's entitled to rely on --

23 MR. GARBETT: Can I make a further
24 objection to that. This very building was closed
25 down because of the presence of pathogens such as

1 Legionnaires disease and so forth. This building
2 was redone totally.

3 And I am very close to part of the issue
4 because my wife worked for 20 years in this
5 building. And they not only had Legionnaire's
6 disease, but they had other airborne illnesses
7 caused by pathogens circulated through the cooling
8 system here. They were using hydrazine and other
9 things. They had asbestos here. They closed it
10 down. When they cleaned up the asbestos they
11 exposed red lead. And there is a combination of
12 factors.

13 And airborne illnesses caused by water-
14 based things, particularly a few bacteria, when
15 you have millions of gallons, becomes quite
16 significant. And I believe those issues -- you
17 can testify to this on the public record, just
18 like myself, may do so later.

19 Thank you.

20 HEARING OFFICER WILLIAMS: Okay, I think
21 with that, unless there's anything further, we can
22 close water quality.

23 Okay, we're going to move on now. Water
24 quality is closed.

25 I believe we have the Mayor and City

1 Manager of Milpitas here. I know you've been
2 waiting anxiously, so certainly you can use the
3 podium up here. Just, if you could, leave your
4 business card with the court reporter at some
5 point. We'd appreciate that.

6 MAYOR MANAYAN: Good afternoon, ladies
7 and gentlemen. My name is Henry Manayan. I'm the
8 Mayor of the City of Milpitas. I'm here today to
9 discuss why the City of Milpitas is currently
10 opposed to Calpine's Los Esteros Power Plant.

11 Milpitas has committed more than \$25
12 million of its own money to improve the
13 interchange of Interstate 880 and State Route 237,
14 let me just walk over here and show you exactly
15 where that is -- this is the U.S. Dataport
16 project; this is the PG&E substation of the
17 Calpine facility.

18 This major intersection is just right
19 here. This is the creek that separates the City
20 of San Jose and the City of Milpitas. And we've
21 developed a very high tech, first class industrial
22 park over here.

23 U.S. Dataport, which is currently being
24 proposed for construction, was brought to our
25 attention last year as the City of Milpitas had

1 basically was welcome to that Dataport server
2 farm. The server farm was consistent with the
3 high tech style and the character of Milpitas.
4 That was a type of development that Milpitas
5 envisioned when it funded -- that is what was
6 presented to the City, and that is what the City
7 supported.

8 Without having the commitment of a
9 server farm Milpitas does not know what uses will
10 spring up around the power plant. In fact, as
11 recently as conversations yesterday, it may just
12 be the power plant, alone, and no server farm with
13 90-foot tall smoke stacks right across the river.

14 The development of the Los Esteros Power
15 Plant continues the concentration of heavy
16 industrial uses at the western gateway of
17 Milpitas. This concentration of five landfills,
18 wastewater treatment plant, electrical facilities
19 and now a power plant deters investment in
20 development and creates a negative stigma that
21 depresses property values.

22 Now, Milpitas has evolved from an
23 agricultural to a manufacturing to a major high
24 technology city. We are at the crossroads of
25 Silicon Valley, the center of the high tech

1 universe.

2 Milpitas is home to companies listed on
3 every major stock exchange. We are working
4 exceptionally hard to create a positive image for
5 our wonderful city.

6 In a single word, the power plant is
7 unattractive. We were promised that the server
8 farm would screen the power plant. However, we
9 have no assurance now that the server farm will
10 ever be built.

11 The objectionable appearance of the
12 power plant will affect the public's image of
13 Milpitas. The public will associate the
14 appearance of the Calpine facility with the
15 community of Milpitas. The appearance and the
16 visual impact of this facility will taint the
17 entire city.

18 Let me share another point with you. In
19 February the Governor and the California Public
20 Utilities Commission petitioned the Federal Energy
21 Regulatory Commission to give Californians relief
22 from expensive energy contracts. You all remember
23 this.

24 In December the State Auditor criticized
25 the energy contracts that the state entered into

1 last year as being expensive, unjust and
2 unreasonable.

3 In public hearings Calpine has stated
4 the reason why the expedited approval is to insure
5 that it meets its obligations to the state of its
6 power contract with Department of Water Resources.

7 MS. LUCKHARDT: Can I object.

8 HEARING OFFICER WILLIAMS: This is
9 public comment.

10 MAYOR MANAYAN: The contract requires
11 Calpine to complete the facility by October 2002
12 or the state may cancel the contract. In other
13 words, Calpine wants to sell power to the state at
14 a price that was negotiated during a time of
15 crisis and duress.

16 Why is the Commission going to such
17 great lengths to accommodate the manifestation of
18 a contract that is unjust and unreasonable?. Why
19 are we trying to accommodate Calpine's interests
20 to deliver power at high and inflated prices?

21 The Energy Commission should wait at
22 least until the Federal Energy Regulatory
23 Commission formally responds to the California
24 petition. If the Commission must approve the Los
25 Esteros plant, we request the facility proceed in

1 tandem with construction of the server farm. And
2 that Calpine should be required to mitigate the
3 visual impacts and the corresponding negative
4 stigma that the facility will have upon the City
5 of Milpitas.

6 We suggest that the project be
7 conditioned in such a fashion that it will be
8 required to create architectural interests rather
9 than the bleak industrial appearance of the
10 project in its current state.

11 The City of Milpitas supports more
12 energy plants and more electrical power for our
13 communities. However, we do not believe this
14 project needs to be rushed to approval. More
15 thoughtful planning, consideration for one's
16 neighbor is a better and more responsible strategy
17 for good corporate citizenship and for the
18 taxpayers of the State of California.

19 Thank you.

20 HEARING OFFICER WILLIAMS: Thank you,
21 Mr. Mayor. Did you bring some people with you?
22 Your City Manager --

23 MAYOR MANAYAN: Our City Manager, Blair
24 King.

25 HEARING OFFICER WILLIAMS: Does he have

1 any comment?

2 Thank you, we appreciate your
3 appearance, sir.

4 MAYOR MANAYAN: Thank you.

5 HEARING OFFICER WILLIAMS: Okay. The
6 next topic is -- Mr. Kessler, you're free. Thank
7 you. We closed out water -- hazardous materials
8 and worker safety and fire protection.

9 (Pause.)

10 HEARING OFFICER WILLIAMS: Let's go off
11 the record for about five minutes.

12 (Brief recess.)

13 MS. LUCKHARDT: Applicant's witness in
14 the areas of hazardous materials and worker
15 safety, fire protection is Jerry Salamy. He needs
16 to be sworn.

17 Whereupon,

18 JERRY SALAMY

19 was called as a witness herein, and after first
20 having been duly sworn, was examined and testified
21 as follows:

22 DIRECT EXAMINATION

23 BY MS. LUCKHARDT:

24 Q Mr. Salamy, do you have a copy of
25 applicant's testimony in the areas of hazardous

1 materials and worker safety and fire protection in
2 front of you?

3 A Yes, I do.

4 Q And was this testimony prepared by you
5 or at your direction?

6 A Yes.

7 Q And does this testimony include a
8 description of your qualifications and was your
9 r, sum, filed with the applicant's prehearing
10 conference statement?

11 A Yes, it was.

12 Q And do you have any corrections or
13 clarifications you'd like to make to your
14 testimony?

15 A No, I do not.

16 Q And are the facts contained in this
17 testimony true to the best of your knowledge?

18 A Yes, they are.

19 Q And do the opinions contained therein
20 represent your best professional judgment?

21 A Yes.

22 Q And do you adopt this testimony on
23 hazardous materials and worker safety and fire
24 protection as your testimony in these proceedings?

25 A Yes, I do.

1 Q And could you provide a very short
2 summary of your testimony?

3 A We reviewed the list of hazardous
4 materials provided by the applicant for this
5 project and determined whether those materials
6 were considered acutely hazardous by the State of
7 California and/or the federal government.

8 We looked at mitigation measures to
9 reduce the impacts of those acutely hazardous
10 materials and determined that the mitigation
11 measures proposed by the applicant reduced the
12 impacts to below significance.

13 Q Thank you.

14 MS. LUCKHARDT: This witness is
15 available for cross. Oh, actually I'd like to
16 move in, before we do that, applicant's exhibit on
17 hazardous materials and worker safety and fire
18 protection. There are two of them, exhibit 4D and
19 4E.

20 HEARING OFFICER WILLIAMS: Those will be
21 moved in subject to cross-examination.

22 MS. LUCKHARDT: He's available for
23 cross.

24 HEARING OFFICER WILLIAMS: Staff? No
25 questions?

1 MR. RATLIFF: No questions. Oh, wait, I
2 do have one question.

3 CROSS-EXAMINATION

4 BY MR. RATLIFF:

5 Q Do you intend to prepare an RMPP for
6 this project for the aqueous ammonia?

7 A Yes, a state RMP, yes, we did it.

8 MR. RATLIFF: Thank you.

9 HEARING OFFICER WILLIAMS: Mr. Garbett.

10 MR. GARBETT: Just a question.

11 CROSS-EXAMINATION

12 BY MR. GARBETT:

13 Q Our first meeting on this project before
14 we took a tour of the facility there was a
15 demolition of buildings going on allegedly because
16 of the City of San Jose's memorandum that
17 basically said that there was unsafe conditions.
18 In that the City of San Jose memorandum, did it
19 tell you to repair the facilities or to demolish
20 them?

21 A Actually I have not seen a copy of the
22 memorandum you're referring to, however I can
23 instruct you to the waste management testimony
24 that had been entered into the record this
25 morning.

1 In that testimony we indicated that
2 there was an environmental site assessment, phase
3 one and phase two, conducted for the property.
4 The phase one is basically a record search of the
5 property and also a survey to determine whether
6 there's obvious signs of contamination.

7 Based on the phase one, a phase two was
8 recommended, which was implemented, and that phase
9 two required both surface and subsurface sampling.
10 The results of those samples indicated that there
11 were a couple of areas that were contaminated.
12 And those soils were then remediated by the
13 applicant.

14 I believe we indicated that several
15 cubic yards of contaminated soils were removed
16 from the site and disposed of as hazardous waste.

17 At that point a closure document was
18 prepared and was submitted both to DTS and the
19 Commission and I believe it indicates the
20 Commission and the Department of Toxic Substances
21 Control indicated that the site was remediated to
22 their satisfaction.

23 Q Prior to that there was work upon the
24 site where much of these residues were, shall we
25 say, diluted by being spread about. Did this

1 constitute a worker hazard, or was any protection
2 for the workers offered at that time?

3 A One moment, please.

4 MS. LUCKHARDT: In order to answer this
5 question we'll need to have Todd Stewart respond.
6 He has previously been sworn, so I would ask him
7 to come back.

8 MR. STEWART: Bill, could you please
9 repeat the question, I didn't hear it, I'm sorry.

10 MR. GARBETT: Okay. When we had our
11 first formal meeting for this, we had buses that
12 went over to the site and there was work ongoing
13 on the site. And they were basically moving soils
14 around.

15 And noticing the placement of the
16 buildings, the location of the wells, the general
17 map and where the pesticides were shown on the
18 documents that you've submitted, I notice that
19 some of these areas being gone over were areas
20 that had been identified with pesticides.

21 And because of that I believe that
22 they're, shall we say, commingling with safe soils
23 with hazardous soils, where you might say they may
24 have been diluted to less than significant levels.

25 Was there a worker hazard by those

1 workers working at that time is the question.

2 MR. STEWART: There was a worker
3 exposure monitoring program that was undertaken in
4 conjunction with all of the demolition and
5 remediation activities.

6 MR. GARBETT: In the closure of one of
7 the wells it was filled with debris before it was
8 closed. Was this some of the hazardous materials
9 that was basically remediated?

10 MR. STEWART: Again, there's no evidence
11 that there was anything improper done with the
12 closure of the wells. The wells were all closed
13 in accordance with all of the LORS that applied
14 under permit.

15 MR. SALAMY: Additionally, again I'll
16 refer to the waste management testimony that has
17 been entered into the record. And we indicate
18 that the contamination was removed from the site
19 and disposed of as hazardous waste.

20 If we were to inject those wastes into a
21 well, by law we would have to get a permit to do
22 so. We have not sought a permit nor was one
23 issued.

24 MR. GARBETT: Can we ask the chain of
25 custody for that material that was disposed and

1 the line be entered into the docket?

2 MS. LUCKHARDT: I don't know where those
3 records are, if we have them or kept them. That
4 was all done under a permit with the City of San
5 Jose. The permits have been issued; closure has
6 been issued.

7 HEARING OFFICER WILLIAMS: Mr.
8 Garbett, --

9 MS. LUCKHARDT: We have the manifests, I
10 guess, for the disposal. But it seems irrelevant
11 to this proceeding.

12 HEARING OFFICER WILLIAMS: Yeah, the
13 witness has testified under oath. Unless you can
14 present something that --

15 MR. GARBETT: I think it is quite
16 relevant.

17 HEARING OFFICER WILLIAMS: It may be
18 relevant, but again, the witness has testified
19 under oath to terms of what happened.

20 MR. GARBETT: But he's testified that he
21 has chain of custody of receipts that wastes were
22 properly disposed of offsite, and we're just
23 asking that the applicant has stated, under oath,
24 testimony today, right in front of me, and I'm
25 just asking for those record to be entered into

1 the docket.

2 HEARING OFFICER WILLIAMS: No, we're
3 not going to do that. Unless you have something
4 to rebut his testimony, that's all that's
5 required. And that's all the Committee -- the
6 Committee is satisfied --

7 MR. GARBETT: Well, shall we say the
8 inference that the intervenor has is that these
9 wastes were disposed of in the well as --

10 (Parties speaking simultaneously.)

11 HEARING OFFICER WILLIAMS: -- something
12 to the Committee that supports that allegation,
13 then we'll take a look at it.

14 MR. GARBETT: We'll docket a copy of
15 that permit.

16 HEARING OFFICER WILLIAMS: Does that
17 complete your cross?

18 BY MR. GARBETT:

19 Q With the large tanks or other holding
20 facilities used for fire water, because this is
21 recycled water that you're basically going to use,
22 is there any treatment or control while these are
23 incubating within these tanks, the recycled water?

24 A I believe that's a project description
25 question and not necessarily a hazardous

1 materials, because the State of California does
2 not consider the recycled water to be a hazardous
3 material.

4 Q The sewage plant, water and digester
5 tanks has to treat it periodically. Is there any
6 reason why, for instance, standing water should
7 not be treated, or in some way checked
8 periodically?

9 The particular recycled water, according
10 to EPA regulations, does not have sufficient
11 chlorine contact time between the sewage treatment
12 plant and your facility.

13 Is there a way that you can go in and
14 insure there that you have safe water onsite, or
15 that workers are not hazard by an accumulation
16 buildup of bacteria or other pathogens?

17 A I can't answer that. That's a process
18 design question.

19 MS. LUCKHARDT: Yeah, that's really more
20 of a water quality question. We just had those
21 folks up here, and they were just up here to
22 answer any of those questions.

23 This witness, it's outside of the scope
24 of his testimony.

25 MR. GARBETT: Thank you.

1 HEARING OFFICER WILLIAMS: Okay.

2 Anything further? Staff, do you have --

3 MR. RATLIFF: No.

4 HEARING OFFICER WILLIAMS: Okay. Then I
5 think we can -- did we receive all the exhibits?

6 MS. LUCKHARDT: We have applicant's
7 exhibits, it's 4D and 4E on hazardous materials
8 and worker safety and fire protection.

9 HEARING OFFICER WILLIAMS: Well, let's
10 move on to staff.

11 MR. RATLIFF: Staff witness is Dr. Alvin
12 Greenberg. He's been sworn previously.

13 HEARING OFFICER WILLIAMS: He's been up
14 there for awhile.

15 MR. RATLIFF: That's right.

16 (Laughter.)

17 DR. GREENBERG: Two more issues, too,
18 thank you for taking one of them off.

19 HEARING OFFICER WILLIAMS: Mr. Garbett,
20 you're in luck.

21 (Laughter.)

22 DIRECT EXAMINATION

23 BY MR. RATLIFF:

24 Q Dr. Greenberg, did you prepare the
25 testimony that appears in exhibit 1 and exhibit

1 1A, staff testimony in this case?

2 A Yes, I did.

3 Q Is it true and correct to the best of
4 your knowledge and belief?

5 A Yes, it is.

6 Q Do you have any changes or corrections
7 to make?

8 A No.

9 Q Can you summarize it briefly?

10 A Very briefly, I reviewed all the
11 hazardous materials proposed for use at the
12 project, both during construction phases and
13 operations and maintenance phase.

14 I looked at engineering controls and
15 administrative controls designed to prevent the
16 accidental release of any of these materials; and
17 the same type of controls to mitigate or keep any
18 release that should happen to be of very small
19 impact and make sure it does not impact offsite.

20 I looked at the toxicity of the
21 chemicals and if there is a chemical proposed for
22 use that is too toxic and would have a -- and
23 there is a less toxic substitute, I would
24 recommend that substitute.

25 I reviewed their offsite consequence

1 analysis; conducted an offsite consequence
2 analysis of my own, as well as relied upon other
3 offsite consequences that I have prepared for
4 other California Energy Commission certified power
5 plants around the state, and agree with the
6 applicant's conclusion that the majority -- the
7 greatest risk would be posed by loss of
8 containment of the 19 percent aqueous ammonia
9 tank.

10 And their conclusion was that with the
11 secondary containment there would be no
12 significant risk of offsite consequence.

13 I also looked at the transportation of
14 hazardous materials to and from the facility --
15 I'm sorry, to the facility. And proposed a couple
16 of conditions of certification that would require
17 that the applicant use, or direct vendors to
18 transport the aqueous ammonia only in Department
19 of Transportation MC307 certified tanker trucks.

20 There is a transportation route that
21 would have to be taken. And they would be
22 restricted to that transportation route.

23 And finally I reviewed the natural gas
24 pipeline, 550 feet of that pipeline. And assured
25 myself that if it is built to today's U.S.

1 Department of Transportation's Office of Pipeline
2 Safety Standards, as well as the California Public
3 Utilities Commission standards, that it would be a
4 safe pipeline.

5 And would not rupture in the event of a
6 seismic event. And yet still I am proposing
7 additional conditions of certification that this
8 line be tested, should there be a seismic event in
9 the area of such magnitude that there is ground
10 rupture.

11 And that there should also be testing
12 after 30 years of initial use of the pipeline.

13 With that I came to the conclusion that
14 the hazardous materials that are being proposed
15 for use at this project during construction and
16 during operations maintenance would not pose a
17 significant risk to the public.

18 The mere fact that hazardous materials
19 are being used does not, in and of itself, mean
20 that there is a hazard or a risk to the public.
21 Every power plant in the United States has to use
22 some hazardous materials.

23 The question then is will they use them,
24 store them, handle them and transport them
25 properly. And the answer I've arrived at is yes.

1 Q Does that conclude your summary?

2 A Yes.

3 MR. RATLIFF: The witness is available.

4 HEARING OFFICER WILLIAMS: Thank you.

5 Any questions?

6 MS. LUCKHARDT: No questions.

7 HEARING OFFICER WILLIAMS: Mr. Garbett.

8 MR. GARBETT: Just a couple of

9 questions.

10 CROSS-EXAMINATION

11 BY MR. GARBETT:

12 Q The EPA data sheets on your hazardous
13 materials that are used in the plant are generally
14 adequate; however, that is in regards to handling.

15 I have a concern, for instance, with the
16 use of polymers. For instance, the usage, for
17 instance, in the cooling towers, the distribution
18 of the mists that go thereby, particularly upon
19 the employees who are at the site on a regular
20 basis.

21 The City of Sunnyvale, for instance, in
22 past years had problems in their sewage plant when
23 they began to use polymers with the arthritic type
24 symptoms where they basically disabled a couple
25 crews in a row almost in toto. And the fact that

1 this may have an affect upon the workers here with
2 the use of polymers. I'm just citing this as one
3 substance that has become problematic, even though
4 there are, quote, allegedly no known health
5 effects.

6 The City of Sunnyvale did run up their
7 workmens compensation account rather strongly and
8 had to disability retire all these workers.

9 Is this going to be a hazard in this
10 plant?

11 A Well, I'd like to answer that question,
12 but usually we address these types of hazards
13 under worker safety and fire protection, because
14 what we're talking about here is hazardous
15 materials use and impact on public.

16 But I'd answer that question, and hope
17 you don't ask it again under worker safety and
18 fire protection.

19 I have reviewed all those, and yes, I'll
20 agree with you that some materials safety data
21 sheets are not adequate, and others are more
22 adequate.

23 I am convinced, and I've reviewed a lot
24 of material safety data sheets. In fact, the Cal-
25 OSHA standard was written when I was Assistant

1 Deputy Chief of Health for Cal-OSHA. And that was
2 my job is to make sure that that standard was
3 written appropriately.

4 So, in any event, I'm very much aware of
5 material safety data sheets. I'm very much aware
6 of worker standards. And I remain convinced that
7 the impacts on workers would be negligible and
8 that we probably would not even be able to measure
9 these polymers in the air in the workplace. They
10 would be at such a low level of drift from any
11 source.

12 We're talking here about materials that
13 are used in very low amounts.

14 Q I understand. I had no question about
15 safety and the handling, it was only the usage.

16 Along with this you have materials being
17 brought onsite and offsite. You have had concern
18 about the natural gas pipeline. There is other
19 fuels available other than natural gas that the
20 Commission sometimes recommends.

21 And early on in the workshops we brought
22 up the subject of, for instance, the gas, the
23 methane that is harvested for instance at the
24 nearby landfills.

25 Since the City of San Jose has recently

1 entered into a contract with the providers at
2 Newby Island for this methane gas, since it is
3 slightly lower in heat value, and therefore,
4 quote, allegedly less heat value means greater
5 safety. Would this not be an enhancement if they
6 could go and use, for instance, landfill gas to
7 fuel this project rather than natural gas?

8 HEARING OFFICER WILLIAMS: Mr. Garbett,
9 let's take that up under alternatives. Okay?

10 MR. GARBETT: Okay. Thank you.

11 HEARING OFFICER WILLIAMS: Okay, I think
12 we'll receive staff's section, hazardous materials
13 management section, into the record. And we'll
14 close hazardous material management and move on to
15 worker safety.

16 MS. LUCKHARDT: Actually I thought we
17 just entered our worker safety information into
18 the record, because the questions did cross over
19 the whole topic, so we actually did both hazardous
20 materials and worker safety since we had the same
21 witness and it looked like it was one large block
22 on the --

23 HEARING OFFICER WILLIAMS: Okay. Do you
24 have anything further?

25 MR. RATLIFF: Well, we neglected to put

1 them together. Perhaps we should have. But we
2 can have Mr. Greenberg testify again on worker
3 safety.

4 HEARING OFFICER WILLIAMS: Okay.

5 DIRECT EXAMINATION

6 BY MR. RATLIFF:

7 Q Mr. Greenberg, did you prepare the
8 worker safety portion of exhibits 1 and 1A?

9 A Yes, I did.

10 Q Are they true and correct to the best of
11 your knowledge and belief?

12 A Yes.

13 Q Do you have any corrections to make?

14 A Just one. On the supplemental
15 testimony, if you turn to the very first page --
16 well, there's only one page of supplemental
17 testimony. There is a typo. The very first
18 reference there involved page 4.14-10. It really
19 should be -9.

20 Q Can you summarize your testimony
21 briefly.

22 A Very briefly it was my job to review the
23 applicant's proposals to insure that worker health
24 and safety is protected. And that also that they
25 will provide adequate fire protection services.

1 Again, this is both during construction and during
2 operations and maintenance.

3 A review of that included looking at
4 some of the applicant's proposed outlines for
5 worker safety, as well as their proposal for fire
6 protection systems, both automatic and manual.

7 It also included contact with the San
8 Jose Fire Department to receive assurances from
9 them that there's adequate response time to a fire
10 that the onsite capabilities could not handle.

11 My conclusion is that the applicant has
12 shown in the AFC that their plans, when
13 implemented, will protect workers and will provide
14 adequate fire protection.

15 Q Thank you.

16 MR. RATLIFF: The witness is available.

17 HEARING OFFICER WILLIAMS: Mr. Garbett.

18 CROSS-EXAMINATION

19 BY MR. GARBETT:

20 Q My only question is would a direct
21 connection to the City's fire mains be preferable
22 to the independent operation using recycled water?

23 A Mr. Garbett, preferable can be a matter
24 of opinion amongst individuals. For example, --

25 Q I'm asking your opinion.

1 A Well, let me tell you why it's going to
2 be difficult. Certainly I don't see any risk at
3 all from using this tertiary treated water as fire
4 suppression. That being said, there can be a risk
5 associated with relying just on a city water main,
6 or a city-delivered fire protection water because
7 the mains are subject to rupture during an
8 earthquake.

9 And so here we have an independent
10 system onsite that would be able to withstand a
11 seismic event, and should there then be a fire
12 where the City of San Jose is off fighting other
13 fires, they'd be able to fight one at this
14 facility should it occur.

15 So, it's really a matter of reliability
16 at that point.

17 Q Should they have both?

18 A In my professional opinion, no, it's not
19 necessary. The onsite fire protection system has
20 more than the minimum amount of firefighting water
21 that is required by NFPA, National Fire Protection
22 Association, or the Uniform Fire Code.

23 I do believe that at some point there is
24 going to be a dual system, a redundant system,
25 where there will be some hydrants coming in there.

1 And that's just from a conversation I had with the
2 Fire Department. But it's not something that I
3 would require right now.

4 Q Is it a requirement that should be there
5 when the plant becomes a combined cycle?

6 A I don't think having a combined cycle
7 versus the simple cycle makes any difference in
8 fire protection.

9 HEARING OFFICER WILLIAMS: Before you --
10 City of Milpitas, did you have any questions here?

11 MR. BRECHER: No questions.

12 HEARING OFFICER WILLIAMS: I'm sorry,
13 Coalition?

14 MR. FREEDMAN: No.

15 HEARING OFFICER WILLIAMS: Okay. We
16 have a question.

17 EXAMINATION

18 MS. BAKKER: When you were talking about
19 the hazardous materials management you mentioned
20 that the secondary containment would be adequate
21 to protect offsite to no impacts.

22 But that begs a question from my
23 perspective. What about onsite?

24 DR. GREENBERG: Precisely. And the
25 reason that we want to make sure that it protects

1 offsite public is because they would not be
2 trained nor equipped to respond to such a
3 catastrophic release of a hazardous material.

4 We address onsite risks in worker
5 safety, and the worker safety training program
6 which includes emergency response, evacuation
7 plans, et cetera, as well as use of personal
8 protective equipment, which would be respirators.

9 And response, if it's a small spill,
10 they may be able to clean that up onsite. If it's
11 a very large spill, they might ask the San Jose
12 Fire Department. They would be first responders
13 on hazardous materials spill.

14 But the containment facility will
15 contain that to a certain area. And, yes, there
16 would be vapors onsite that would be harmful to
17 workers' health. But they're trained to not only
18 detect that, there will be some automatic shutoff
19 valves, as well. But they're trained to detect
20 that and don personal protective equipment and
21 evacuate at the same time.

22 HEARING OFFICER WILLIAMS: Yes, please.

23 MR. FREEDMAN: Sorry, I just have one
24 follow-up, and I apologize if I missed this.

25 //

1 CROSS-EXAMINATION

2 BY MR. FREEDMAN:

3 Q The training, the worker training that
4 you talk about, would that also apply to employees
5 of U.S. Dataport?

6 A No, it would not.

7 Q So they would not have the same level of
8 expertise in the event of a catastrophic hazardous
9 materials release?

10 A That is correct. And the modeling shows
11 that the California Energy Commission's Staff's
12 level of concern would not be reached -- the
13 airborne concentration would not be reached at
14 U.S. Dataport even if there is a catastrophic
15 release where the entire contents of the aqueous
16 ammonia storage tank were to be spilled and take
17 up the secondary containment.

18 We're dealing here with a material that
19 is a very low vapor pressure. So don't confuse
20 this with anhydrous ammonia, where I wouldn't be
21 sitting here and telling you this.

22 So, mitigation -- I mean using aqueous
23 ammonia is already one major step of mitigation
24 from using the anhydrous form. That's ammonia
25 that's not in water solution.

1 Applicants also typically use at energy
2 facilities in the state 29 percent aqueous
3 ammonia. This is 19 percent aqueous ammonia. And
4 indeed, under the federal RMP regulations, section
5 112R of the Clean Air Act, one does not even have
6 to prepare a risk management plan. Under the Cal-
7 R program, ARP program, accidental release
8 program, there are certain circumstances wherein
9 19 percent aqueous ammonia solution you would not
10 have to prepare an RMP. That would be if the
11 vapor pressure is 10 mm or less.

12 Nevertheless, the applicant has stated,
13 even though there may be some question as to
14 whether they should prepare one, they conducted an
15 offsite consequence analysis, and they used a
16 concentration much higher than the 19 percent, and
17 they also used a volume much higher than the
18 volume that they were storing.

19 I reviewed that, plus I reviewed the
20 other modeling that we have done at other
21 locations, plus did some of our independent
22 modeling to show that the shortest distance from
23 the aqueous ammonia storage tank to the U.S.
24 Dataport facility is such that you would not even
25 achieve the 75 ppm level that we have -- staff

1 uses as a level of concern.

2 That's half the level that USEPA uses.
3 EPA uses 150 ppm. The Cal-ARP program uses 150
4 ppm.

5 From a public health and toxicological
6 standpoint, 75 ppm will not impair anybody's
7 ability to leave the area. It will not be so
8 overwhelming that somebody would gag or be
9 physically incapacitated. Would you smell it?
10 Yes. The odor threshold for ammonia is maybe 5 to
11 10 ppm. So people would smell it, but they would
12 not be incapacitated.

13 And certainly if there is this
14 catastrophic release, they should be removed. I
15 do want to assure the Committee that there has
16 never been such a failure of an aqueous ammonia
17 storage tank at a CEC-certified energy facility in
18 the State of California.

19 So we're talking here about a
20 consequence that has never happened yet. But
21 nevertheless we ask the question, well, what if it
22 should happen. If this is going to be the one
23 time in the next 100 years it happens, what's the
24 impact.

25 MR. FREEDMAN: Thank you.

1 HEARING OFFICER WILLIAMS: Anything
2 further?

3 MR. RATLIFF: No.

4 HEARING OFFICER WILLIAMS: We'll receive
5 staff's portions of the staff assessment and the
6 supplement on this topic.

7 And unless there's anything further
8 we're prepared to close it out and move on to land
9 use.

10 MS. LUCKHARDT: We need to change
11 witnesses.

12 HEARING OFFICER WILLIAMS: Okay. We'll
13 take a five-minute break.

14 (Brief recess.)

15 MS. LUCKHARDT: Applicant's witness on
16 biological resources is EJ Koford.

17 HEARING OFFICER WILLIAMS: We've changed
18 the order again. We're going to move -- to
19 accommodate another witness we're going to move
20 biology in front of land use. We have a witness
21 who has had oral surgery and she needs to get out
22 of here. So, we'd ask all the parties' indulgence
23 of this witness.

24 And, applicant, if you would proceed.

25 MS. LUCKHARDT: Okay. EJ, have you been

1 sworn?

2 MR. KOFORD: I've been sworn.

3 DIRECT EXAMINATION

4 BY MS. LUCKHARDT:

5 Q Do you have a copy of applicant's
6 testimony on biological resources?

7 A Yes, I do.

8 Q And was that testimony prepared by you
9 or at your direction?

10 A Yes, it was.

11 Q And does this testimony include a
12 description of your qualifications and was your
13 r, sum, included either with a copy of your
14 testimony of a copy of applicant's prehearing
15 conference statement?

16 A It does, and it was.

17 Q And do you have any corrections or
18 clarifications that you need to make to your
19 testimony today?

20 A I'd like to make one additional with
21 respect to prior filings, there weren't references
22 in the testimony provided of the materials that
23 have exchanged between us and the CEC since the
24 AFC.

25 So, the specific sections were, I

1 prepared section 8.2 of the AFC. There were a
2 series of data adequacy responses that were filed
3 September 14th, and I was responsible for portions
4 of data request response sets 1A, B, D and F.
5 Specifically those were numbers 7, 8, 12, 13, 17,
6 149, and I can provide that as a written text if
7 you'd like at a later time.

8 The subject of those responses had to do
9 with clarification of a habitat site; discussions
10 of the revised landscape plan; tree removal; and
11 extensive discussion of nitrogen emissions. And a
12 response to a letter of December 28th from the
13 Commission asking for some additional
14 clarification, particularly with landscape issues.

15 Q And were all those documents that you
16 listed previously filed and docketed with the
17 Commission?

18 A They've all been filed and docketed with
19 the Commission.

20 Q And with those changes are the facts
21 contained in this testimony true to the best of
22 your knowledge?

23 A They are true to the best of my
24 knowledge.

25 Q And do the opinions contained therein

1 represent your best professional judgment?

2 A Yes, they do.

3 Q And do you adopt this testimony as your
4 testimony on biological resources in this
5 proceeding?

6 A Yes, I do.

7 Q I would ask that you provide a brief
8 summary of your testimony.

9 A I was really quite pleased with the
10 LECEF project selecting this particular site in
11 that it had relatively little biological value.

12 You can see from the drawing to your
13 right that there are a number of open areas, both
14 to the east, west and north of this project site.
15 And they selected for development an area that had
16 already been substantially altered from the
17 natural condition.

18 And to a great extent they've maintained
19 all their plans for development within an area
20 that has already been developed. So the
21 biological values of that area are pretty
22 marginal.

23 We concluded that the primary uses of
24 the area were by foraging raptors. And even
25 that's rather small amount of use. Burrowing

1 owls, white-tailed kites, northern harriers and
2 possibly loggerhead shrikes can occasionally use
3 the area. But their predominant use would be in
4 the more open areas both east and west of the
5 project.

6 So our concerns were to avoiding impacts
7 much of which the applicant did by siting the
8 project in a location that had already been
9 substantially developed.

10 So our conclusions were that impacts
11 were quite small. There is a small contribution
12 to cumulative impacts in the region simply as a
13 matter of developing a small area of undeveloped
14 habitat.

15 Q Thank you.

16 MS. LUCKHARDT: At this point we would
17 like to move applicant's exhibit 4I on biological
18 resources testimony into the record.

19 HEARING OFFICER WILLIAMS: We'll receive
20 it subject to cross-examination.

21 MS. LUCKHARDT: And the witness is
22 available for cross.

23 HEARING OFFICER WILLIAMS: Staff?

24 MR. RATLIFF: No.

25 HEARING OFFICER WILLIAMS: Go right

1 ahead, Mr. Freedman.

2 CROSS-EXAMINATION

3 BY MR. FREEDMAN:

4 Q Just a couple of questions for you.

5 First of all, are you aware of the letter that was
6 sent from PG&E dealing with the worker parking and
7 staging areas under the -- they were commenting on
8 the biological resources section of the staff
9 assessment. Are you familiar with this concern
10 that was raised?

11 A To tell you the truth I read all the
12 comments that came in. I can't associate that
13 specific letter with that specific issue, but I'm
14 sure I reviewed it.

15 Q Can I refresh --

16 A Please.

17 Q -- your memory with one quote? They
18 request that the worker parking and staging area
19 for the power plant project be moved southerly at
20 least 780 feet from the northern boundary line of
21 the North San Jose Energy Center's property.

22 Do you know whether this request has
23 been accepted or accommodated as part of the plan?

24 A I'll answer that question, but the level
25 of biological sensitivity for any specific

1 locations other than wetlands on the site was low
2 enough that temporary impacts would probably not
3 be sufficient to cause a great deal of concern
4 there.

5 With that I will try to answer your
6 question by asking Todd Stewart to answer.

7 Q I apologize if you're not the correct
8 witness. I wasn't sure exactly where this falls
9 because they reference biological resources
10 section of testimony.

11 A I am the correct witness for biological
12 issues. Whether or not the suggested change was
13 made or not, I can't assure you.

14 MS. LUCKHARDT: We're going to have Todd
15 Stewart up here again -- he's previously been
16 sworn -- to respond to this.

17 MR. STEWART: Now your question is?

18 MR. FREEDMAN: Well, in PG&E's comments
19 that they had submitted on the staff assessment
20 they said that there was a concern about the
21 worker parking and staging areas, saying that it
22 could cause a conflict with the PUC order, and
23 that they requested that they be moved southerly
24 at least 780 feet from the northern boundary line.

25 MR. STEWART: Right, and your question

1 is whether or not Calpine would honor that when
2 PG&E begins its construction activities on the
3 site? The answer to that is yes.

4 MR. FREEDMAN: Sure.

5 MR. STEWART: Yes.

6 MR. FREEDMAN: So Calpine has
7 accommodated that request, then, and will make the
8 change?

9 MR. STEWART: Calpine will accommodate
10 that request or will negotiate with PG&E to reach
11 a mutual agreement between the two companies.

12 MR. FREEDMAN: But has not yet reached
13 an agreement is what I'm hearing?

14 MR. STEWART: Those discussions really
15 haven't taken place --

16 BY MR. FREEDMAN:

17 Q Back to biology -- risk to nesting owls
18 that may be found on the site.

19 A Burrowing owls, yeah.

20 Q In the survey that should be conducted
21 30 days prior to site mobilization, are you aware
22 whether such a survey has already been conducted?

23 A Yeah, we conducted several surveys last
24 year in preparation for this, also surveyed in
25 January. The owls in this area comprise both

1 migratory and a very few resident owls. So they
2 really wouldn't be expected prior to January.

3 But in the latter part of January we did
4 conduct a survey and found no resident owls in the
5 area that would be affected.

6 Q And is there any plan to conduct any
7 further surveys?

8 A Yeah, we have a full-time biological
9 monitor on this project who checks the site over
10 at least weekly to look for any owls moving into
11 the area. And under our permitting conditions,
12 any owl that showed up in the construction area
13 would be treated according to state Fish and Game
14 requirements.

15 Q Okay. There's one other proposed
16 condition I wanted to ask you about. It deals
17 with the requirement for the purchase of 40 acres
18 of butterfly compensation land. What's the status
19 of that?

20 A We've identified a parcel in the Kirby
21 Canyon landfill area, a fairly well established
22 area where butterflies are known to occur. A
23 local butterfly expert has been out there to
24 review the site and make sure that it is suitable
25 habitat. And we're in negotiations to purchase

1 that parcel.

2 Q Okay. And when's the expected
3 consummation date of that transaction?

4 A My last understanding is imminent.

5 MR. FREEDMAN: Okay, thank you, no
6 further questions.

7 HEARING OFFICER WILLIAMS: Mr. Garbett.

8 DIRECT EXAMINATION

9 BY MR. GARBETT:

10 Q Yes, the question is on the raptors on
11 the site, basically you have referred to U.S.
12 Dataport would basically take care of these
13 things, or shield them where this would not be.
14 Was U.S. Dataport just convenient bogeyman along
15 the way to go and protect us from our raptors?

16 A I'm sorry, I don't think I ever said
17 anything about U.S. Dataport, sir.

18 Q Okay. Also, is the loss of feeding
19 grounds for migratory birds, the site was
20 basically planted and used for the feeding of
21 migratory birds. What is going to be the impact
22 of the loss of this site for the feeding grounds,
23 particularly in the event that, for instance, NASA
24 Ames Research Center, which is going to be
25 developed simultaneously?

1 Don Edwards Wildlife Preserve is nearby,
2 and since this was a feeding ground, the migratory
3 path is being interrupted like, for instance, a
4 little bit further north we have Blair Island
5 which used to go to NASA Ames down to Don Edwards,
6 through this feeding grounds on its way south and
7 north, either way.

8 But how much impact is this going to
9 have on the wildlife at Don Edwards Wildlife
10 Preserve not having this what I call a secondary
11 feeding ground?

12 A The AFC and the staff assessment both
13 acknowledge that this project will contribute to
14 the cumulative impacts of all projects that are
15 developing lands in the area.

16 As I mentioned in my preamble, I'm
17 rather pleased to say that this project selected
18 an area that had already been developed and is
19 essentially unavailable. The amount of
20 incremental loss associated with this project
21 alone is pretty small.

22 I can't comment on those other projects,
23 but any project that decided instead to develop an
24 open pasture and undeveloped land would have
25 substantially greater effect.

1 Numerically or quantitatively it would
2 be difficult to even detect the changes that will
3 occur in terms of available foraging habitat due
4 to this project. As you can see, nearly all the
5 site had already been in a condition that
6 preempted substantial wildlife use.

7 Q Thank you.

8 A You're welcome.

9 HEARING OFFICER WILLIAMS: Okay. I just
10 have a sort of housekeeping question here.

11 Mr. Koford talked about several
12 exhibits, attachments or whatever. Are those
13 listed in -- are they something that we should
14 check off here on the applicant's exhibits?

15 MS. LUCKHARDT: Those would have been --

16 HEARING OFFICER WILLIAMS: They were not
17 attached to his testimony.

18 MS. LUCKHARDT: They were not attached
19 to his testimony and they are parts of a whole set
20 of documents. Do you have them -- yeah, the
21 exhibit numbers. We need the -- 2W is the data
22 request set 1. 2U is data request set 1A. 2B --

23 HEARING OFFICER WILLIAMS: 2B is already
24 in.

25 MS. LUCKHARDT: No, 2B is already in.

1 You're talking about the data responses would be
2 2 --

3 HEARING OFFICER WILLIAMS: What about
4 1F, I mean 2 --

5 MS. LUCKHARDT: Yeah, it would be 2D,
6 which is 1F, parts of 2D. 2F, parts of 2F. And
7 then where is the data adequacy response --
8 exhibit 2. Yeah.

9 HEARING OFFICER WILLIAMS: Okay.

10 MS. LUCKHARDT: So it's all parts of
11 data responses, the AFC and supplemental filings.

12 HEARING OFFICER WILLIAMS: The Committee
13 will receive those, also subject to --

14 MS. LUCKHARDT: Yeah, I figure at the
15 end we'll move all of the larger pieces in --

16 HEARING OFFICER WILLIAMS: Okay.

17 MS. LUCKHARDT: -- that will have
18 various subject areas attached --

19 HEARING OFFICER WILLIAMS: Okay, thank
20 you. Staff, are you ready to go?

21 MR. RATLIFF: I believe so, just one
22 second.

23 Yes, we're ready. The staff witness
24 will be Natasha Nelson. She hasn't been sworn.

25 HEARING OFFICER WILLIAMS: Mr. Court

1 Reporter, please.

2 Whereupon,

3 NATASHA NELSON

4 was called as a witness herein, and after first
5 having been duly sworn, was examined and testified
6 as follows:

7 DIRECT EXAMINATION

8 BY MR. RATLIFF:

9 Q Ms. Nelson, did you prepare the portion
10 of exhibit 1 and exhibit 1A that are the staff
11 testimony in this proceeding?

12 A Yes, I did.

13 Q Are those sections true and correct to
14 the best of your knowledge and belief?

15 A Yes.

16 Q Do you have any changes to make in your
17 testimony at this time?

18 A On page 4.2-16, the paragraph under
19 worker parking and staging area. The first line I
20 noted that the worker parking and staging areas
21 would occur on the northwest section of the
22 applicant's 55-acre property.

23 I'd like the words northwest section
24 stricken from my testimony. That was an incorrect
25 assumption on my part.

1 I guess there would be two "the", so and
2 one of the "the"s.

3 Q Does that complete the changes you have
4 to make in your testimony?

5 A Yes.

6 Q Would you summarize your testimony very
7 briefly?

8 A As noted by the applicant's biologist we
9 did have temporary and permanent removal of open
10 space as a result of this project. I, in
11 addition, identified the impact of operations and
12 nitrogen emissions as a cumulative impact and
13 requested 40 acres be put into conservation
14 easement.

15 I found that no impacts or all impacts
16 could be mitigated to less than significant
17 levels.

18 Q Thank you. Does that conclude your
19 summary?

20 A Yes. I'm fine.

21 Q Okay.

22 MR. RATLIFF: The witness is available
23 for cross.

24 MS. LUCKHARDT: No questions.

25 HEARING OFFICER WILLIAMS: Go right

1 ahead.

2 CROSS-EXAMINATION

3 BY MR. FREEDMAN:

4 Q Just a couple of quick questions. You
5 had noted a change in the section on 4.2-16 to
6 remove the word northwest, is that correct?

7 A Yes, I have requested that change.

8 Q Was that in response to discussions with
9 counsel about some of the concerns PG&E has
10 raised?

11 A It's internally inconsistent. I have on
12 page 4.2-21 the parking and equipment staging
13 areas would be located anywhere on the 55-acre
14 parcel. And I cannot find my notes as to why I
15 included northwest section. So I think it was
16 just an error from an earlier draft.

17 Q And are you familiar with the PG&E
18 letter that makes a specific request with respect
19 to these areas?

20 A The PG&E letter had two issues that I
21 tried to incorporate into my testimony. The first
22 was the temporary transmission line, and also this
23 northwest work parking and staging area. I felt I
24 had no changes because it was not important to me,
25 and would not cause a different set of impacts

1 regardless of whether it was north or south, as
2 long as it was on the 55-acre parcel. That is how
3 I structured my testimony.

4 Q So the location of these staging areas
5 is really not relevant to your analysis?

6 A As long as it stays within the 55 acres
7 identified previously as the footprint for this
8 power plant and the worker parking and staging
9 areas.

10 Q Now am I correct in understanding that
11 there is a biological mitigation plan that's
12 referred to that is being conducted?

13 A We required that all of the conditions
14 of certification that the Committee adopts, as
15 well as any permit conditions, be combined
16 together into what's called biological resources
17 mitigation implementation and monitoring plan.

18 At this time I have had a draft
19 submitted. I believe that the AFC had an outline
20 of the BRMIMP, if I can use that acronym.

21 Q BRMIMP.

22 A Yeah.

23 Q So there is a draft that's circulating,
24 is that correct?

25 A Yes, it does come to the Commission and

1 then we would request agency comments if they have
2 permits as part of this project.

3 Q And what's the timeline for reviewing
4 the adequacy of this plan?

5 A The applicant has 30 days prior to
6 construction that we need to have it, and within
7 15 days we give a response as to whether it's
8 adequate and we needed a change. So it could be
9 up to two days before construction when the final
10 one that was going to be used.

11 I will note that this is a living
12 document, so it's something changed if something
13 is not working well. For instance, a sampling
14 program, and we weren't getting the results we
15 wanted, they are allowed to change the BRMIMP. It
16 does have a living aspect to it.

17 Q But is there an initial adequacy
18 determination that must be performed?

19 A Yes, the adequacy would be that it
20 includes all the -- the BRMIMP condition, itself,
21 has several numeric items that must be fulfilled.
22 And then, as noted, if they do obtain a permit,
23 the terms and conditions of the permit must be
24 incorporated.

25 So we would be cross-checking very

1 closely and would not allow it to be data adequate
2 unless those items were all present. That would
3 be the data adequacy level.

4 The second level would be is it working.

5 Q And what determinations need to be
6 reached with respect to this BRMIMP prior to the
7 Commission approving the license to begin
8 construction?

9 A Usually the Committee and the Presiding
10 Member do make their proposed decision, and then
11 they do adopt the Commission decision before we
12 have a final BRMIMP. It's really the compliance
13 project manager who takes over after that that
14 would insure the BRMIMP's turned in and the
15 compliance project manager is the one who issues
16 the letter that states you are now able to begin
17 construction on the site and linears.

18 Q So it doesn't need to be complete before
19 the permit's issued, only as part of the
20 compliance monitoring process?

21 A Correct.

22 Q Okay, thank you.

23 MR. FREEDMAN: I have no further
24 questions.

25 HEARING OFFICER WILLIAMS: Mr. Garbett.

CROSS-EXAMINATION

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BY MR. GARBETT:

Q The question I have is in regards to raptors, if, for instance, based upon the PG&E letter and so forth, in order to get power into the area for the temporary facility to go and avoid an EIR or to avoid having the Commission make an overriding consideration over the PUC's general order 138A, if for instance the applicant lowered the voltage on these lines, make them a little bit fatter and so forth, and maybe a little bit shorter, down to 50 kV to go and avoid all this, to basically just be able to do things with the City of San Jose and PG&E by itself, without getting the PUC involved, would this affect the amount of raptors that might be inclined to be in and out of this area?

MR. RATLIFF: I object on the grounds that I think the question is unclear. If the witness thinks she understands the question, it's fine with me if she answers it. I couldn't understand it.

HEARING OFFICER WILLIAMS: Mr. Garbett, could you break that question down maybe a little bit --

1 MR. GARBETT: Okay.

2 HEARING OFFICER WILLIAMS: -- to sub-
3 parts --

4 BY MR. GARBETT:

5 Q If you got fatter wires on shorter poles
6 will it affect the number of raptors in the area?

7 A The real concern with raptors is
8 actually only the spacing of the phase-to-phase or
9 the hot wires, and the phase-to-ground, or any
10 grounding mechanism, such as if the pole was
11 grounded.

12 So, it would not matter the type of
13 wire. They don't actually -- thicker wire would
14 be better for other birds that may have less
15 visual acuity. But raptors are very keen and
16 would be able to avoid a thicker wire.

17 MR. GARBETT: Thank you.

18 HEARING OFFICER WILLIAMS: Okay, seeing
19 nothing further, we'll accept staff's assessment
20 sections topic in this area and the supplement
21 testimony.

22 Did you have anything further?

23 MS. LUCKHARDT: Ready to go to land use.

24 HEARING OFFICER WILLIAMS: This PG&E
25 letter, is that part of the record?

1 MR. RATLIFF: I believe it is. I've
2 seen it at some point in the past. I thought it
3 was a docketed copy, but you'd have to ask the
4 project manager.

5 MR. WORL: It has been docketed.

6 HEARING OFFICER WILLIAMS: Okay. Have
7 we received it in evidence at all?

8 MR. RATLIFF: No, it was just
9 correspondence from PG&E commenting on the aspects
10 of the final staff assessment.

11 HEARING OFFICER WILLIAMS: Okay. I
12 think it's the Committee's intent that we receive
13 that, and we'll mark it 1E. And what's the date
14 of that letter?

15 MR. RATLIFF: I believe it was January
16 11th, but --

17 MR. FREEDMAN: January 11th.

18 HEARING OFFICER WILLIAMS: Okay. So,
19 we're going to receive that as an exhibit, as
20 well.

21 With that I think we can close the topic
22 of biology.

23 Let's go off the record.

24 (Off the record.)

25 HEARING OFFICER WILLIAMS: Are you

1 ready?

2 MS. LUCKHARDT: Yes.

3 HEARING OFFICER WILLIAMS: Okay, let's
4 go on to land use --

5 MS. LUCKHARDT: In the area of land use
6 the applicant would call -- go ahead.

7 HEARING OFFICER WILLIAMS: I was just
8 going to say that biology is closed and we're
9 moving into land use.

10 MS. LUCKHARDT: Great. The applicant
11 calls Valerie Young and she needs to be sworn.
12 Whereupon,

13 VALERIE YOUNG
14 was called as a witness herein, and after first
15 having been duly sworn, was examined and testified
16 as follows:

17 DIRECT EXAMINATION

18 BY MS. LUCKHARDT:

19 Q Do you have a copy of applicant's
20 testimony on land use?

21 A Yes, I do.

22 Q And was this testimony prepared by you
23 or at your direction?

24 A Yes, it was.

25 Q And does this testimony include a

1 description of your qualifications and was your
2 r, sum, filed with applicant's prehearing
3 conference statement?

4 A Yes, it was.

5 Q And do you have any corrections or
6 clarifications to make to your testimony?

7 A Yes, I have one clarification and one
8 additional -- my testimony on page 29 references
9 three City of San Jose approval documents for the
10 zoning. This is the notice of determination, and
11 ordinance number 26579 and resolution number
12 70844.

13 My copy of the testimony did not have
14 the resolution or the ordinance included with it.
15 We just wanted to make sure that you have those.
16 The notice of determination was in there, but not
17 those copies.

18 And then I'd also like to move exhibits
19 2Y, 2Z and 2AA as part of my testimony.

20 Q And those are all documents that deal
21 with annexation of the property, itself, by the
22 City of San Jose, the planned development zoning
23 application, the final actions of which you just
24 referred to, and a letter from the City of San
25 Jose regarding the status of the project?

1 A That's correct.

2 MS. LUCKHARDT: These have all been
3 previously filed and docketed, I believe, in this
4 proceeding.

5 MR. GARBETT: I'd like to object to
6 those. Those are not public documents. They may
7 have been filed with the Commission. The
8 intervenors have not received a copy, and the City
9 has not given out copies of these except very
10 reluctantly; then we've only received partial
11 copies. The documentation is not of the City
12 files as to pertinent matters such as legal
13 agreements that are actually part of the
14 documents. They're conditional ordinances.

15 The final ordinances was not passed
16 until February 26th for the final readings. And
17 because of that, these documents were not legal,
18 even though they were represented to be so at the
19 hearing you had on February 24th.

20 MS. LUCKHARDT: What we're referring to
21 are documents that have been either issued by or
22 filed with the City of San Jose. We're talking
23 about the actual application, a final annexation
24 of the property by the City of San Jose. We're
25 talking about a letter that came in to the

1 Commission at the request of Commission Staff in
2 order to grant data adequacy, I believe, filed on
3 August 15th.

4 These are all documents that are public
5 that have been available --

6 HEARING OFFICER WILLIAMS: Could you
7 give Mr. Garbett copies? Do you have any extra
8 copies of those?

9 MR. GARBETT: I am going to object to
10 those because I have been to the City of San Jose
11 attempting to get them under the Public Records
12 Act or any way I could get them.

13 The application from the City is not --
14 or from the applicant is not there. I finally got
15 to see the file after all the City hearings were
16 completed. I seen their file. They had duplicate
17 documents here and there. They had different
18 dates, different signatures, different text.

19 Their computer records were different
20 from their written records. There is a --

21 HEARING OFFICER WILLIAMS: I understand.

22 MS. LUCKHARDT: All of that may or may
23 not be true --

24 HEARING OFFICER WILLIAMS: I just want
25 to get -- I want to make sure we're all talking

1 about the same sheet, so let's get a copy of what
2 we're talking about and maybe we can --

3 MR. GARBETT: These are the same ones
4 we're talking about, the same things I got. I
5 have a little bit more complete version than what
6 they just handed me on some of these.

7 MS. LUCKHARDT: Oh, okay, all right.

8 MR. GARBETT: The most specific one that
9 I object to is --

10 HEARING OFFICER WILLIAMS: Let's take
11 them one by one.

12 MR. GARBETT: -- ordinance 26579.

13 HEARING OFFICER WILLIAMS: Let's take
14 them one by one. Okay, now, what's the first
15 document, applicant, that you're offering? We're
16 just going to go down the list one by one.

17 MS. LUCKHARDT: Okay. 2Y is a copy of
18 the annexation paperwork. And I think I only have
19 one copy of that.

20 HEARING OFFICER WILLIAMS: How many
21 pages is it?

22 MS. LUCKHARDT: You know, if we don't
23 need it -- we were just putting them into the
24 record such that we would have the final approval
25 documents of items such as the adoption of the

1 annexation of the property and final zoning
2 actions.

3 And to fill out the record we thought
4 we'd also submit the application. But, I don't
5 know necessarily that we absolutely need it if
6 it's going to cause that much of a problem.

7 MR. RATLIFF: Are these documents that
8 just go to the fact that the City of San Jose has
9 conformed --

10 MS. LUCKHARDT: Right.

11 MR. RATLIFF: -- its general plan and
12 its zoning --

13 MS. LUCKHARDT: The City of San Jose has
14 annexed the property and has completed its zoning
15 review.

16 MR. RATLIFF: Well, if the Committee
17 wants those documents we can docket them. If they
18 don't want the documents, we can have our
19 witnesses testify to that effect.

20 MS. LUCKHARDT: Yeah.

21 MR. RATLIFF: We can do it either way.

22 HEARING OFFICER WILLIAMS: Mr. Garbett,
23 do you have any problem with the stipulation that
24 the City has annexed this property and --

25 MR. GARBETT: Yes, I have objections to

1 that. They have not done so in a legal manner.
2 The documents they just gave me here, as the
3 copies they're entering in the record, are
4 unsigned copies.

5 I do have what they call signed copies
6 here, but they're rubber-stamped. The particular
7 one that I object most highly to is the zoning
8 ordinance as such, the 26579.

9 And specifically it says here, whereas
10 prior to February 19, 2002, the applicant has
11 agreed and shall have executed hold harmless
12 release and indemnity agreement -- city attorney
13 and so forth.

14 In this case that agreement is not
15 available at the City. It is not available even
16 today at the City Attorney's Office. And for that
17 reason, without that hold harmless agreement, this
18 ordinance is void on its face, since it was not
19 executed prior to this.

20 This ordinance also not only had to go
21 forward on February 19th and be approved, but be
22 approved on the second reading. And it was
23 allegedly approved on the second reading.

24 However, the ordinance was not present
25 to be read at the Council. The Ralph M Brown Act

1 was violated there. The particular planning
2 director's hearing after that where the project
3 was allegedly approved, they did not have any of
4 the documents available then.

5 At the Planning Commissioner's hearing
6 prior to the City Council hearing, the documents
7 were not available then.

8 So basically what has happened is that
9 at each and every stage of the City's process, the
10 Brown Act was violated. And the particular final
11 ordinance, since you do not have this hold
12 harmless agreement available by Calpine, signed by
13 the City, it is invalid on its face.

14 It is also an urgency ordinance, and the
15 urgency they cite is the Governor's executive
16 order that expired last year. And for these
17 reasons it's not an urgency ordinance at least
18 because it is based upon an expired order.

19 And for that reason it would not even go
20 into effect until January 1st the coming year.

21 MS. LUCKHARDT: I think actually --

22 MR. GARBETT: -- it's effectively moot.

23 MS. LUCKHARDT: -- what may be best is
24 if I go ahead and have the witness testify and
25 talk to some of these issues, and then we

1 determine admissibility of some of the documents
2 after that.

3 HEARING OFFICER WILLIAMS: Okay, let's
4 do that.

5 MR. RATLIFF: Could I point out we also
6 have representatives from the City of San Jose
7 here who can also speak to these issues, if
8 necessary.

9 HEARING OFFICER WILLIAMS: Oh, good.
10 Okay, let's do that.

11 MS. LUCKHARDT: Okay. I have just a
12 couple of questions.

13 BY MS. LUCKHARDT:

14 Q Maybe the best thing for you to do is
15 to, if you could, address some of the issues just
16 presented by Mr. Garbett, as well as you
17 understand them, just to clarify those while
18 they're fresh in your mind.

19 A Okay. Just by way of background, my
20 role in the project is to be responsible for
21 processing all of the land use entitlements for
22 the project through the City of San Jose.

23 The Los Esteros project is phase one of
24 the U.S. Dataport project. You probably heard
25 that. Which is a 2.227 million square foot

1 internet datacenter.

2 The Los Esteros project will provide
3 electric power for reliable operation of that
4 datacenter when it becomes operational.

5 The datacenter project was originally
6 approved by the City of San Jose in April of 2001
7 under a planned development zoning. And that
8 facility had a 49 megawatt energy facility and 89
9 backup diesel generators to provide emergency
10 power during periods of possible interruption of
11 electrical service.

12 In its approval of the original zoning
13 the Council directed that the diesel generators be
14 replaced with an environmentally superior
15 technology, and the Los Esteros project is in
16 direct response to that condition of approval.

17 A revised PD zoning was required for the
18 revised project. That zoning was approved by the
19 City Council on February 19th of this year under
20 an urgency ordinance which does not require a
21 second reading of the ordinance, but which becomes
22 effective on the day of the reading of the
23 ordinance. So it was effective on February 19th.

24 And that is the ordinance number 26579
25 that Mr. Garbett is referring to. Zonings are

1 adopted by ordinance in the City of San Jose.

2 At that time findings of consistency
3 with the City's general plan and other City policy
4 documents were set forth in the staff report and
5 incorporated into the approval motion.

6 In addition to the ordinance, the City
7 Council also adopted resolution number 70844,
8 which is consistent with City practice, and made
9 its CEQA findings in that resolution in compliance
10 with the California Environmental Quality Act and
11 the City's use of the CEC Staff's assessment for
12 CEQA purposes.

13 In that resolution the City relies on
14 the already certified Dataport EIR from last year,
15 as well as the staff assessment for the two parts
16 of the project.

17 Subsequent to the zoning approval the
18 City issued a planned development permit on
19 February 20th for grading and site preparation and
20 for construction of the private road to serve the
21 facility.

22 Under the City's municipal code the PD
23 permit effectuates the zoning. So the zoning has
24 been effectuated upon issuance of the PD permit.

25 I hope that answers the entitlement

1 questions.

2 Q Okay, and maybe so you can just clarify
3 it, the planned development zoning application
4 that was filed, how did that treat Dataport and
5 the power project?

6 A I don't know what you mean by how did it
7 treat.

8 Q Were they one application or were they
9 two applications?

10 A They were one single application. The
11 energy facility has always been a component of the
12 datacenter.

13 Q And just to be crystal clear, the City
14 did act on all the applications that were before
15 it?

16 A That's correct.

17 Q It has completed its zoning review?

18 A That's correct.

19 Q And how does the City view the
20 interrelationship between the datacenter and the
21 Los Esteros Critical Energy Facility?

22 A The energy facility and the datacenter
23 are two components of the same project in the
24 City's perspective and in all of the application
25 materials and in their own staff reports. The

1 energy facility has always been and is now
2 continuing to be intended to be the energy source
3 for the datacenter.

4 It meets the City's sustainability
5 policies, and the City looks to approve projects
6 that have their own energy capabilities,
7 particularly facilities that are high energy
8 users.

9 Q And then one last question. Earlier
10 during the day there were some questions about
11 restrictions within the City of San Jose
12 ordinances regarding construction. Can you speak
13 to that?

14 A I believe the question was on whether or
15 not there is a limitation on construction hours.
16 The City's municipal code, section 20.100.450
17 limits hours of construction only when that
18 construction activity is within 500 feet of a
19 residential unit. And the hours of construction,
20 if you are within that distance, is 7:00 a.m. to
21 7:00 p.m. Monday through Friday.

22 Q Does that ordinance apply, or that
23 municipal code section apply to this project?

24 A To my knowledge we do not have a
25 residential unit within 500 feet of the project.

1 So it would not apply.

2 Q Okay, thank you.

3 MS. LUCKHARDT: That completes our
4 direct and the witness is available for cross-
5 examination.

6 HEARING OFFICER WILLIAMS: Anything,
7 staff?

8 MR. RATLIFF: No.

9 CROSS-EXAMINATION

10 BY MR. FREEDMAN:

11 Q Just one quick question on the direct
12 testimony that you just gave. You said the City
13 of San Jose approved Los Esteros as part of a
14 single application that involved both Dataport and
15 Los Esteros in the same parcel, is that correct?

16 A There are several different parcels, but
17 it's all one zoning application.

18 Q One zoning application, so the proposal
19 was not for a stand-alone merchant energy
20 generator, was it?

21 A That's correct, it was not.

22 Q So when San Jose made that approval it
23 was doing so with the understanding that Los
24 Esteros would be used as mitigation for the
25 Dataport facility, and they would be sort of one

1 project taken together, is that correct?

2 A That's correct.

3 Q Thank you.

4 MR. FREEDMAN: No further questions.

5 HEARING OFFICER WILLIAMS: Mr. Garbett.

6 CROSS-EXAMINATION

7 BY MR. GARBETT:

8 Q Isn't it true that there was originally
9 a planned development zoning for the Dataport
10 project approved, and then you had a second one,
11 which was just most recently, allegedly approved,
12 so you actually have two PDs over the same
13 essential area?

14 A There was an approved planned
15 development zoning in April of last year. The
16 City's approval of the recent zoning supersedes
17 and takes the place of that other zoning.

18 Q It's a funny thing but they're both
19 still standing with the City, and they did not
20 rescind or reject the previous one, so you
21 basically have two projects on the same area. Can
22 you explain --

23 HEARING OFFICER WILLIAMS: Mr. Garbett,
24 you're starting to testify again.

25 MR. GARBETT: I know.

1 HEARING OFFICER WILLIAMS: It's not the
2 time for that. You can ask questions.

3 MR. GARBETT: Yes.

4 BY MR. GARBETT:

5 Q Is the Silker property that is occupied
6 within 500 feet?

7 A The residence is not within 500 feet.

8 Q Who is the applicant that was approved
9 in the application for the particular PD
10 presently? Who was the name of the applicants
11 there, and was the City of San Jose one of those
12 applicants for the area, also?

13 A There is City-owned property that is
14 part of the zoning, and the applicants for the
15 zoning were Calpine, the Silkers, who own the
16 other private piece of property, and the City for
17 the buffer land, yes.

18 Q I understand the application for the CEC
19 is for Calpine C*Power. Is that, indeed, a
20 different corporate entity?

21 MS. LUCKHARDT: I'm questioning the
22 relevance of this question.

23 MR. GARBETT: Relevance is to pierce --

24 MS. LUCKHARDT: Typically --

25 MR. GARBETT: -- the corporate veil to

1 find out who the true applicants are in this
2 project both before the Commission and before the
3 City.

4 MS. LUCKHARDT: These projects are
5 typically, they create LLCs for every individual
6 project. I assume over time that Calpine will do
7 the same, or C* will do the same for this
8 particular project, so this isn't anything that's
9 unusual and different from any other project
10 before the Energy Commission.

11 HEARING OFFICER WILLIAMS: Did you have
12 some questions regarding the initial PD zoning?
13 Did you want to follow up on that?

14 MR. GARBETT: The one a year ago April.

15 HEARING OFFICER WILLIAMS: Yes.

16 MR. GARBETT: Just the fact that I
17 believe that was a stalking horse basically with
18 U.S. Dataport. The reason why I say it's a
19 stalking horse -- and I'm trying not to avoid to
20 testify -- is the use of U.S. Dataport as a
21 stalking horse --

22 HEARING OFFICER WILLIAMS: Mr. Garbett,
23 why don't you ask the witness who is here. If you
24 formulate a question --

25 MR. GARBETT: Okay, I think --

1 HEARING OFFICER WILLIAMS: -- for her,
2 it might --

3 MR. GARBETT: -- I need to give a
4 background on it, which my question --

5 HEARING OFFICER WILLIAMS: She might
6 know it. Why don't you give her a shot.

7 BY MR. GARBETT:

8 Q So the question is since Dataport was
9 used in a Public Utilities Commission application
10 to change the EIR after it was drafted, before the
11 final version came out, is U.S. Dataport just a
12 stalking horse to get this energy project approved
13 now?

14 A No.

15 Q Okay. At the February 20th hearings
16 before the City you basically stated to the
17 planning directors representatives at this hearing
18 that you were not going to use any permits
19 whatsoever from the City. And I had brought up
20 the issue at that hearing --

21 MS. LUCKHARDT: This is beyond the scope
22 of the testimony here. We're talking about the
23 hearing before the City of San Jose.

24 MR. GARBETT: Well, she cited the
25 February 20th hearing specifically.

1 MS. LUCKHARDT: Simply to indicate that
2 the approvals had been granted.

3 MR. GARBETT: That is correct, and
4 that's what I'm asking about, is that approval.
5 She basically said that she had received some
6 permits for construction. At that particular
7 hearing, prior to the hearing I had checked to see
8 if there had been any requests for any permits
9 filed. There were no requests. And I brought
10 this up at the hearing.

11 Now, she says she did not need any
12 permits. That she was going to use the --

13 MS. LUCKHARDT: Now, I object, you're
14 testifying. I'd like to have a question that I
15 can either respond --

16 BY MR. GARBETT:

17 Q The question is, when there were no
18 permits at the date of that hearing why does she
19 say there were permits approved as of that date.

20 A I don't know that I understand your
21 question.

22 Q Okay.

23 A What permits are you referring to?

24 MR. GARBETT: How should I ask the court
25 reporter to read this back about five minutes ago?

1 (Off-the-record discussion.)

2 HEARING OFFICER WILLIAMS: No, no we
3 don't want to do that. Mr. Garbett, can you re-
4 ask the question?

5 MR. GARBETT: Okay.

6 BY MR. GARBETT:

7 Q You stated that on February 20th the
8 City approved your grading permits, among others.
9 But on February 20th, --

10 HEARING OFFICER WILLIAMS: Let's stop
11 there. Is that --

12 MR. GARBETT: -- you had no hearing --

13 MS. YOUNG: No, that's not correct.

14 HEARING OFFICER WILLIAMS: Okay, why
15 don't --

16 MS. YOUNG: The City did not approve a
17 grading permit on February 20th. The City
18 approved a planned development permit. And also a
19 tree removal permit.

20 Those applications were filed with the
21 City of San Jose, and they were scheduled, and
22 they were noticed, and they were heard at the
23 directors' hearing on February 20th.

24 MR. GARBETT: Could we take a brief
25 break and I'll bring the particular agendas in

1 that these hearings were held upon to cite those
2 specific issues that they were having the hearing
3 on, which is different than what has just been
4 testified to?

5 MS. LUCKHARDT: We're not here to
6 testify to what happened, whether the City of San
7 Jose had appropriate agendas for their meetings.
8 And so I think what he's asking is beyond the
9 scope of what we're testifying to and what's in
10 front of this Committee here today.

11 MR. GARBETT: I believe it goes to the
12 credibility of the witness and the testimony given
13 so far.

14 HEARING OFFICER WILLIAMS: Well, you're
15 free to bring those in at some point. You may
16 enter those exhibits if --

17 MR. GARBETT: Yes.

18 BY MR. GARBETT:

19 Q With those exhibits there, do you have
20 the hold harmless release indemnity agreement --
21 acceptable City Attorney filed prior to February
22 19th, do you have a copy of that which should be
23 attached to this ordinance 26579?

24 A I do have a copy of the indemnity and
25 release agreement between the City of San Jose and

1 Calpine Corporation.

2 Q Could you make a copy of that available?

3 A I'd be glad to.

4 Q Is there any reason why the City does
5 not have a copy of that?

6 A I don't know.

7 Q With the land use issues that you have
8 presented you're basically citing the fact that
9 you want to do a Dataport project as well as an
10 energy facility. Planning directors hearing on
11 February 20th, you testified there that --

12 MS. LUCKHARDT: She's not testifying
13 here about what may or may not have been said
14 during that hearing.

15 MR. GARBETT: Okay, so basically her
16 testimony there you're not going to comment on
17 there, or testimony that she has said here that I
18 have brought up again?

19 MS. LUCKHARDT: We're --

20 MR. GARBETT: So basically I --

21 MS. LUCKHARDT: If it's testimony that
22 she has presented here it's fair game for
23 questions. If you're --

24 MR. GARBETT: Well, I'm just going to
25 move to strike all her testimony and all the

1 documents she's submitting. Thank you.

2 MS. LUCKHARDT: And we would, of course,
3 object to that.

4 HEARING OFFICER WILLIAMS: On what
5 grounds, Mr. Garbett?

6 MR. GARBETT: On grounds that she's
7 contradicted herself in her testimony. She has
8 introduced documents that are in a form different
9 than what is filed at the City. She gave me the
10 copies of the documents she filed. They are
11 unsigned. The ones I have from the City are
12 signed, albeit with a rubber stamp, they are
13 signed copies that I have in my possession --

14 MS. LUCKHARDT: I'm happy that Mr.
15 Garbett --

16 MR. GARBETT: -- which are different
17 from the ones she's attempting to file.

18 MS. LUCKHARDT: -- has a better and more
19 current copy than we happen to have when we filed
20 our testimony.

21 HEARING OFFICER WILLIAMS: Yes, unless
22 you can show a material deviation between the two
23 documents, the Committee is inclined to receive
24 the documents.

25 If it's just a matter of signature,

1 they're public records; we don't feel that's a
2 problem.

3 MR. GARBETT: Under evidence code
4 sections 352, 353 I suggest the authentication of
5 the signatures be checked. Thank you.

6 MS. LUCKHARDT: We can submit signed
7 copies.

8 HEARING OFFICER WILLIAMS: All right.
9 Anything further? Okay.

10 CROSS-EXAMINATION

11 BY MS. SCHILBERG:

12 Q You mentioned the ordinance that deals
13 with construction activity outside of certain
14 hours if there's residential nearby.

15 Is there, in the same ordinance or in a
16 separate ordinance, anything that deals with
17 traffic associated with construction activity? In
18 other words, is there any ordinance that deals
19 with the fact that there may be dump trucks or
20 something passing through areas of the City?

21 MS. LUCKHARDT: If you know the answer
22 you can --

23 MS. YOUNG: I'll give you my best
24 answer. What I was quoting from was the municipal
25 code. To my knowledge the municipal code does not

1 have what I think you're referring to might be, I
2 guess in my mind be considered to be mitigation
3 for truck traffic, or maybe you're referring to
4 hours of truck traffic?

5 BY MS. SCHILBERG:

6 Q Right, that was --

7 A That I don't know the answer to, if the
8 code specifies hours for truck traffic. The City
9 does identify streets that are suitable for truck
10 traffic. Whether or not they restrict the hours
11 of trucks on those streets, I do not know.

12 Q Okay.

13 MS. LUCKHARDT: I have one question in
14 redirect if everybody's finished.

15 REDIRECT EXAMINATION

16 BY MS. LUCKHARDT:

17 Q Just in response to one question from
18 the Coalition, the City's approval of the planned
19 development zoning, does that require that any one
20 project or combination of projects be developed
21 together?

22 A No. The zoning is approved as the
23 zoning that entitles that land to have certain
24 uses on it. How the zoning is effectuated is by
25 the issuance of planned development permits.

1 In this case, and as is the case in many
2 City-approved projects, and I can give you some
3 examples, where you have different phases of a
4 project or different components of a project, what
5 typically is done is separate planned development
6 permits for separate pieces of projects.

7 Large developments, for example, that
8 are phased in over time may get separate planned
9 development permits for the phases as they are
10 ready to come to construction.

11 So while the zoning certainly approves
12 the combined land uses as they are shown, the PD
13 permit is what effectuates the components of the
14 zoning.

15 MS. LUCKHARDT: Thank you, that's all I
16 have.

17 HEARING OFFICER WILLIAMS: Any questions
18 in response?

19 MR. FREEDMAN: Just a followup on that
20 last statement.

21 RE CROSS-EXAMINATION

22 BY MR. FREEDMAN:

23 Q You said that in some cases projects get
24 phased permits, is that correct? Could you repeat
25 that?

1 A Projects -- the way zoning is
2 effectuated in the City of San Jose is you are
3 given your zoning approval by ordinance. And then
4 you are required to obtain what's called a planned
5 development permit in order to effectuate the
6 zoning.

7 And in cases where you have a large
8 project, for example, and I've seen numerous
9 occasions of this, you can get -- I don't know
10 that I would call it phased permits -- you get
11 individual planned development permits for the
12 different phases or components of the project.

13 Q And was that type of phased permitting
14 sought in this case?

15 A I don't know that it was not being
16 sought or that it is being sought. We have
17 applied for and received a PD permit from the City
18 for construction of the access road and for the
19 site grading.

20 So those are related -- that PD permit
21 is actually related to both the Los Esteros
22 project and the Dataport project. It effectuates
23 the zoning.

24 Q But just to clarify, the application for
25 the permit and the approval for the permit was

1 premised on the understanding that there would
2 ultimately be both Dataport and Los Esteros on the
3 same parcel?

4 MS. LUCKHARDT: That's beyond the scope
5 of the redirect.

6 HEARING OFFICER WILLIAMS: If you know
7 the answer.

8 MS. YOUNG: The access road is approved
9 by the City as an access road to both the Dataport
10 and the Los Esteros site. It is one and the same
11 access road.

12 BY MR. FREEDMAN:

13 Q I guess I meant the larger zoning
14 approval also that was referenced in the redirect
15 by your counsel.

16 A I'm not sure what the question is then.
17 About the phasing --

18 Q Well, I guess the question was whether
19 the decision to grant the zoning approval was
20 premised on the understanding that there would be
21 both Dataport and Los Esteros operating on the
22 same parcel of land.

23 A Yes, there are three parcels associated
24 with the project. But the zoning in both the
25 ordinance and the resolution speak to the issue of

1 the Dataport and the Los Esteros project being one
2 of the same project.

3 MR. FREEDMAN: Okay, thank you.

4 HEARING OFFICER WILLIAMS: Mr. Garbett.

5 MR. GARBETT: Yes.

6 RE-CROSS-EXAMINATION

7 BY MR. GARBETT:

8 Q You basically have had two projects
9 there, and the first project, which --

10 HEARING OFFICER WILLIAMS: Mr. Garbett,
11 you're testifying again. If you could ask her a
12 question about what you want to inquire.

13 BY MR. GARBETT:

14 Q Between the two planned developments
15 that you made with the City there was a general
16 plan change. This was a general plan change as to
17 the master plan.

18 MS. LUCKHARDT: It's clearly beyond the
19 scope of the redirect.

20 BY MR. GARBETT:

21 Q That master plan does not have the
22 current PD in it, is that correct?

23 HEARING OFFICER WILLIAMS: Do you
24 understand the question?

25 MS. YOUNG: No.

1 HEARING OFFICER WILLIAMS: Okay. Can
2 you rephrase the question, Mr. Garbett.

3 BY MR. GARBETT:

4 Q Is your project in compliance with the
5 Alviso master plan?

6 A Yes.

7 Q Is your plan in conformance with the
8 change to the Alviso master plan?

9 MS. LUCKHARDT: Objection, we're beyond
10 the scope of the redirect.

11 HEARING OFFICER WILLIAMS: I'll grant
12 him some leeway.

13 MS. LUCKHARDT: Okay.

14 MS. YOUNG: I don't know what change
15 you're referring to.

16 BY MR. GARBETT:

17 Q Let me give you a number.

18 HEARING OFFICER WILLIAMS: Mr. Garbett,
19 I have a proposal. If you can't find it readily
20 we can move on to staff, and come back to it.
21 Staff might very well have the answers you're
22 looking for in this area.

23 MR. GARBETT: Okay. If I could take a
24 break to get a couple pieces of paper while staff
25 is there. I have no questions for staff.

1 HEARING OFFICER WILLIAMS: Okay.

2 MR. GARBETT: And then come back.

3 HEARING OFFICER WILLIAMS: Yeah, let's
4 do that. Staff.

5 MR. RATLIFF: Yes. The staff witness is
6 Negar Vahidi, is that correct?

7 MS. VAHIDI: Yes.

8 MR. RATLIFF: You need to be sworn.

9 HEARING OFFICER WILLIAMS: Mr. Court
10 Reporter.

11 Whereupon,

12 NEGAR VAHIDI

13 was called as a witness herein, and after first
14 having been duly sworn, was examined and testified
15 as follows:

16 DIRECT EXAMINATION

17 BY MR. RATLIFF:

18 Q Ms. Vahidi, did you prepare the portions
19 of exhibit 1 and 1A which are the staff testimony
20 in this case for land use?

21 A Yes, I did.

22 Q Is it true and correct to the best of
23 your knowledge?

24 A Yes, it is.

25 Q Do you have any corrections at all to

1 make to it?

2 A No, I don't.

3 Q Can you summarize it briefly?

4 A Sure. Not to reiterate a lot of the
5 content of the staff assessment that was brought
6 up by the applicant, I'll explain the general
7 approach and who we spoke with.

8 The focus of the land use staff
9 assessment was to conduct an environmental
10 analysis of the project based on CEQA guidelines
11 and take a look at any land use incompatibilities
12 of the proposed project with existing or planned
13 surrounding uses. And any potential conflict with
14 applicable laws, ordinances, regulations and
15 standards related to land use of the appropriate
16 jurisdictions.

17 And we did not discover any significant
18 impacts per CEQA. And that's basically the short
19 of it.

20 Q One additional question. Did the City
21 of San Jose inform its zoning and general plan
22 requirements to the project and to Dataport?

23 A Yes, they did -- I'm not sure I
24 understand your question exactly.

25 Q There's been discussion today about

1 whether the City actually took action on the PD
2 zone approval --

3 A Yes, they did.

4 Q They did?

5 A They did.

6 Q Thank you.

7 MR. RATLIFF: I have no further
8 questions.

9 BY MR. RATLIFF:

10 Q Does that conclude your summary?

11 A Yes.

12 MR. RATLIFF: Okay, the witness is
13 available.

14 HEARING OFFICER WILLIAMS: Staff, I
15 believe you mentioned that there was someone here
16 from the City?

17 MR. RATLIFF: Yes.

18 HEARING OFFICER WILLIAMS: And who would
19 that be? Is it somebody that you would be
20 sponsoring, or would --

21 MR. RATLIFF: Well, actually, no. The
22 City speaks for itself. Mr. Eastwood and Ms. Lee,
23 I believe are both here. And both, I think, are
24 familiar with the project. I don't know if they
25 came expecting to speak, but I would think that

1 they're able to talk about some of these issues.

2 HEARING OFFICER WILLIAMS: Could you
3 come forward, please, the City of San Jose folks,
4 and introduce yourselves.

5 MR. EASTWOOD: Rob Eastwood, City of San
6 Jose.

7 MS. LEE: Elena Lee, City of San Jose.

8 HEARING OFFICER WILLIAMS: Are you both
9 from the planning office?

10 MR. EASTWOOD: Yes.

11 HEARING OFFICER WILLIAMS: Are you
12 familiar with the project?

13 MR. EASTWOOD: Very familiar.

14 HEARING OFFICER WILLIAMS: Okay. Are
15 you prepared to testify?

16 MR. EASTWOOD: Can testify; we can
17 answer any questions you might have.

18 HEARING OFFICER WILLIAMS: Okay. Then
19 my proposal is that when Mr. Garbett comes back in
20 is to subject you to some withering questions --

21 (Laughter.)

22 MR. EASTWOOD: We have a lot of
23 experience in that --

24 HEARING OFFICER WILLIAMS: Okay, that's
25 good. So, we'll do that. Okay, thank you. So,

1 he's left the room but we'll do that.

2 Cross-examination of --

3 MR. RATLIFF: Mr. Williams, I would hope
4 that perhaps we could make sure that any pattern
5 of questions that we're going to go through are
6 actually focused on issues that are germane to our
7 proceeding.

8 HEARING OFFICER WILLIAMS: Yes.

9 MR. RATLIFF: I'm a little bit afraid
10 that they may have to do with grievances or
11 proceedings --

12 HEARING OFFICER WILLIAMS: Yeah,
13 confined to the City's action on land use permits.

14 MR. RATLIFF: Yeah, the City has taken
15 an action --

16 HEARING OFFICER WILLIAMS: Right.

17 MR. RATLIFF: -- as we understand it.

18 HEARING OFFICER WILLIAMS: Right.

19 MR. RATLIFF: We've seen evidence to
20 that effect in the forms of what's been presented
21 today. I think Mr. Garbett is suggesting that
22 that action is in some way illegal.

23 HEARING OFFICER WILLIAMS: Right.

24 MR. RATLIFF: I don't think we can
25 resolve that here. That can only be resolved in a

1 court.

2 HEARING OFFICER WILLIAMS: Right.

3 MR. RATLIFF: So, okay.

4 HEARING OFFICER WILLIAMS: Cross-
5 examination?

6 MR. FREEDMAN: We have no questions.

7 HEARING OFFICER WILLIAMS: Okay. Do we
8 have the documents in? The Committee will accept
9 staff's assessment --

10 MR. RATLIFF: Yes, we would move it,
11 please.

12 HEARING OFFICER WILLIAMS: Those will be
13 received into evidence.

14 So, I think if somebody could locate Mr.
15 Garbett. Don't know where he went.

16 Let's go off the record until he
17 returns.

18 (Brief recess.)

19 HEARING OFFICER WILLIAMS: We've been
20 told we do have this room, we can use this room
21 for the remainder of the night as long as we use
22 these doors. But if you go out one of those doors
23 outside, these double doors, they lock behind you
24 and you can't get back in.

25 So we will go into -- we will complete

1 things tonight. And the Committee, at the
2 prehearing conference, had announced that we would
3 take public comment beginning at 5:30. I
4 understand that we have some people here from the
5 public who want to speak to the project.

6 Am I correct, are there members here
7 from the public?

8 (Parties speaking simultaneously.)

9 (Pause.)

10 HEARING OFFICER WILLIAMS: I'd just like
11 to do these in alphabetical order, so Dean Beard.

12 MR. BEARD: My name is Dean Beard, and
13 I'm a concerned citizen. I've worked in Alviso
14 for about three years now, and I do public service
15 work so I'm in touch with many of the people in
16 the community on a daily basis.

17 Prior to that I worked in public service
18 work in Milpitas for about eight years. So I'm
19 quite familiar with both communities.

20 I'd like to speak in favor of this
21 project, but I'd like to start out by saying that
22 the people in Alviso are very sensitive to any
23 developments in their community. By the way, how
24 much time do I have? I don't want to exceed --

25 HEARING OFFICER WILLIAMS: Well, that's

1 a good question. We're going to try and limit it
2 to about five minutes. I think that's been about
3 the --

4 MR. BEARD: I can manage, thank you.

5 HEARING OFFICER WILLIAMS: -- time
6 allotted most folks.

7 MR. BEARD: But I do want to emphasize
8 the sensitivity that the Alviso community has to
9 any developments, and why is that? Because that's
10 a community that's been dumped on for over 100
11 years. And it's been dumped on in terms of
12 landfills, sewage treatment plants, asbestos and
13 waste from canneries. And that's just part of the
14 story out there.

15 But for the most part the people in
16 Alviso look very favorably on this development.
17 Why is that? Well, it's for several reasons.

18 One, they plan to use an enormous amount
19 of the waste fresh water that's available in that
20 community. And that's a real positive for the
21 environment and the community.

22 The location of the plant -- by the way,
23 if you aren't familiar with Alviso, it's located
24 on a flood plane between the Coyote and Guadalupe
25 Rivers. So it's a low-lying area. And it's a

1 low-lying area that's very sensitive
2 environmentally because of the wildlife and the
3 natural life that's there. So the people are
4 concerned about that aspect, too. So, this bodes
5 positively for that part of our concerns.

6 The other part, it's away from the
7 village or town of Alviso, and we feel it will not
8 impact us with traffic, because if you compare
9 this to a manufacturing operation that we are
10 familiar with, and certainly Milpitas is familiar
11 with, that involves usually hundreds, thousands,
12 possibly in the tens of thousands of people
13 descending on the community daily with an enormous
14 amount of traffic and a lot of housing problems.
15 So this does not involve that. It has a very low
16 number of people who will operate and manage this
17 facility. So, we're quite happy about that.

18 It also means it will probably provide
19 more income and revenue than any other kind of
20 development because it will be less demanding on
21 our services such as police and fire and school
22 services. So I don't think it would dilute any of
23 our services, and probably add to the support of
24 those.

25 I like the use of reclaimed water, and

1 it will not affect our open space, our habitat in
2 any significant way that we can determine.

3 The air quality is another question that
4 comes up throughout this entire are. And the
5 amount of pollution contributed by this plant when
6 it's in full operation would be totally
7 insignificant compared to the amount of air
8 pollution that would occur normally on 880 every
9 day, morning, noon and night, as we know, if
10 you're familiar with that busy freeway.

11 Since it's away from the residential
12 areas, both of Alviso and so far as I know in
13 Milpitas, I don't think it will impact those
14 residential areas seriously.

15 I did work at the intersection of -- I
16 didn't mention before -- Milpitas Boulevard and
17 Calaveras Boulevard, so I'm familiar with that
18 part of the community, too.

19 But I think probably the most positive
20 thing in favor of this as we see it, this is an
21 energy short area. And until U.S. Dataport builds
22 out, which is going to take quite awhile, this
23 will provide a real positive and powerful source
24 of energy for that particular part of our
25 community. And I think we're very fortunate to

1 have a very dependable energy provider such as
2 Calpine, as opposed to some of the others that
3 we've seen in the news lately.

4 So, with that I'd be open to any
5 questions you have, and if not, I'll adjourn
6 myself. Thank you.

7 HEARING OFFICER WILLIAMS: Thank you,
8 sir. Next we'll have Jim Kanine.

9 MR. KANINE: Thank you very much. Jim
10 Kanine, President and CEO of the San Jose Silicon
11 Valley Chamber of Commerce. It's good to be back
12 here again. I've been to several of these
13 hearings throughout the life of this project, and
14 looking forward to a little light at the end of
15 the tunnel, as probably some of you are, as well.

16 And, again, let me say I appreciate your
17 service and dedication on this Commission. As
18 somebody who served in the State Assembly for
19 three terms, I know the amount of time and energy
20 you put into this. And I commend you for it.

21 I stand representing the San Jose
22 Silicon Valley Chamber of Commerce. We are a
23 network of 2000 companies in the general are of
24 Silicon Valley, including members in Milpitas, as
25 well. We've well advertised our strong support

1 for this. We've gotten nothing but support from
2 our members in all of the communities that we
3 represent.

4 We think that this is a responsible
5 project that has been very responsive to the City
6 of San Jose in some of their early concerns. They
7 have modified this project to meet the concerns of
8 San Jose, including reducing the number of diesel
9 generators, the use of the wastewater as was
10 noted, and certainly it's also consistent with
11 Mayor Ron Gonzalez' energy independence plan that
12 he has set out for San Jose.

13 So it meets all of the criteria for our
14 community. It also does support Dataport in
15 making it more of a reality. The City has tied
16 those two projects together. And certainly in the
17 interim, even though this goes on first, it does
18 provide excess power to the grid. So it is a
19 total win for our community and the business
20 community stands foursquare behind it.

21 Thank you for your consideration.

22 HEARING OFFICER WILLIAMS: Thank you,
23 sir. Mr. Garcia.

24 MR. GARCIA: Jose Garcia representing
25 Building Trades Council of Santa Clara and San --

1 Counties. Building and Construction Trades
2 Council with more than 30,000 union construction
3 workers. And we are here representing these
4 workers, speaking in favor of the project for many
5 reasons.

6 First of all, it's going to bring new
7 life to the economy, and we need the jobs; we know
8 that. We need electricity; we know that. And
9 beyond, it is going to create jobs not only for
10 people that is going to be building this project,
11 but for future employees of this plant.

12 I was invited to a presentation very
13 much like this before, and I was telling everybody
14 that I come from a country that has plenty of
15 wildlife, plenty of forest, plenty of everything
16 except jobs. And so that's why we were here. It
17 is important to have jobs. I mean, again, I grew
18 up in the forest. We used to swim in the rivers.
19 But, again, I said, you know what, I have to move
20 away. And I left my parents, all my brothers and
21 sisters for a job. And I don't want that to
22 happen to anybody, to go to a different place, to
23 a different city, to a different country looking
24 for a job.

25 So, we need jobs. We need the economy

1 to come back. Thank you.

2 HEARING OFFICER WILLIAMS: Thank you.

3 Mr. Santos.

4 MR. SANTOS: Good evening, I'm Richard
5 Santos, born and raised in Alviso. And the Santos
6 Family has been in Alviso for 86 years. Also I'm
7 a retired fire captain of 33 years, San Jose Fire
8 Department.

9 And I'm very active in the Alviso
10 community; there's nothing that goes on that I
11 don't know about. Also I'm a Director of the
12 Santa Clara Valley Water District.

13 And U.S. Dataport first came to Alviso
14 about two years ago; met with us on numerous
15 occasions, with various people in our community.
16 And sat down and said, here's what we want to do,
17 and what's your concerns, and I can go on and on.

18 And we took numerous meetings, countless
19 of hours. And then Calpine came into the picture.
20 Did the same thing. Met with church groups,
21 senior citizens, and a variety of people. We sat
22 down and addressed all the concerns.

23 I worked with Councilman Chuck Reed to
24 make sure we had more environmental issues and
25 trails and different things that they're going to

1 provide an open space beyond the Santa Clara
2 Valley, the Santa Clara County Audubon Society.
3 So they met all the concerns.

4 They've been very honorable people. I
5 think they're going to be a real vital resource to
6 help our community get even better, with jobs and
7 revenue and to help our community.

8 And so I'm very for it, and I appreciate
9 the time.

10 HEARING OFFICER WILLIAMS: Thank you,
11 sir. Is there anybody else from the public that
12 would like to come forward and speak to the
13 project?

14 Okay, --

15 MS. LUCKHARDT: I have one letter that
16 came in from Mayor Gonzalez, the City of San Jose.
17 I guess he couldn't be here today, but wanted to
18 have this letter entered into the public record.

19 So I guess I'll just present a copy to
20 you, a copy to the court reporter.

21 HEARING OFFICER WILLIAMS: Okay. Just
22 one page?

23 MS. LUCKHARDT: Yes.

24 HEARING OFFICER WILLIAMS: Okay, we'll
25 receive the letter as public comment. It's dated

1 March 8th. And it's from Ron Gonzalez, the Mayor
2 of San Jose. The court reporter will have it if
3 anyone wants to take a look at it. Do you want to
4 read it into the record or --

5 MS. LUCKHARDT: Sure, if you'd like me
6 to I could read it into the record.

7 HEARING OFFICER WILLIAMS: Why don't we
8 do that.

9 MS. LUCKHARDT: "Dear Commissioners: I
10 am pleased by the concerted efforts of the
11 California Energy Commission and the City of
12 San Jose to expedite review and consideration
13 of the Los Esteros Critical Energy Facility
14 application. Last month the San Jose City
15 Council approved the rezoning necessary for
16 the project, and I strongly support its
17 prompt approval by the Commission."

18 "In response to the City Council's
19 direction in approving the U.S. Dataport
20 project last April, the applicants redesigned
21 the power generation component of the
22 project. They have eliminated 89 diesel
23 backup generators, and the project now
24 includes an environmentally superior natural
25 gas fired power plant. This step will

1 provide peaking power to the grid prior to
2 buildout of the datacenter, which will be
3 energy self-sufficient.

4 "This project will directly benefit the
5 residents and the economy of San Jose and
6 Silicon Valley. And it will further the
7 state's effort to quickly respond to energy
8 shortages by increasing available power
9 supply in an area of crucial need.

10 "Thank you for your efforts, and I look
11 forward to news of the Commission's approval
12 of the LECEF application. Sincerely, Ron
13 Gonzalez, Mayor."

14 HEARING OFFICER WILLIAMS: Okay, good.
15 Okay, at this point, Mr. Garbett, I think you had
16 some --

17 MR. GARBETT: You want me to trail the
18 meeting, or do you want me to speak now to the
19 issues?

20 HEARING OFFICER WILLIAMS: Well, I have
21 a proposal. We have several people from the San
22 Jose Planning Department here, and my proposal was
23 to have them come forward and offer whatever
24 testimony about planning commission and what
25 action they took, if you find that necessary.

1 Is that something you find acceptable,
2 or do you have other -- I know you had questions.
3 We had stopped you --

4 MR. GARBETT: Questions of the witness.

5 HEARING OFFICER WILLIAMS: Of this
6 witness?

7 MR. GARBETT: Yes.

8 HEARING OFFICER WILLIAMS: You can ask
9 those questions if you like, but --

10 MR. RATLIFF: Mr. Williams, if I may, I
11 mean I don't, like I say I don't represent the
12 City of San Jose, but they are not a party to this
13 proceeding. They did not file prefiled testimony
14 and in all fairness they came to answer questions
15 that would be directed to them by you.

16 I just wanted to make sure we don't put
17 them in a bad situation here and subject them to
18 what is essentially cross-examination on the spot.
19 That was not, I think, their purpose in coming
20 here.

21 HEARING OFFICER WILLIAMS: Did you get
22 your document?

23 MR. GARBETT: I have a document here.
24 I'd just like to show the credibility. It was
25 stated previously by your witness that on February

1 19th they passed an ordinance under an urgency
2 ordinance of February 19th, it did not require a
3 second reading. But, in fact, it required
4 publication and was published in The San Jose Post
5 Record on February 26th. I have a copy of that.

6 And there were other certain things that
7 were required of that ordinance, such as the metes
8 and bounds, that they did not include.

9 And I have here a City Council agenda
10 dated March 5, 2002, and an amended agenda. And
11 once again, we have under here, final adoption of
12 ordinances and ordinance 26579, real property, and
13 PDC SH0109088.

14 So, in fact, the ordinance was not
15 completed until March 5th, at the most. And by
16 the way, the ordinance was not available to anyone
17 until March 6th. And I got that copy and so
18 forth.

19 HEARING OFFICER WILLIAMS: Did you want
20 to submit that as part of the exhibits?

21 MR. GARBETT: I would.

22 HEARING OFFICER WILLIAMS: If you could
23 bring it forward, please, we'll mark it.

24 COMMISSIONER BOYD: Mr. Chairman, I'm
25 struggling with the relevance of this. This is

1 beginning to try my patience even --

2 MS. LUCKHARDT: Yes, I don't know what
3 the document is --

4 MR. GARBETT: The credibility of the
5 witness and her documents --

6 COMMISSIONER BOYD: But you have a
7 grievance with the City of San Jose, in my
8 opinion. And that should be the proper forum.
9 I'm strained to understand the relevance. We've
10 had representatives here from --

11 MR. GARBETT: This is -- testimony.

12 HEARING OFFICER WILLIAMS: I think, Mr.
13 Garbett, what everybody is struggling with is the
14 particular point that you're trying to make. I
15 mean everyone is grappling with that.

16 I mean, what precisely is it that you're
17 objecting to?

18 MR. GARBETT: We're objecting and ask to
19 have the witness' remarks struck because of the
20 untruthfulness of the remarks.

21 HEARING OFFICER WILLIAMS: What is
22 untrue is what we're trying to get at. What --

23 MR. GARBETT: I'd asked the court
24 reporter to read back the comments earlier.

25 And she has stated that because it was

1 passed as an urgency ordinance on February 19th,
2 the City did not require a second reading of the
3 ordinance. When, in fact, you have, on March 5th,
4 we have the agenda there where there was a second
5 reading.

6 MS. LUCKHARDT: Valerie --

7 MS. YOUNG: I will try to respond to
8 that. None of us on the applicant's team were
9 aware that this was scheduled for the March 5th
10 City Council meeting. This is the first time that
11 I have heard of this.

12 Because we were told, and in fact, the
13 former City Attorney, who's on our legal counsel
14 team, and this is true to my understanding of
15 urgency ordinances with the City of San Jose, is
16 they are adopted in one motion at one meeting at
17 one time. And do not require a second reading.

18 So I am not understanding why this was
19 scheduled. And you would have to ask the City
20 Clerk that question. This is the first time I've
21 heard of it.

22 HEARING OFFICER WILLIAMS: So, is that
23 your objection?

24 MR. GARBETT: My objection was there,
25 and as I spoke to the issue on March 5th at the

1 City Council meeting, I stated once again, under
2 the Brown Act, the documents were not available.
3 And that has been my issue with the City.

4 At each and every stage of the City
5 procedure, the documents were not available prior
6 to the hearing. You have to wait till the
7 following day to even get a peek at them, let
8 alone --

9 HEARING OFFICER WILLIAMS: And what Mr.
10 Boyd is saying is that -- what Commissioner Boyd
11 is saying is that that is -- the Brown Act issue
12 is something separate from our proceeding.

13 MR. GARBETT: Not with the Commission.

14 HEARING OFFICER WILLIAMS: Our concern
15 is whether or not, from a legitimate planning
16 action, whether or not that occurred. It appears
17 that it did.

18 Now, I'm not keen on all the Brown Act
19 issues, but I don't believe that a violation of
20 the Brown Act would necessarily make whatever
21 action the City Council took inappropriate. I
22 believe it's a separate issue. I could be wrong
23 on that.

24 But it appears to us that the City did
25 take the required land use action. And, you know,

1 that's what we're concerned with.

2 So if there is a Brown Act problem or
3 some other notice problem, then this isn't the
4 place for that to be dealt with.

5 MR. GARBETT: The question is to the
6 credibility of the witness. As far as the Brown
7 Act and the City, the fact they have kept
8 documents secret, they have not allowed them to be
9 shown under the Public Records Act or copied, this
10 has been a procedural -- went through the motions,
11 but in this case I am after the credibility of
12 this witness with the documents I have presented.

13 HEARING OFFICER WILLIAMS: And I believe
14 she's explained what her position was, what her
15 thoughts were. And it could be just a matter of
16 reliance on what she was told. And I believe
17 that's what she stated, so.

18 MR. GARBETT: Once again I question the
19 credibility of the documents she has submitted,
20 also.

21 HEARING OFFICER WILLIAMS: Okay.

22 MR. GARBETT: And I'd ask that a motion
23 that they be stricken.

24 HEARING OFFICER WILLIAMS: Again, we're
25 not going to strike the documents. We're going to

1 receive the documents into evidence. We believe
2 that there has been a sufficient foundation
3 presented for the receipt of those documents.
4 Notwithstanding the allegations you make about the
5 Brown Act or the lack of notice.

6 We believe that there was sufficient
7 action taken by the City on this matter. And
8 they're sufficiently public that we can receive
9 them into our record.

10 Now, beyond that, it's up to you to
11 pursue in some other forum.

12 MR. GARBETT: Is this a ruling that you
13 are making --

14 HEARING OFFICER WILLIAMS: Yes.

15 MR. GARBETT: -- here that can be
16 appealed?

17 HEARING OFFICER WILLIAMS: Well, if you
18 want to appeal it, you're welcome to.

19 MR. GARBETT: Okay.

20 HEARING OFFICER WILLIAMS: Okay. Did
21 you have any other land use questions for anybody?

22 MR. GARBETT: No.

23 HEARING OFFICER WILLIAMS: Okay. Then
24 have we received the exhibits --

25 MS. LUCKHARDT: I'd move the exhibits.

1 HEARING OFFICER WILLIAMS: Those
2 exhibits have been accepted, as well as staff's
3 exhibits in this area.

4 So, with that I think we can close out
5 land use, and move into looks like visual
6 resources. I think we told you three hours some
7 six hours ago.

8 (Pause.)

9 HEARING OFFICER WILLIAMS: Let's go off
10 the record.

11 (Off the record - 6:05 p.m.)

12 HEARING OFFICER WILLIAMS: The Committee
13 has received an exhibit number 5; it's the City
14 Council agenda for March 5, 2002. Nine pages, one
15 page of which is relevant and goes to the issue of
16 the City's reconsideration -- is that the right
17 word?

18 MR. GARBETT: Final adoption of
19 ordinance.

20 HEARING OFFICER WILLIAMS: Final
21 adoption of the rezoning ordinance?

22 MR. GARBETT: Yes.

23 HEARING OFFICER WILLIAMS: So that's in
24 evidence as number 5.

25 With that we'll move to visual.

1 MS. LUCKHARDT: In the area of visual
2 resources, the applicant calls Thomas Priestly and
3 Marshal Gale, neither of whom have been sworn.
4 Whereupon,

5 THOMAS PRIESTLY and MARSHA GALE
6 were called as witnesses herein, and after first
7 having been duly sworn, were examined and
8 testified as follows:

9 DIRECT EXAMINATION

10 BY MS. LUCKHARDT:

11 Q I guess I'll start with Dr. Priestly.
12 Do you have a copy of applicant's testimony on
13 visual resources?

14 DR. PRIESTLY: Yes, I do.

15 MS. LUCKHARDT: And was this testimony
16 prepared by you or at your direction?

17 DR. PRIESTLY: Yes, it was.

18 MS. LUCKHARDT: And does this testimony
19 include a description of your qualifications, and
20 was your r, sum, attached to applicant's prehearing
21 conference statement?

22 DR. PRIESTLY: Yes.

23 MS. LUCKHARDT: The Hearing Officer has
24 asked that we not go through an extensive
25 description of your qualifications. Could you

1 just briefly describe your experience on CEQA and
2 Energy Commission applications?

3 DR. PRIESTLY: Okay. The details of my
4 training and experience are summarized on the
5 r, sum, attached with my testimony. I have
6 experience with CEQA and with analysis of projects
7 under CEQA for the Energy Commission.

8 I've worked on three recent power plant
9 projects that have been proposed for development.
10 And in addition I have done the visual analyses
11 for a number of peaker projects. And I have also
12 worked on compliance issues related to several
13 other projects.

14 MS. LUCKHARDT: Thank you. And do you
15 have any clarifications or corrections to make to
16 your testimony today?

17 DR. PRIESTLY: No.

18 MS. LUCKHARDT: And are the facts
19 contained in your testimony true to the best of
20 your knowledge?

21 DR. PRIESTLY: Yes.

22 MS. LUCKHARDT: And do the opinions
23 contained therein represent your best professional
24 judgment?

25 DR. PRIESTLY: Yes, they do.

1 MS. LUCKHARDT: And do you adopt the
2 visual resources testimony as your testimony in
3 these proceedings?

4 DR. PRIESTLY: I do.

5 MS. LUCKHARDT: Okay, I'll turn to you,
6 Ms. Gale. And do you have a copy of your
7 testimony on visual resources?

8 DR. GALE: Yes, I do.

9 MS. LUCKHARDT: And was this testimony
10 prepared by you or at your direction?

11 DR. GALE: Yes, it was.

12 MS. LUCKHARDT: And does your testimony
13 include a description of your qualifications and a
14 copy of your r, sum, ?

15 DR. GALE: Yes, it does.

16 MS. LUCKHARDT: And then I'd like you to
17 also just briefly describe your experience as it
18 pertains to creating visual simulations for CEQA
19 Energy Commission projects.

20 DR. GALE: Okay. Well, I have over 20
21 years of professional practice experience in
22 California, including preparing a number of visual
23 resource assessments with accurate, realistic
24 visual simulations for large scale energy
25 projects.

1 Many of these studies and simulation
2 studies conform to CEQA and NEPA requirements for
3 environmental documentation. And I have prepared
4 several visual simulation studies for power plants
5 and transmission projects recently.

6 MS. LUCKHARDT: Thank you. And do you
7 have any corrections or clarifications to make to
8 your prefiled testimony?

9 DR. GALE: No.

10 MS. LUCKHARDT: And are the facts
11 contained in this testimony true to the best of
12 your knowledge?

13 DR. GALE: Yes.

14 MS. LUCKHARDT: And do the opinions
15 contained therein represent your best professional
16 judgment?

17 DR. GALE: Yes.

18 MS. LUCKHARDT: And do you adopt this
19 testimony as your testimony on visual resources in
20 this proceeding?

21 DR. GALE: Yes.

22 MS. LUCKHARDT: In the interest of time
23 I would like to ask a few questions of these
24 witnesses in response to the testimony presented
25 by Dr. Clay. If you would prefer we could wait

1 till after Dr. Clay's testimony, but it may be
2 faster to do it this way.

3 HEARING OFFICER WILLIAMS: However you
4 wish.

5 MS. LUCKHARDT: Okay. Then I'll
6 proceed. I think --

7 HEARING OFFICER WILLIAMS: It's your
8 call.

9 MS. LUCKHARDT: Yeah, I think that would
10 be the most expeditious way to get through visual
11 resources.

12 Dr. Priestly, could you explain your
13 personal, on-the-ground research of the project
14 site and its surroundings?

15 DR. PRIESTLY: Let's start by saying
16 that I started work on this project with some
17 knowledge of the site and its surroundings.

18 First, I'm a very long term resident of
19 the Bay Area and I've been driving up and down 880
20 and highway 237 for years, so I'm generally
21 familiar with the views from these roads and the
22 evolution of the landscape in the project area.

23 Also, a some of you know, I worked on
24 the visual analysis for the Metcalf project. And
25 some of you may remember that two of the

1 alternative sites for that project were on or
2 adjacent to the property being considered for this
3 project.

4 So, as a part of my work on the Metcalf
5 project, I had the occasion to spend time in the
6 project area, getting familiar with it, and to do
7 at least a preliminary evaluation of the potential
8 impacts of a Metcalf-like project were it to be
9 located on those sites.

10 I started work on this project in late
11 May and had the occasion then to do field work in
12 the project area several times during the period
13 from May through August. And a couple things I
14 can say is that first of all my field work in the
15 project area was preceded by a review of project
16 plans and elevations, review of maps and air
17 photos, reviews of previous EIRs that had done for
18 the project area.

19 Some of you who are from the area know
20 that although this is this fairly innocent looking
21 open site, in fact has been the center of
22 attention for a number of projects. So, as a
23 consequence, there have been a number of studies.

24 I might mention first the proposed, and
25 now, I think it's fair to say approved and

1 planned, PG&E Los Esteros substation. And the
2 U.S. Dataport.

3 I've also taken a look at the San Jose
4 general plan and the Alviso plan, again all in
5 preparation for going out to visit the site.

6 I also had our GIS people draw some
7 distance zones on a topo sheet so I could
8 understand the distance of various viewing points
9 from the site.

10 My goal in looking at the landscape
11 plan, or in looking at the original plans for the
12 site was to really understand the project and its
13 relationship to its setting; its relationship to
14 other landscape features.

15 And especially in reading the plans I
16 was interested in understanding, well, what are
17 the features and qualities that these plans have
18 identified as being important, being sensitive
19 that we really need to pay attention to.

20 So all of this provided a backdrop for
21 my field work. And so my initial investigation
22 involved driving all over on the major roads
23 around the project area to determine the potential
24 project visibility. Front roads, other public
25 areas, and from public areas that were potentially

1 sensitive.

2 And here's just kind of an example of
3 the kind of thing that I had done. We have heard
4 about the residents on the Silker property. But
5 the actual closest residential neighborhood is a
6 mobile home community located southwest of the
7 project site on the other side of highway 237.

8 So, for example, I spent quite a bit of
9 time in that mobile home community trying to
10 figure out, well, would this project be visible
11 from any of the residences in that mobile home
12 community.

13 And so subsequent to these initial
14 visits which, in fact, led to my selection of key
15 observation points, and I'll talk about those a
16 little bit later, but subsequent to that initial
17 visit I have made at least four additional visits
18 to the project area. And those visits included
19 doing things like taking a close look at some
20 areas in the neighborhood of Alviso that the
21 Energy Commission was particularly interested in.

22 I made it a point to stay at the Crown
23 Plaza Hotel, specifically requesting a room as
24 high up as possible, and on the north side so I
25 could observe the project site from the hotel

1 under both day and nighttime conditions.

2 I spent time early in the morning
3 driving around trying to identify, look at the
4 character and quality of steam plumes from other
5 facilities in the project area.

6 Took a look at the potential views from
7 the residences on the Silker property. And on
8 another visit I walked the proposed trail
9 corridors on both sides of Coyote Creek. Took a
10 very close look at the proposed Veritas
11 development.

12 MS. LUCKHARDT: And can you describe how
13 the key observation points were selected?

14 DR. PRIESTLY: Yeah, I've just explained
15 the activities I undertook to become familiar with
16 the project area, and so the selection of the KOPs
17 was then an outcome of these activities.

18 So the kinds of questions, you know, of
19 course, I asked myself in selecting these key
20 observation points is, you know, where are the
21 areas from which the project would be prominently
22 visible. Where are the areas that are likely to
23 be sensitive to the project effects. And this is
24 based on the numbers of viewers and the
25 sensitivity of the viewing situation.

1 And also what were the viewpoints that
2 were used as a basis for analysis of other
3 projects that had been proposed for this site.

4 For example, both the Los Esteros
5 substation and the Dataport projects use the view
6 that we ended up selecting for our KOP1, and
7 that's the view from highway 237 just east of
8 Zanker Road.

9 The second KOP that was initially
10 selected was the view from Zanker Road, which
11 serves as an alternative route into and out of the
12 Alviso community. And also serves as an access
13 route to people using the San Francisco Bay
14 National Wildlife Refuge.

15 And at the time, based on the visibility
16 of the project from nearby publicly accessible
17 areas, you know, that was my professional judgment
18 as to the most appropriate observation points to
19 use as a basis for analysis.

20 For example, viewpoints on the east side
21 of Coyote Creek were not selected because of the
22 role of the riparian vegetation in screening views
23 towards the project from that area.

24 Something also I might say is that in
25 selecting the viewpoints, I discussed the matter

1 with Chuck Cornwell, who is a colleague of
2 Marsha's at Environmental Vision, the person who
3 does a lot of the preparation of the simulations,
4 has been involved in many many CEQA projects. You
5 know, I trust his judgment as a sounding board for
6 what kinds of views are really appropriate to
7 illustrate, understand the impacts of projects of
8 this type.

9 I might add that later, at the request
10 of the Energy Commission Staff, we added another
11 key viewpoint on Grand Boulevard in the community
12 of Alviso. This was a location about 1.7 miles
13 from the site, and this represents kind of the
14 closest viewpoint in Alviso from which the project
15 would be potentially visible.

16 MS. LUCKHARDT: And are the views that
17 you selected consistent with standard Commission
18 and CEQA practice for analyzing a project such as
19 this?

20 DR. PRIESTLY: Yeah, they are. They're
21 quite consistent in that they are representative
22 viewpoints from sensitive areas from which there
23 is a likelihood that the project will be seen.

24 And something I might add is in terms of
25 the numbers, it's fairly consistent, certainly

1 consistent with practice under CEQA; I've had the
2 occasion to look at a large number of visual
3 analyses from various CEQA projects around the
4 state.

5 And I would say, based on at least this
6 particular sample, it's pretty typical for CEQA
7 analysis to have anywhere between about one and
8 three views.

9 And I do say actually for this project
10 we're probably a little bit at the low end of the
11 spectrum in terms of numbers of key observation
12 points for power plant projects that come under
13 the review of the Energy Commission.

14 You know, based on my experience in, you
15 know, 13, 14 projects and other projects I've
16 looked at, I would say that in general the numbers
17 of KOPs varies, oh, between about four and eight.

18 On one of my projects I think that we had 11.

19 But I think that the number for this
20 project is really quite appropriate to the scale
21 of the project in that we are dealing with a
22 project whose highest elements are 90 feet, thus
23 limiting, you know, the zone from which it's
24 visible. And then also given kind of the
25 characteristics of this area where it essentially

1 backs up where, on one side, to the sewage
2 treatment ponds, and to another to an area that is
3 now inaccessible.

4 My professional judgment is that the
5 KOPs that we selected, in fact, were quite
6 appropriate and very very consistent with both
7 CEQA and CEC practice.

8 MS. LUCKHARDT: And so I gather from
9 your last statement that the selected KOPs would
10 provide a representative understanding of the
11 views in this project then, from various
12 locations?

13 DR. PRIESTLY: Yes, they do.

14 MS. LUCKHARDT: And then can you explain
15 the limitations on the views of the site from 237?

16 DR. PRIESTLY: You know, in his
17 testimony Dr. Clay has suggested that oh, maybe we
18 should have selected a viewpoint for KOP1 along
19 highway 237. That's either 500 to 1000 feet
20 either east or west of the point that we selected.

21 And I think really that the point that
22 we selected is the most appropriate one, because
23 when you start looking closely at the
24 configuration of things in that area there's
25 really a lot to that viewpoint. Because as you're

1 driving east along highway 237, your views toward
2 the project site are blocked to a large degree by
3 the Zanker Road overcrossing.

4 So it's only when you get out from under
5 that overcrossing that the views toward the site
6 open up. And so we selected a location where the
7 onramp on the south side, eastbound onramp kind of
8 merges in. So that way we picked up the
9 visibility of the site both from the highway and
10 for those folks who are merging into the highway
11 at that point, as well.

12 And so clearly if you were to move the
13 site further west it wouldn't work because of
14 blockage of the view. And if you were to move
15 further east, that wouldn't be desirable because
16 you'll be kind of moving out of the primary cone
17 of vision of people driving along highway 237.

18 So I think that we hit just the right
19 spot. And I think our judgment in this has been
20 confirmed by the fact that this was a viewpoint
21 used both by Los Esteros and by the Dataport
22 project.

23 MS. LUCKHARDT: And then turning to
24 KOP3, can you describe the selection of that
25 particular location?

1 DR. PRIESTLY: Yes. In a way it's too
2 bad we don't have a copy of that we can put up.
3 Because I know Dr. Clay has expressed some
4 concerns about the composition of that view.

5 And so I, first of all, want to make it
6 clear to everybody, I did not make an effort to
7 intentionally make this view worse than it was.
8 That view was selected again along Grand Avenue,
9 and it was intended to be reflective of the views
10 that would be seen from residences on it's more or
11 less the northwest side of the street; the view
12 from people driving up the street.

13 And I made it a point to take that view
14 at an intersection of what are the cross-streets,
15 so that it's also reflective of the view of people
16 coming down that cross-street, and you know,
17 stopping at Grand Boulevard.

18 And, in fact, it's those folks who have,
19 in a way, have the most open view towards the site
20 when they're stopped at that intersection. They
21 would be looking, you know, right in the middle of
22 their cone of vision they would be looking towards
23 the power plant site, I think 1.7 miles away.

24 So, that's the reason why that
25 particular spot was selected. There are a couple

1 of parked cars along the side of the street, but
2 there are parked cars all up and down the street.
3 I didn't go out of my way to find them.

4 And there was a utility pole in that
5 view. And I did make it a point in framing my
6 view, to get the utility pole over at the right
7 side of the view so that it wouldn't distract from
8 the image, and certainly so that it would not
9 block the view of the power plant project.

10 MS. LUCKHARDT: Okay. And, Ms. Gale,
11 can you describe the creation of the visual
12 simulations relied on by Dr. Priestly in his
13 analysis?

14 DR. GALE: Yes. The computer generated
15 visual simulations from the Los Esteros project,
16 in the AFC and subsequent data requests, are the
17 result of a systematic site photography and
18 computer modeling process.

19 And I might say this is a process that
20 we have developed over more than a decade of
21 professional practice on dozens of CEQA and other
22 environmental studies.

23 The basic steps in the computer
24 simulation process include the following
25 procedures: First, site the topic using a 35 mm

1 single lens reflex camera and a 50 mm lens.

2 Second, computer modeling of an existing
3 site conditions and surrounding, including key
4 viewpoint locations.

5 Next, computer modeling of the proposed
6 project elements. Overlay of the three-
7 dimensional computer model on the digitized site
8 photographs. And finally computer rendering of
9 the simulation image.

10 I'd like to give you a brief description
11 of the three visual simulation photographs that
12 were used for the KOPs. These photos provide the
13 basis for the project visual simulations.

14 And as I mentioned, all of the
15 photographs were shot with this 35 mm camera and a
16 50 mm lens.

17 The KOP photo 1, which is the view from
18 highway 237 that Tom has just described, is a
19 composite of two 50 mm lens photos. And it
20 represents an approximate view angle of a 28 mm
21 lens.

22 The KOP2 view, the view from Zanker
23 Road, is a composite of 50 mm lens photos which
24 represent an approximate view angle of a 35 mm
25 lens.

1 And finally, the KOP3 photo, the view
2 from Grand Boulevard in Alviso was shot with a 50
3 mm lens.

4 Now, while using a 50 mm lens for a
5 normal lens, as it's called, is generally
6 advisable for simulation photography. The site
7 specific conditions for the Los Esteros Critical
8 Energy Facility project warranted showing a wider
9 angle of view for two of the visual simulations.

10 Specifically, with respect to the
11 highway 237 simulation, the view from KOP1, it was
12 important, we thought, to replicate the view that
13 was previously analyzed in the U.S. Dataport
14 project EIR published in September 2000.

15 Those were figures for reference, 22 and
16 23 in the EIR. And as documented in the Dataport
17 EIR, the highway 237 simulation photo was shot
18 with the equivalent of a 28 mm lens.

19 Similarly a slightly wide angle view was
20 used for the KOP2 photo taken from Zanker Road.
21 In this case it was important to portray the full
22 project area as seen from the critical vantage
23 point, and a slightly wider angle view was
24 required.

25 In both instances, with the wide angle

1 views, the photographs presented in the AFC showed
2 image height to width ratio in a format that
3 realistically portrays the actual scale of the
4 project. This is important. I'm referring to the
5 height to width ratio of the image.

6 For this reason the KOP image is shown
7 as the widest of the three simulations in
8 relationship to its height in order to reflect
9 this widest view angle. The KOP2 image is the
10 next wide. And finally you see the 50 mm lens
11 KOP3 as the most, I'll call it upright of the
12 three images.

13 This formatting technique enables us to
14 use the wide angle or panoramic simulations while
15 minimizing the perceived distortion of the
16 vertical scale in the landscape.

17 Let me move from photography to briefly
18 touch on the data that we used to produce the
19 simulations. And that's really all visual
20 simulations are based on some type of data.

21 The simulations for the Los Esteros
22 project rely on several data sources, including
23 site specific topographic survey data; USGS
24 topographic data; rectified aerial photographs;
25 scale drawings; and a three-dimensional CAD model

1 of the project and proposed facility and site.
2 This was provided by Calpine engineers.

3 With respect to the subject of data
4 resolution, the engineering drawings include site
5 specific grading plans. They were provided in
6 both digital and hard copy format.

7 The topographic data for the site was at
8 one-foot contour intervals with spot elevations at
9 one-tenth of a foot. And the scale of the USGS
10 data is 1:24,000, so it has five-foot contour
11 intervals.

12 Finally, I wanted to highlight our
13 actual simulation methods or computer modeling
14 methods. And these were described briefly in the
15 AFC.

16 Topographic and site data provided the
17 basis for developing an initial digital model of
18 existing conditions. Aerial photographs and
19 onsite measurements were used to determine and to
20 verify the locations and dimensions of site
21 features, such as buildings, fences, utility
22 poles, freeway signs, trees and roadways.

23 In addition, the aerial photos and site
24 survey were utilized to document and verify the
25 location of the simulation viewpoints. Again,

1 this is very important in producing an accurate,
2 three-dimensional computer model. USGS data was
3 also used for that purpose of documenting the key
4 observation point locations.

5 Scale verification for the digital model
6 and overlays of the project was established based
7 on a combination of three factors: accurate
8 viewpoint determination and documentation; control
9 of photographic lens and film data; and modeling
10 of existing features in the model, itself.

11 The simulation images, themselves, were
12 produced based on computer renderings of the 3-D
13 model, combined with digital versions of the three
14 site photographs. This photo and wireframe
15 overlay composite technique relied on a computer
16 generated process.

17 I'm going to add here that as I
18 mentioned, we've produced simulations for other
19 power plant projects that the CEC has reviewed.
20 And on previous occasion the Commission requested
21 in a data request, I believe, for some
22 verification of the accuracy of our images. We
23 provided documentation, including wireframe
24 overlays. And I believe that demonstrated the
25 accuracy of the images that have been prepared by

1 our firm and submitted as part of the AFC
2 documentation.

3 One last thing I might offer in terms of
4 verifying accuracy, this is more of an intuitive
5 commonsense approach. If we look, and I do hope
6 that all of you have the visual simulations. It
7 looks like you do. I was going to refer to KOP1,
8 figures 8.11-3A and 3B that would give you an
9 existing view and visual simulation of the project
10 at the end of construction. In other words, the
11 project, as you see it, without any landscape
12 screening.

13 And if we compare the existing view and
14 the simulation of the project, you can see there
15 are currently on the site a number of greenhouse
16 structures. They range in height from about 15 to
17 20 feet approximately. That's what you see in the
18 existing view.

19 If you look at the simulation you see a
20 power plant with stacks reaching a height of 120
21 feet in this case. We produced the visual
22 simulations before Calpine engineers lowered the
23 stack height to 90 feet.

24 And so I would say, as an eyeball
25 intuitive means to verify the general

1 reasonableness and accuracy you might look at
2 those existing greenhouses at the 15 to 20 foot
3 height, and compare it to what you see the stack
4 height. And I think you can see a reasonable
5 level of accuracy there.

6 Now, the methods that I just described
7 require a great degree of verification as to
8 accuracy and modeling. So what I'm suggesting in
9 terms of an eyeball commonsense comparison is just
10 for your reference to say, yes, I believe these
11 images are quite accurate for their purpose.

12 MS. LUCKHARDT: Can you explain how you
13 have done analyses like this for other Energy
14 Commission projects? Are the techniques that you
15 have described that you used to represent this
16 project also typical of other CEQA analyses that
17 you have completed for other projects?

18 DR. GALE: Yes, I would say the
19 techniques I've just described are quite
20 comparable to a number of studies. One area where
21 I would say the simulations might differ for the
22 AFC process we have included not just one level of
23 landscape maturity, but two, sometimes three
24 levels. So we show existing conditions; proposed
25 project after construction; proposed project with

1 ten years landscape maturity, and then 20 years.
2 And that's a bit more than we do on a typical CEQA
3 study I would say.

4 MS. LUCKHARDT: And in your professional
5 opinion do these simulations provide a reasonably
6 accurate representation of the proposed project?

7 DR. GALE: Yes, I believe they do.

8 MS. LUCKHARDT: And then at the risk of
9 being incredibly redundant, in your professional
10 opinion are the methodologies that you've
11 described to evaluate this project consistent with
12 typical CEQA and CEC analysis?

13 DR. GALE: Is that to me?

14 MS. LUCKHARDT: Yeah.

15 DR. GALE: I'm sorry, I missed --

16 MS. LUCKHARDT: That's okay, it was so
17 incredibly redundant when I read it that we can
18 just ignore that.

19 DR. GALE: Okay.

20 (Laughter.)

21 MS. LUCKHARDT: I apologize for that.
22 And then shifting to Dr. Priestly, is Dr. Clay's
23 characterization of your use of the reference
24 materials listed at the end of your visual
25 resources analysis, and that would be the one, I

1 think, included in the application for
2 certification. Is his characterization of that
3 accurate?

4 DR. PRIESTLY: I guess my answer would
5 have to be yes and no. They're accurate to the
6 extent that Dr. Clay certainly, you know,
7 correctly summarizes the articles, and is able to
8 identify, you know, kind of a paradigm of
9 landscape assessment that they reflect.

10 But there are some attributions that he
11 makes about my use of those articles that is quite
12 incorrect. Based on some conclusions that he has
13 reached that do not reflect at all what is stated
14 in the text of my AFC.

15 And I don't know, can I elaborate a
16 little bit or --

17 MS. LUCKHARDT: Oh, yes, I would like
18 you to explain that.

19 DR. PRIESTLY: Yeah, and let me explain.
20 And I think the remarks he makes about the
21 literature that you'll see what Dr. Clay is talked
22 about is in the reference section --

23 HEARING OFFICER WILLIAMS: Excuse me,
24 Mr. Priestly -- let's go off the record.

25 (Off the record.)

1 MS. LUCKHARDT: Okay, and I'll ask Dr.
2 Priestly to pick up on his discussion of the
3 references used in the AFC.

4 DR. PRIESTLY: Okay, yeah, pick up where
5 we were before. I was starting to say that it
6 appears to me that Dr. Clay's discussion of the
7 references that I included in my reference
8 section, actually I think gets to his critique of
9 the method that I used for assessing the character
10 and quality of the existing landscape in the
11 project area, and then for assessing the impacts
12 of the projected project changes.

13 So first I should mention that, in fact,
14 this is kind of central here to the discussion in
15 a way, so I have prepared a rather extensive
16 response on the subject. But given kind of the
17 lateness of the hour here, I am going to try to
18 compress my remarks and just get right to the
19 point. I may leave some things unsaid, but if
20 there are some lingering concerns we can maybe
21 deal with those later.

22 So, I'm going to be struggling a little
23 bit here and just making it very very brief.

24 So, first of all, you know, the method
25 that I used in assessing the existing landscape is

1 summarized on page 8.11-5 of the AFC. So my
2 technique is not a mystery. My method is laid out
3 right there for everybody to see, to know what it
4 was I considered in evaluating landscape quality.

5 You'll also notice the table 8.11-1
6 which lays out some criteria that go along with
7 landscapes that are a different quality levels.
8 It's essentially like a scale, like a rating scale
9 for landscape quality and includes, you know,
10 factors that would make a given landscape or view
11 land end up on one of those points along the
12 scale.

13 As the footnote here indicates, this
14 scale came out of some work done by Boueloff and
15 his colleagues at Virginia Tech. There's a group
16 of landscape scholars there that have essentially
17 reviewed the literature that's been done on
18 landscape, landscape evaluation, and tried to boil
19 it down and come up well, what are the factors
20 that are useful and descriptive in evaluating
21 landscapes.

22 And they have actually done this in the
23 context of attempting to develop an artificial
24 intelligence approach for evaluating landscapes.

25 It was about I guess the summer of '99

1 as I started to get involved in more power plant
2 projects I was really searching for a landscape
3 rating methodology that I thought would really be
4 useful for power plant projects.

5 Up until that point the Commission Staff
6 had been using a landscape evaluation approach
7 that was more or less based on work that had been
8 developed by the Bureau of Land Management. And
9 for a number of reasons we can talk about some
10 other time, I did not really think that this
11 approach was actually all that helpful for power
12 plant projects located in, you know, developed,
13 quasi-developed areas.

14 In looking for something different I
15 came across this, and it appeared, I think, to
16 offer a solution because the work that they had
17 done does do, I think, a good job of pulling
18 together the insights from a number of different
19 paradigms of landscape assessment.

20 And it's true that they essentially
21 identified all of these criteria for evaluation of
22 landscapes with the thought that they were going
23 to be using it in this artificial intelligence
24 approach.

25 So at that time I called Pat Miller who

1 was one of the collaborators in this effort. He's
2 in the landscape department at Virginia Tech, and
3 had a number of conversations with him about this.

4 He ended up sending me more articles and
5 material related to this effort. And he also told
6 me that at that time, anyway, the artificial
7 intelligence aspect of this really wasn't ready
8 for widespread application. They were still in
9 the development and testing stage.

10 You know, perhaps at some date, maybe an
11 artificial intelligence approach would be also use
12 to -- would be useful to all of us for this kind
13 of project.

14 However, for the moment I think that the
15 set of criteria for landscape evaluation that they
16 have developed provides a very useful device for
17 the kind of professional assessment approach that
18 I used on this project. In that again they have
19 identified a number of factors that affect the way
20 people might respond to a landscape; the extent to
21 which the landscape might be considered to be, you
22 know, have extremely high visual quality versus,
23 you know, very low visual quality.

24 So, anyway, it is in that spirit that
25 this work by Boueloff and Associates was used.

1 And I do take exception to some of the language in
2 Dr. Clay's testimony suggesting, for example, on
3 page 9, first paragraph, that the methods have
4 been taken out of context in a manner contrary to
5 Boueloff's intent.

6 And I would say that the criteria that
7 he has developed have been used and applied in a
8 way that has been different from the context in
9 which they are developed. But it does not mean
10 that they can't be used in that way.

11 I'd be interested to know, you know, how
12 it is that this particular use, in fact, would be
13 contrary to the intent of those who were involved
14 in this effort.

15 Something I'll say very briefly, too, in
16 terms of the analysis also on page 9 there is a
17 criticism that there is no empirical evidence to
18 present it to indicate how the criteria were
19 applied.

20 And I think if you will look at the
21 narratives for each of the key observation points,
22 both in terms of the descriptions of the existing
23 settings and the descriptions of the settings as
24 they would appear after the change is brought
25 about by the proposed project, you in fact will

1 see that each of the criteria that is appropriate,
2 relevant for that particular view or location in
3 fact has been addressed.

4 In very, you know, very briefly, based
5 on this method and, you know, as I have laid out
6 here on page 8.11-5 of the AFC, we're looking at
7 the natural features of the landscape. The
8 positive and negative effects of manmade
9 alterations. And the visual composition of the
10 landscape, as well as experiential factors.

11 And, again, to the extent to which these
12 things are relevant for the view they are
13 mentioned in those descriptions.

14 And one of the things I can say is that
15 in fact the level of analysis that you're seeing
16 in this AFC goes well beyond the level of analysis
17 that one typically sees in EIRs, anyway, prepared
18 under CEQA. And is equal to the level of analysis
19 that is seen in most AFCs prepared for the Energy
20 Commission.

21 Another thing I might mention, too,
22 there's kind of an implicit/explicit criticism
23 here for not, say like walking through every
24 single variable indicating the extent to which it
25 plays a role in the assessment.

1 And I think experience has shown, I know
2 some of the earlier CEC Staff assessments did this
3 kind of thing, and you ended up with an analysis
4 that was actually just very very tedious, and
5 really lost the reader, and kind of turned people
6 off. So the intent here was to prepare an
7 analysis that was very very focused.

8 It doesn't mean that something more
9 complete wasn't done to back it up, but what you
10 see in the AFC attempts to be, you know, to the
11 point, and something that people can follow and
12 understand.

13 And another point that I really feel I
14 need to make is somehow the witness for Milpitas
15 really was reading a lot into the fact that I have
16 included these references in my reference section.

17 I, nowhere, state or imply, suggest that
18 somehow I am applying the methods, in fact the
19 very divergent methods that are explained or
20 developed the information that were in those
21 references that he cites.

22 So, as a consequence, I'm rather
23 confounded by the rather strong statements on page
24 9 -- let's see, is it 9 or page 8, rather, that
25 falsely suggesting this is the term, falsely

1 suggesting is the term used. So it implies
2 something, you know, devious or wrong on my part.

3 So, given the fact that there's no
4 substantial reason for him to think that, I don't
5 think I said anything in my text that implies or
6 suggests that. I really do take exception to the
7 strength of that language.

8 So, I'll stop there.

9 MS. LUCKHARDT: Okay. And going on
10 through Dr. Clay's testimony he asks a series of
11 questions that start, they're actually under C-1
12 and starting on my page 9 through 10, and I'm
13 wondering if you have any responses to those
14 questions he proposes?

15 DR. PRIESTLY: Yeah, as I was indicating
16 before, and as is actually stated here, that the
17 analysis of visual effects of changes based on
18 field observations, review of the following
19 information, planning documents, project maps,
20 drawings of the project area, simulations,
21 research on design measures for integrating
22 electrical facilities into their design settings.
23 I mean that's really quite true, and this is kind
24 of a standard thing one does in attempting to
25 understand what the implications are of the visual

1 changes brought about by projects.

2 And one of the things, again, that I'm
3 slightly confounded by is in this set of questions
4 there is -- I have the sense that the reference to
5 local plans and other local planning documents is
6 almost being ridiculed. And I'm actually a little
7 bit surprised by that, because as a planner who
8 has a background in research, who for many years
9 has been doing, you know, real, applied visual
10 assessment, project assessment work, one of the
11 realities is that we don't always have all of the
12 great resource information that we would like to
13 have.

14 And one way, I have discovered that one
15 way of getting some sense of public values towards
16 landscapes is to take a very very careful read of
17 plans. Particularly the scenic highway elements,
18 urban design sections of plans can be very useful
19 in their discussions in terms of identifying
20 features of the local environment of the landscape
21 that are, you know, really important to the
22 community.

23 And particularly to the extent that a
24 particular area is designated as scenic; or is
25 given some kind of special protections is an

1 indicator that, yeah, this is an area that we need
2 to pay some attention to.

3 Because, again, you'll come to the
4 bottomline in answering the CEQA questions is not
5 only the extent to which a project will bring
6 about some changes in the environment. The other
7 part of the equation to answer those CEQA
8 questions is the so-what of it. In fact, of what
9 significance is this change.

10 And, again, reference to local planning
11 documents could be quite helpful in determining
12 that.

13 Yeah, as I've explained before, the
14 approach was systematic, but in terms of the
15 presentation, we tried to boil it down to, you
16 know, kind of the bottomline, those factors that
17 were relevant and KOP.

18 MS. LUCKHARDT: Thank you. And
19 understanding that you have not specifically been
20 employed by either side on the Morro Bay siting
21 case, but your general understanding of the areas,
22 could you please describe the difference between
23 the setting for Los Esteros and the Morro Bay
24 project?

25 DR. PRIESTLY: Yeah, first I do want to

1 make it very very clear, I have not been involved
2 in the Morro Bay project, so I don't have any
3 inside information about that project. I just
4 have a more general familiarity with that region
5 from, you know, vacation trips and the like up and
6 down the coast. And I know something about the
7 project from what I have read in the visual
8 section of the AFC.

9 So, a couple things we can say about
10 that project. I think it's probably not a good
11 basis for comparison with other CEC power plant
12 projects, because we're talking about a project
13 that's very different and an environmental setting
14 that's very different.

15 In fact, I'd say that they're kind of
16 extraordinary and are way off at one end of the
17 scale.

18 You know, first of all, in terms of what
19 we're talking about in the project, we have an
20 existing fossil power plant with stacks that are
21 something on the order of 450 feet high. And part
22 of the scheme, as you probably all know, the
23 applicant is going to take out those stacks.

24 Secondly, unlike this project which is
25 a, you know, small to medium sized single cycle

1 plant, at Morro Bay they are talking about putting
2 in two -- is it 500 or 600 kV -- megawatt -- well,
3 it's --

4 MS. LUCKHARDT: My understanding is that
5 it's over 1000 megawatts.

6 DR. PRIESTLY: How much?

7 MS. LUCKHARDT: A thousand.

8 DR. PRIESTLY: So, it's two 500 megawatt
9 power plants, so that's, you know, two power
10 plants the size of, say, the Metcalf Power Plant
11 here for San Jose.

12 So, we're talking about projects that
13 are very big. And particularly because of the
14 height of the stacks that are being removed, of
15 course, the area from which the project is going
16 to be viewed is rather large.

17 So there's some other factors are, you
18 know, given the fact that it's along the coast,
19 there are like long views up and down the
20 coastline that is more -- because you have the
21 hills coming down to the coast, it's kind of an
22 amphitheater-like arrangement, in some areas
23 anyway. You have some long views. In other areas
24 you have views across the bay, itself. So this is
25 a project that has a very very high degree of

1 visibility.

2 So, in addition to the difference in the
3 project, the situation is very very different from
4 Los Esteros, as well, in that first of all, the
5 existing project with those very tall stacks is
6 right next to Morro Rock, which is a major
7 landmark.

8 So, for example, on the Boueloff scale,
9 the landscape area affected by this project is
10 certainly an area of outstanding visual quality.
11 You know, Morro Rocks appear on postcards and
12 travel brochures and so on. And so that there is
13 kind of a visitor industry that is related to that
14 landscape.

15 So the issues are, you know, I think
16 much more sensitive to here, because it's in the
17 coastal zone, you have all of the concerns and
18 policies of the Coastal Commission. There are
19 state beaches nearby from which there are views of
20 the existing project, and the proposed project, as
21 well.

22 So, the situation is very very
23 different. And for some of the reasons that I
24 have just explained, they have ended up with many
25 more key observation points than would be -- than

1 we have found necessary at Los Esteros.

2 Although, in fact, some might say that
3 although there are reasons for having as many
4 points, others might argue that they still maybe
5 have more than are absolutely necessary. But
6 we'll let others argue that.

7 So, certainly the level of analysis that
8 was done there, you know it was quite
9 extraordinary, and you know, warranted by the
10 particulars of that situation which are very
11 different from Los Esteros, which is a landscape
12 of nowhere near the same level of sensitivity and
13 importance. And we're dealing with a project that
14 is much smaller. It's going to have stacks 90
15 feet high, as opposed to say, 450 for the ones
16 that are coming down, and I think about 145 for
17 the ones that are going in at Morro Bay.

18 MS. LUCKHARDT: And then turning to this
19 project, how did you evaluate Los Esteros in
20 relation to the CEQA guidelines?

21 DR. PRIESTLY: Yeah, again, by use of a
22 systematic approach to answer the CEQA questions.
23 Some of the questions weren't exactly relevant,
24 like the question related to effects within a
25 scenic highway, but for the others by application

1 of the method that I've just described.

2 We determined the extent to which the
3 CEQA questions, you know, to which the substantial
4 impacts that the CEQA questions asked about would
5 take place.

6 MS. LUCKHARDT: And you talked about
7 your review of local plans. Could you just
8 identify the location where you analyzed local
9 plans in your evaluation of this project?

10 DR. PRIESTLY: Okay, the details of my
11 evaluation of the local plans are contained in a
12 data response. And I don't have the number.

13 MS. LUCKHARDT: Was it the data adequacy
14 response, by chance?

15 DR. PRIESTLY: It may well have, yeah,
16 it may well have been, yeah.

17 MS. LUCKHARDT: Okay, and do you agree
18 with Dr. Clay's characterization of the project in
19 relation to San Jose's general plan?

20 DR. PRIESTLY: No, I do not. And,
21 again, if you were to take a look at my very
22 detailed analysis policy, my policy for reasons
23 are clear.

24 MS. LUCKHARDT: And can you explain how
25 visible this project is from either the McCarthy

1 or the Veritas developments?

2 DR. PRIESTLY: From the McCarthy Ranch
3 development, as a whole, and maybe if I can get up
4 and just point to one of the air photos --

5 MS. LUCKHARDT: Sure, just take a mike
6 or something --

7 (Off-the-record discussion.)

8 DR. PRIESTLY: This will be very very
9 brief here. Presumably when you're saying
10 McCarthy Ranch development, what you're primarily
11 talking about is big box shopping center over
12 here, and -- office buildings, was that what you
13 mean by McCarthy Ranch?

14 If that is the case, then the visibility
15 of the project site is over here, in fact is quite
16 limited, because as you can see if you're in the
17 parking lot, say, over here at WalMart or
18 something, you have these great large, big box
19 buildings blocking your view. This is where most
20 of the people are.

21 The only place where you might see in
22 this direction is, I guess this may be McCarthy
23 Ridge Road that moves around here, you're looking
24 in this direction, but first of all your point of
25 view isn't directly toward the plant. There's

1 quite a bit of riparian vegetation along here.

2 Then there's the question of visibility
3 from the Veritas complex, and that's this area.

4 MR. RATLIFF: Dr. Priestly, you want to
5 make sure the Committee sees you.

6 DR. PRIESTLY: Oh, sorry. Okay, so the
7 Veritas development is this area here, which is
8 now in the process of being developed.

9 So, a couple of things. When you're
10 down here at the Veritas parking lot you have the
11 large levee along Coyote Creek which partially
12 blocks your view. And, in fact, in the EIR which
13 was done recently for this area, mention is made
14 of the role of this levee in screening views
15 towards the west.

16 There's also considerable amount of
17 riparian vegetation in this area, which also
18 screens views towards the west.

19 The project site is located something on
20 the order of about 1000 feet from the closest
21 point of the Veritas complex. And these buildings
22 are under construction. And it would be possible
23 from an upper story of some of these buildings to
24 have some kind of a view towards the project site,
25 but to a very large degree the views are going to

1 be screened by the riparian vegetation. And
2 again, from the building itself, the distance is
3 on the order of about 1400 feet, which is about a
4 quarter mile which then puts the project outside
5 of the foreground zone.

6 And I think -- so, let me stop there.

7 MS. LUCKHARDT: And then lastly, Dr.
8 Priestly, you previously mentioned that you
9 prepared the visual impact analysis for the
10 Metcalf Energy Center. It's my understanding that
11 the Committee will be asked, or will take official
12 notice of the Metcalf project for the prehearing
13 conference.

14 And I'm wondering if you can explain the
15 differences between the alternatives analysis
16 conducted for Metcalf and the project that is
17 proposed for Los Esteros.

18 DR. PRIESTLY: Okay, and you're talking
19 about the differences, the physical differences in
20 the projects, themselves?

21 MS. LUCKHARDT: Right, in relation to
22 the visual analysis that was conducted.

23 DR. PRIESTLY: Yeah, so clearly the two
24 projects were quite different in scale. Again,
25 for two sites on and adjacent to the site that

1 we're looking at now, we were assuming the
2 development of a Metcalf-like project. So the
3 Metcalf project -- is it a 500 megawatt, 600
4 megawatt -- kind of in that range. It's a full-
5 size, combined cycle power plant which has stacks
6 that are on the order of 145 feet high, and has
7 the very large HRSG structures, which are
8 approximately 100 feet high.

9 It has a much bigger cooling tower than
10 the project that is now being proposed. So, in
11 general, it's fair to say that a Metcalf-like
12 project at this location would have a much greater
13 profile, would be more visible and have more of a
14 visual effect.

15 MS. LUCKHARDT: Thank you. That's all I
16 have on direct. And I would, at this point, like
17 to move applicant's testimony on visual resources.
18 And I'm looking for the numbers here.

19 Let's see, I've got 4H, which would
20 be -- yes, 4H.

21 HEARING OFFICER WILLIAMS: The Committee
22 will receive it subject to cross.

23 MS. LUCKHARDT: Oh, 4H and I guess 2R,
24 I'm being instructed by my folks okay.

25 HEARING OFFICER WILLIAMS: Okay.

1 MS. LUCKHARDT: And the witnesses are
2 available for cross.

3 MR. BRECHER: Mr. Chairman, I'd just
4 like to say that I don't object to the reception
5 in evidence. I do want to note for the record
6 that I was served with Dr. Gale's testimony about
7 an hour and a half ago, saw it for the first time
8 at that point. So, my cross-examination is going
9 to be rough.

10 I don't know why I wasn't served with
11 that along with the other testimony. But in view
12 of the fact that we are the only -- this is the
13 only intervenor's direct testimony that's been
14 presented all day, that will be presented, it
15 seems to me that we should have had a bit more
16 notice as to --

17 MS. LUCKHARDT: Yeah, the testimony that
18 he's referring to is the testimony of Ms. Gale.
19 That was submitted on Friday. And it was sent to
20 John Bakker's office instead. The folks who were
21 sending it out did not realize that there was a
22 change of counsel. That was not intention. And
23 we didn't intend to have it go to the wrong
24 address.

25 But I have to note that they changed

1 counsel at the last minute. There are undoubtedly
2 going to be some rough spots of everyone getting
3 things changed over because the service still said
4 John Bakker, and that's what the folks doing the
5 proof of service had followed.

6 So, we apologize for him not receiving
7 it more in advance, but on the other hand, you
8 might also note that although Milpitas has been an
9 intervenor in this case the entire time they have
10 not -- they've provided nothing in relation to the
11 kind of testimony that we received at this point.

12 We had had no comments, no comments on
13 the staff assessment, no comments on data requests
14 about the veracity or the accuracy of the
15 simulations. And so we had to scramble to -- and
16 we found ourselves very lucky that Ms. Gale was
17 available to come testify today. And could drop
18 everything else on her very busy plate to respond
19 to a lot of the comments made by Dr. Clay's
20 testimony.

21 And had we known that those were
22 concerns and had they been expressed throughout
23 the process as they typically are, then we would
24 have been prepared and could have prefiled the
25 testimony earlier, along with the remainder of our

1 testimony.

2 MR. BRECHER: Well, I'm not going to
3 belabor this issue, but that doesn't take care of
4 the problem. We filed our testimony on time. It
5 was filed out of my office. The return address
6 plainly said where it came from.

7 We didn't sandbag anybody. We filed our
8 document according to the schedule. And had we
9 had days instead of two hours, we could have done
10 a much better job in dealing with it.

11 I'm not a conspiratorialist, and I'm
12 willing to accept the view that this was a
13 mistake, but it sure is a very convenient mistake
14 in terms of our mounting an effective cross-
15 examination here. We'll do the best we can.

16 HEARING OFFICER WILLIAMS: So noted.

17 MR. BRECHER: Dr. Priestly, --

18 MR. RATLIFF: Wait, do I get a chance?
19 I mean it's okay, but I have a few very brief
20 questions --

21 MR. BRECHER: -- get to go first, is
22 that how it works?

23 MR. RATLIFF: Usually, but it's up to
24 the Committee, of course.

25 MR. BRECHER: Okay, yes. Sure.

CROSS-EXAMINATION

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BY MR. RATLIFF:

Q Dr. Priestly, some very brief questions. You've testified earlier that you have testified in other Energy Commission proceedings, is that correct?

A That is correct.

Q And is it your experience in those proceedings that the staff accepts the KOPs the applicant forwards uncritically without examining whether or not those KOPs are appropriate, or whether more KOPs are needed?

A Not at all. The staff reviews the KOPs very very carefully; and there are oftentimes when the staff asks us to select and analyze additional KOPs. And in the case of this project, you know, they asked us to do another one, and we did.

Q And in the same vein is it your experience that staff to uncritically accept the simulations or the other aspects of the applicant's testimony on visual resources?

A Not at all. You might recall the Delta project, which I think was the first one on which Environmental Vision prepared the simulations. And staff was very very exacting. They didn't

1 take anything on faith, and required Environmental
2 Vision to show all of their homework as to how
3 they arrived at the final simulations. And
4 apparently they must have passed the test.

5 Q Has it been your experience also that
6 you've had to adjudicate this issue with staff on
7 other occasions --

8 A Which --

9 Q -- impact of visual resources? Has it
10 been your experience that you have had to
11 adjudicate the impact on visual resources in other
12 cases, such as Metcalf or the Sutter Power
13 projects?

14 A Yes, it has been. I think it's quite
15 fair to say that staff never takes anything on
16 face value, and really works to make sure that the
17 issues are fully addressed.

18 MR. RATLIFF: Thank you.

19 (Off-the-record discussion.)

20 CROSS-EXAMINATION

21 BY MR. BRECHER:

22 Q Dr. Priestly, I'd like to take you back
23 to the first time that you became aware of this
24 project. Could you tell me how -- give me the
25 meeting or the phone call, whatever it was, that

1 first introduced you to this project.

2 A This particular project, for this site,
3 I first became quite -- well, first of all, I had
4 been aware for actually some time that some kind
5 of a project, a power plant project was kind of in
6 the works for this site.

7 But, as some might know, I joined
8 CH2MHILL in mid May of this past year. And
9 shortly after I joined CH2MHILL I was invited to
10 join the team for this project.

11 Q So that CH2MHILL had this project on its
12 plate before you came on board, is that correct?

13 A It had just come on to their plate --

14 Q Okay.

15 A -- at about that time, so it wasn't very
16 much before.

17 Q And were you designated the project
18 leader, is that how it's described in your shop?

19 A Not me, personally. CH2MHILL has a very
20 well organized way for dealing -- for organizing
21 projects. So the project manager for this project
22 was Jerry Salamy, who is here.

23 Q All right, but with respect to visual --

24 A Then, yes, so I was made you might want
25 to call it like the lead visual resources

1 specialist for this project.

2 Q Okay, and who else worked with you at
3 your firm on the visual impact?

4 A Yeah, it's fair to say that I did most
5 of the work on this analysis, myself. But I was
6 assisted by Environmental Vision, which prepared
7 the visual simulations.

8 Q Okay.

9 A And which also served as a sounding
10 board for various, you know, issues that came up.

11 Q And Mr. Salamy told you that you would
12 have a task to perform. What was that task?

13 A Excuse me?

14 Q What task were you asked to perform by
15 Mr. Salamy?

16 A I was asked to do, essentially to do the
17 visual analysis for this CEC project.

18 Q Okay. And was it your idea to bring in,
19 is it Visual Resources, --

20 A Environmental Vision?

21 Q Environmental Vision.

22 A You know, I would be hard pressed to say
23 because Environmental Vision has done work on a
24 lot of these projects. They're also a consultant
25 that CH2MHILL frequently uses. So I am -- I don't

1 know whether Mr. Salamy is under oath and can
2 respond to this, or --

3 MR. BRECHER: Well, let's put him under
4 oath and let's hear the answer.

5 MS. LUCKHARDT: Mr. Salamy has
6 previously been sworn.

7 MR. SALAMY: Environmental Visions, I
8 don't recall exactly whether it was Tom or myself.
9 I know I've used Environmental Visions on several
10 AFCs that I've prepared through our shop.

11 MR. BRECHER: Okay, thank you, sir.

12 BY MR. BRECHER:

13 Q So, Dr. Priestly, what was the first
14 step that you undertook once you were on board
15 doing this visual analysis?

16 A Yeah, I would say the very first thing
17 that I did is I got a copy of the EIR for the
18 Dataport project so that I could understand the
19 relationship of this project to Dataport. And so
20 I could understand the visual analyses that had
21 been done for the Dataport project.

22 Q Did you understand that your task was to
23 prepare a visual analysis for this project only,
24 and not the Dataport?

25 A Yeah, my understanding was that I was --

1 what was described to me at the time that I
2 started work on this project is that the analysis
3 that we were doing would be tiering off of the
4 analysis that was done for Dataport.

5 So my original direction instructions
6 were to prepare an analysis of this project in the
7 context of the Dataport project, which had already
8 been approved for this site.

9 Q And did that instruction ever change in
10 any manner?

11 A Later in the process, yeah, this, in
12 fact, was in response to I think some discussions
13 with the Energy Commission, a decision was made to
14 do two parallel analyses. One for the project in
15 the context of Dataport; and another one assuming
16 that, for whatever reason, Dataport would not
17 materialize immediately and we would have to
18 understand what the implications of this project
19 would be in that setting without Dataport.

20 So, if you look in my analysis you'll
21 see that there were two -- there are two equal
22 treatments.

23 Q And did you ever learn that the Dataport
24 project is in limbo and may not be built?

25 A No. I'm not aware of that.

1 Q What did you do -- what was your next
2 step in the process of constructing your visual
3 analysis?

4 A Yeah, as I had indicated in my previous
5 remarks, I tried to obtain copies of -- in fact, I
6 did obtain copies of other planning analyses that
7 had been done for that area of the Alviso plan,
8 the City of San Jose general plan, the
9 environmental analysis that had been prepared for
10 the Los Esteros substation project.

11 And I kind of steeped myself in those to
12 try to understand the relevant policies; the
13 sensitivity; and in general what was happening in
14 the site and the surrounding area.

15 And then, as I mentioned earlier, I
16 worked with our GIS people to have some maps
17 prepared that put the plot plan in the context of
18 the site and the surrounding area. I wanted to
19 understand where would the various Dataport
20 structures be and so on.

21 So that as I prepared for the field I
22 really had the tools that I needed to really, you
23 know, understand what was going on vis-a-vis this
24 project in its context.

25 Q Okay, and did you do any other work

1 before you went and did your field work?

2 A Other things that I did was certainly
3 communicate with other members of the project,
4 particularly the project engineers to, you know,
5 get the details on what is this project. What is
6 the project design. What are the characteristics
7 of the facilities that could be built at this
8 site.

9 Q Did you take a look at any drawings
10 about what the physical building would actually
11 look like?

12 A Yeah, I certainly recall having asked
13 for drawings showing the elevations of the
14 project.

15 Q But did you have any drawings that
16 showed you what it would actually look like, as
17 opposed to just schematics? Something like a
18 simulated photo so you could see --

19 A You know, I can't recall that any were
20 available at that time. There may have been, for
21 this one there may have been like an axonometric
22 drawing.

23 Q Have you ever seen a drawing about what
24 the plant would look like? Have you ever seen a
25 drawing that would give, to a layman's view,

1 here's --

2 A You mean kind of like a 3-D sort of like
3 artist's rendering?

4 Q Yeah, a painting or a drawing --

5 A You know, to be honest I can't recall
6 that I had.

7 Q So to this day you don't really know
8 what it's going to look like, other than
9 schematic --

10 A Well, no, that really wouldn't be a fair
11 thing to say. You know, as I indicated, when I
12 gave my quals, I've worked on a fair number of the
13 full-sized power plants and a number of peaker
14 plants, so, you know, I have some idea of what
15 these projects are all about, what they look at.

16 And, you know, my training is in
17 planning, so I can read site plans and get an idea
18 of what the project's going to entail based on the
19 site plan by looking at elevation drawings and so
20 on.

21 You know, as a professional I don't
22 necessarily have to see a, you know, a three-
23 dimensional artist's drawing or sketch to have,
24 you know, some conception of what's going to be
25 involved.

1 Q So you don't know what color it's going
2 to be?

3 A Pardon?

4 Q Do you know what color it will be?

5 A Well, you know, traditionally this is an
6 issue that has been left undefined until the end
7 when it can be worked out amongst the city and the
8 applicant and the CEC. And very often we'll make
9 an assumption about what the color will be.

10 And I think I think if we look in my AFC
11 I probably indicated what color was being assumed
12 for the project. And then that color would have
13 been reflected in the simulations that we
14 prepared.

15 Q But is it correct that in your view the
16 color is not a very important aspect --

17 A Oh, no, not --

18 Q -- or it is important?

19 A -- oh, no, not at all. To the contrary,
20 color's important, and that's actually one of the
21 reasons why we leave it as an issue to be worked
22 out by all the parties usually as a condition of
23 certification.

24 Again, in doing our analyses we'll
25 assume, usually assume like a neutral gray as kind

1 of our point of departure. And then we'll
2 certainly work with color as a mitigation measure,
3 as we get further along.

4 Q So if Mr. Calpine decided it should be
5 shocking pink, would you figure that it's a visual
6 intrusion?

7 A Well, let's say that would never happen.
8 You know, I have been working on these issues for
9 some time, and I think that there has been a lot
10 of education about the importance and the
11 sensitivity of the color issues.

12 And I know that generally Calpine and
13 the other applicants are very willing to, you
14 know, to work with this issue; define a color that
15 will be satisfying to all the parties; and will
16 really help to integrate the facility into its
17 setting.

18 Q So your answer was yes?

19 A We're going to have to go back to the
20 original question.

21 Q Shocking pink.

22 A What about shocking pink?

23 Q Would it be a visual intrusion?

24 A Depending -- well, really depending upon
25 the context and what the shocking pink is applied

1 to.

2 Q The power plant.

3 A Okay, in this power plant, in this
4 particular setting, yeah, my own professional
5 judgment is that shocking pink would not be a good
6 choice, and it would not help in reducing,
7 minimizing the impacts of the facility.

8 Q And you must have seen power plants in
9 the past where the stacks were painted like barber
10 poles?

11 A Yeah, I guess I have in places where the
12 stacks are very high and they're close to airports
13 and they have to conform to FAA regulations that
14 require that.

15 Q And that, too, would be a visually
16 intrusive situation, would it not, sir?

17 A Well, again, you know, it all depends
18 upon the context.

19 Q Here, in this power plant.

20 A On this power plant, having striped, you
21 know, barber pole striped towers would add to, you
22 know, some level of visual contrast with the
23 surroundings. It would not be the desirable
24 approach to take.

25 Q And would you find that there was a

1 significant visual impact if that were the case in
2 this --

3 A Well, when you start talking about a
4 significant visual impacts, you know, that's
5 something else. And, you know, we would want to
6 evaluate it very carefully before making a final
7 determination is or there is not a significant
8 impact.

9 Q So you would not prepare to evaluate the
10 possibility that there could be a significant
11 visual impact based on color at this time, is that
12 correct?

13 Shall I repeat the question?

14 A Yeah, --

15 Q You are unprepared at this time to make
16 a decision whether the color of the power plant
17 might produce a significant visual impact?

18 A What I -- I guess I really can't answer
19 or don't wish to answer the question in the way in
20 which you have phrased it.

21 What I would say is that if somebody
22 were to propose a color scheme for this project
23 that goes outside the normal range of things that
24 we would consider for a project of this type, we
25 would need to, you know, we'd need to take a very

1 very careful look at that and determine whether
2 that variation in the design would, you know,
3 raise the level of contrast, visual salience to
4 the point that a visual impact is created.

5 MR. BRECHER: I'd like to ask the
6 Chairman to direct the witness to answer the
7 question that I asked him.

8 HEARING OFFICER WILLIAMS: Could you
9 repeat the question?

10 MR. BRECHER: Yes.

11 BY MR. BRECHER:

12 Q You're unprepared at this time to
13 determine whether the color of the plant might
14 cause a significant environmental impact?

15 MS. LUCKHARDT: I find the question to
16 be argumentative and unnecessary in this
17 proceeding. My witness has testified that under
18 standard Energy Commission process there is
19 absolutely no way Michael Clayton is ever going to
20 let us paint barber poles or bright pink power
21 plants.

22 So, I think we're way outside of
23 anything that is even under consideration before
24 this Committee.

25 MR. BRECHER: Well, that's speculation

1 on the part of the attorney. I asked the question
2 whether because he doesn't know what the color is
3 he's prepared at this point to state whether or
4 not the plant could have a significant visual
5 impact based on its color.

6 MS. LUCKHARDT: The question that --

7 HEARING OFFICER WILLIAMS: I think
8 that's a fair question. Go ahead.

9 BY MR. BRECHER:

10 Q I've asked the question three times,
11 sir, and I can ask it again.

12 A Okay, you can tell that, you know, I'm
13 just hesitant to make an --

14 Q Oh, I know you are.

15 A -- an off-the-cuff response. I mean
16 color is an important variable.

17 Q And therefore, since you don't know the
18 color you can't tell, sitting here today, whether
19 the plant might have a significant environmental
20 impact, is that correct?

21 And you can't know that until the color
22 has been selected, isn't that true, sir?

23 A No, that's -- again, the way you have
24 phrased it isn't -- well, it's not really taking
25 us in a productive direction, I guess is what I

1 want to say --

2 Q Well, it's productive for me, sir.

3 A Well, again, as I had indicated, I have
4 been involved in something like 13, 14 power plant
5 projects and I certainly know the predilections of
6 the Energy Commission Staff in terms of project
7 color.

8 And the kinds of highly contrasting
9 colors that you have been presenting as
10 hypotheticals are just not within the realm of
11 possibility for a project of this type.

12 MR. BRECHER: Mr. Chairman, I still
13 haven't received an answer to my question. I've
14 asked it several times. I think I'm entitled to
15 an answer.

16 My question simply is that since the
17 color has not been determined now it's impossible
18 to tell whether or not the plant might have a
19 significant visual impact, until the color has
20 been decided upon.

21 Now, the witness has said he doesn't
22 think that a bad color will be decided upon. But
23 it hasn't been decided upon. And so I'm asking
24 him at this moment can he determine that.

25 I've asked him three times, I haven't

1 received an answer.

2 HEARING OFFICER WILLIAMS: Can you or
3 can you, I mean --

4 DR. PRIESTLY: Well, I would say in
5 general in this case, and I, you know, hesitate to
6 do it, but in this particular case, given the
7 scale of this project, you know, we are talking
8 about a project whose tallest features is the
9 stacks, which are 90 feet high. Most of the other
10 features are considerably shorter than the stacks.

11 The project is set back 1000 feet or
12 more from the closest publicly accessible viewing
13 areas. The project is going to be surrounded by
14 sound walls on two sides. It's going to be
15 surrounded by landscaping.

16 So, given all of those factors which
17 will tend to screen the visibility of the power
18 plant to some extent, and given the fact that it
19 is going to be seen in the context of an
20 environment which is urbanized and further
21 urbanizing, and in fact may well be surrounded by
22 the U.S. Dataport buildings, which are going to,
23 you know, highly screen the project, I would say
24 that I guess I am prepared to say that the
25 probability that even in the very very unlikely

1 event that an extreme color choice were to be
2 selected, that it is not likely that the visual
3 impacts of this particular project would be pushed
4 over to the level of a significant visual impact.

5 BY MR. BRECHER:

6 Q So it doesn't matter what color it is,
7 no matter what color it's painted it would not be
8 a significant visual impact, is that correct, sir,
9 is that your testimony?

10 I think I almost heard that.

11 A I guess, you know, what I would have to
12 say is that I would say most colors, if you were
13 to pick something really extreme, particularly
14 like if you were to cover this thing with mirrors,
15 for example, because we know that the Commission
16 Staff is very concerned about glare, if you were
17 to pick a highly highly reflective color, it's
18 possible that from some of the views, one of the
19 views, anyway, that it's possible that that could
20 push this over to the level of a significant
21 impact.

22 But again, I do want to add that the
23 color that we have proposed as a basis for our
24 analysis is a neutral gray. And the probability
25 that the Commission, as a condition of its

1 decision, would allow us to do something that
2 would be highly contrasting and would push this
3 thing over to the level of significance, or you
4 know, it's very improbable.

5 Q Thank you, sir. Now, you mentioned that
6 you worked on a number of different power plant
7 projects. About how many have you worked on?

8 A As I've indicated, maybe 13 of the
9 larger size power plants and a number of peaker
10 plants.

11 Q Do they all look the same?

12 A I would say that the larger plants have
13 a lot of things in common; they're fairly similar.
14 There are a few exceptions in that some are, you
15 know, are bigger; they might be 1200 megawatts
16 instead of 500 or 600 megawatts.

17 And there are a couple of exceptions, as
18 well, in that two of the projects that I have been
19 working on have been given architectural
20 screening.

21 Q Do the peaker plants, are they about the
22 same size as the plant we're talking about here?

23 A The peaker plants are pretty modular;
24 and I would say in general, at least the ones I
25 have worked on, would be smaller.

1 Q Okay. And you did visual analyses for
2 these peaker plants?

3 A Yes, I did.

4 Q How many were there?

5 A Well, let's see, off the top of my head
6 I can think of four.

7 Q Okay. Do you remember what they were in
8 your head, because I'd like to ask you about them.

9 A Okay, I mean I've been very busy so I
10 need to take a minute to walk down memory lane
11 here.

12 Q Oh, we've been here for hours and hours,
13 sir, a couple more minutes isn't going to make any
14 difference.

15 Let's take the first one that you worked
16 on. Can you remember what it was?

17 A Okay, I worked on a set of three oh,
18 about a year, year and a half or so ago, that were
19 proposed for sites at the Newark substation, at a
20 substation site in Hayward, and at a rural site
21 next to a Hetch Hetchy substation in Stanislaus
22 County.

23 Q And did you use roughly the same type of
24 visual analysis that you did here? Did you go
25 through the same steps to prepare those analyses?

1 A Generally, although -- yeah, generally
2 went through the same analysis.

3 Q How many KOPs were there in each of
4 those?

5 A Typically for those there were one to,
6 at most, two.

7 Q For all four of them?

8 A For each, no, for each one.

9 Q Right --

10 A For each project --

11 Q -- for each of the four of them there
12 were no more than two KOPs?

13 A That's correct.

14 Q Okay. And now for the larger plants,
15 what was the greatest number of KOPs you ever
16 used?

17 A It would have to be for the Metcalf
18 Power Plant, where I think that we ended up with
19 something about 11 viewpoints, not although I
20 think two of them ended up with the -- in
21 collaboration with the Commission Staff, a
22 decision was made that two of the KOPs did not
23 require the full evaluation with a simulation
24 because, as it turns out they were so far from the
25 power plant project that the CEC Staff did not

1 feel that a simulation was required.

2 Q Okay. Getting back to the abstract for
3 a moment, we were talking about all the plants
4 looking the same. Are you aware of any power
5 plants anywhere in the world in which
6 architectural treatments, as opposed to screening,
7 was used to soften the visual impact of the plant?

8 A Yeah, oh, sure. Yeah, I have, you know,
9 had the opportunity to see some, and in fact
10 there's a whole history of power plant development
11 that we talk about, you know, that back in the old
12 days when power plants were developed right in the
13 middle of cities, you know, in very dense urban
14 areas, and I'm thinking like, you know, the east
15 side of New York, for example, near the United
16 Nations, where those kinds of urban power plants
17 would get an architectural treatment.

18 Q All right, and is it fair to say that
19 some of them actually got to the point where they
20 were attractive? Could you go that far?

21 A Yeah, in general, yeah, that is fair to
22 say.

23 Q So it is possible to do that, is it not?

24 A Yeah.

25 Q Okay. Are you aware of any predilection

1 or any efforts being made on the current Los
2 Esteros plant to move the plant in the direction
3 of being attractive?

4 A Well, first of all, I guess my first
5 part of the response to that question is, you
6 know, to what degree are people saying that this
7 particular -- to what degree are we saying that
8 this plant's current design is, you know,
9 unattractive.

10 Secondly, to my knowledge, there has
11 been no discussion related to the development of
12 an architectural treatment for this project. And
13 I think it's fair to say that given the fact that
14 this project was conceived of as a part of the
15 U.S. Dataport project, whose buildings would
16 completely surround the project and screen it from
17 views from the surrounding area, one could say
18 that it would not necessarily be serving anyone's
19 interest to invest in architectural treatment for
20 this project, for a plant that is not going to be
21 seen by the public.

22 Q Okay. You mentioned that you look at
23 the general plans of the various cities in the
24 area as part of your research?

25 A Yeah.

1 Q Did you happen to come across the San
2 Jose general plan policy four which states that
3 there should be attractive design qualities and
4 high standards of architectural excellence with
5 respect to new buildings?

6 Do you remember anything like that?

7 (Pause.)

8 MR. BRECHER: I'll give you a reference
9 again; it's, I don't know if you have the plan
10 there, page 4.12-20, policy four.

11 MR. RATLIFF: That's in the staff
12 testimony, of course.

13 DR. PRIESTLY: Okay, this policy we
14 should first say, was written in the context of
15 scenic routes. And it refers to development
16 occurring adjacent to landscaped throughways.

17 First of all, highway 237 is a
18 landscaped throughway. But the operative word
19 here is adjacent to landscaped throughways.

20 We could certainly say that the U.S.
21 Dataport project, whose buildings, you know, are
22 just feet away from highway 237 are adjacent to
23 this landscaped throughway.

24 My assessment of this policy was the
25 power plant, that was the power plant, would be

1 consistent with this policy because it would not
2 be adjacent. It's separated by 400 or more feet
3 from the boundary of -- you know, from the edge of
4 the freeway, and in addition, would be surrounded
5 by the U.S. Dataport buildings and structures.

6 BY MR. BRECHER:

7 Q And at page 4.12-22, there's a reference
8 to high quality of architectural design. Do you
9 think that this plant qualifies as high quality
10 architectural --

11 A Okay, now, what is the number of that
12 policy?

13 Q 4.12-22.

14 A Well, I'm interested in what section of
15 the general -- what is the name of that section of
16 the general plan, what are the policies it
17 pertains to?

18 Q We'll come back to that. So, in your
19 view the power plant is not adjacent to highway
20 237?

21 A Yeah, in my view it is not.

22 Q Now, when we're screening, we don't
23 screen beautiful things, we screen ugly things, is
24 that pretty accurate?

25 We don't screen the Taj Mahal, do we?

1 A Well, in fact there may be reasons why,
2 in fact, a landscape plan is proposed for a
3 facility, even a beautiful facility like the Taj
4 Mahal, in fact, to direct people's attention in a
5 particular way, perhaps create a sense of drama or
6 whatever in terms of the sequence of views toward
7 the project.

8 Q But you wouldn't call it screening,
9 would you, sir?

10 A You could, but --

11 Q But you wouldn't, would you?

12 A I would call it like a landscape plan,
13 or a landscape enhancement or something.

14 Q Yeah, I mean there's a difference in
15 screen. When you say screening, screening is
16 generally used to hide something, is it not, sir?

17 A Yeah, that's a very fair statement.

18 Q Okay. So, is it fair to say that the
19 screening is necessary in your view to hide the
20 power plant because it's ugly?

21 A No. In fact, I wouldn't say it was, you
22 know, necessary.

23 Q You don't think screening is necessary?

24 A I would say it's something that would be
25 a very very good thing to do in this case, but in

1 regard to a somewhat separate issue is the project
2 one which would have a significant impact and
3 require screening for the mitigation of that
4 impact, that's an issue that would have to be
5 looked at in some detail.

6 However, for the purposes of our
7 analysis we assume that some level of screening
8 would be provided along the eastern -- the western
9 and southern portions of the project.

10 Q And, again, the purpose of providing
11 that screening is to do what?

12 A Is to reduce the visibility of a plant,
13 and put the -- better relate the plant to its
14 overall visual context.

15 Q Why would we want to reduce the
16 visibility of the plant if it's not ugly?

17 A Because there are, you know, many people
18 who -- because there are people who would evaluate
19 the presence of a plant as being an undesirable
20 thing.

21 Q They wouldn't think it's ugly?

22 A Some might.

23 Q Most wouldn't? Come on, sir, let's --

24 A Well, again --

25 (Parties speaking simultaneously.)

1 DR. PRIESTLY: Again, it all depends
2 upon the context. I'll just, you know, here's an
3 anecdote. I was in San Joaquin the other day for
4 a workshop. There were people there who had
5 visited the power plant in Pittsburg. And it was
6 very very interesting that the people who had
7 visited this plant said, this plant is beautiful.
8 In fact, they thought the cooling tower was
9 particularly interesting and cool.

10 So, there is, you know, a range of
11 opinions about these kinds of things.

12 Q And that power plant looked like the
13 normal ones that we've been discussing?

14 A Yeah, it's -- yeah, I would say yeah,
15 it's pretty conventional in its design.

16 Q Okay, do you think that these folks
17 represent the average Joe-Sixpack, or might they
18 be somewhat extreme?

19 A You know, it's -- I'm not going to say.
20 I think that they represent one portion of the
21 public opinion out there.

22 Q Okay. But isn't it accurate, sir, that
23 the average person, most people would find power
24 plants unattractive?

25 A Yeah, I would say experience has shown

1 that probably people with higher incomes, higher
2 levels of education may find them to be. And
3 people with training in things more like the arts
4 and the social sciences, you know.

5 I've done research on perceptions of
6 transmission lines. And, in fact, fairly in
7 depth. And in fact, there are -- we found in
8 doing statistical analyses that there are like
9 clusters of people who have different perceptions
10 of these kinds of things.

11 And so it's hard, you know, it's not
12 really fair to say that across the board people
13 think that, you know, it's ugly or beautiful.
14 There are, you know, subgroups of people who hold
15 those decisions. At least, you know, projecting
16 from what I know about responses to power lines
17 that would be my hypothesis about power plants.

18 Q And would you say this would be a
19 majority of the folks that you've encountered, or
20 a minority that would take that view?

21 A Again, it would all be very very
22 contextual.

23 Q And what context would we be talking
24 about?

25 A Well, we've just been talking about some

1 of the factors that play a role in integrating a
2 project into its setting, so some of these things
3 have to do with the scale of the project, its
4 relationship to its surrounding, the surrounding
5 land uses, you know, the situation from which
6 people are observing the project, the extent to
7 which it might be perceived as say an intrusion
8 upon someone's residential neighborhood and so on.

9 So there's a very very long list of
10 variables taken into account.

11 Q You mentioned that you visited a trailer
12 park near the plant, is that correct, sir?

13 A I didn't use the term trailer park. I
14 wouldn't use the term trailer park. It was a
15 mobile home residential community.

16 Q Excuse me, sir, you visited a mobile
17 home community near the facility, did you?

18 A Yes, I did.

19 Q Did you talk to any of the folks there?

20 A No, I did not.

21 Q What reaction do you think they'd have
22 if you asked them whether they would enjoy the
23 view of the power plant going in there?

24 A Well, actually for most of them that
25 would not be the question, because from this

1 mobile home community there would not be views of
2 the power plant. From just a few of the units on
3 the very very edge there could be a view, maybe,
4 of the tops of the stacks. But it would be a very
5 very limited view.

6 Q Okay. And if you added the cloud from
7 the cooling tower, would that increase the number
8 of mobile homes that could view the facility or
9 its --

10 A Yeah, you know, actually in this case it
11 wouldn't because the mobile homes are placed
12 fairly closely together. So when you're in the
13 community it's really a very very enclosed world,
14 and there are a lot of trees that create a tree
15 canopy.

16 So except from the homes that are along,
17 you know, the periphery, one corner of the -- like
18 the northeast corner of the periphery of the
19 project, the views of the plumes would be limited.

20 And I think if you look at the most
21 recent analysis of the plumes, the height of the
22 plumes that we are talking about is not very
23 large. So it's not like they're going to be like
24 giant mushroom clouds.

25 Q How large is -- about how many feet

1 above the stack does the plume extend?

2 A We have to take a look at the visual
3 testimony to refresh my memory.

4 Q Would you do that, please?

5 (Pause.)

6 MR. RATLIFF: Commissioner, if I may.
7 We're in strong hope that we might finish tonight.
8 Do you know how late we have the room?

9 COMMISSIONER BOYD: Indefinitely.
10 Beyond 9:00 we were told that we could keep going.

11 MR. RATLIFF: We could keep going, okay.
12 (Off-the-record discussion.)

13 MR. RATLIFF: -- would have difficulty
14 coming back tomorrow for testimony, so we wanted
15 to figure out how we're going to do it.

16 (Off-the-record discussion.)

17 COMMISSIONER BOYD: At the beginning of
18 this hearing we said we would like to try to
19 finish this today or tonight.

20 DR. PRIESTLY: Okay, if you're ready?

21 BY MR. BRECHER:

22 Q Yes, sir.

23 A I have actually looked in the analysis
24 prepared by Mr. Clayton. On page 4.12-10, that's
25 of the staff, the original staff visual

1 assessment. Page 4.12-10.

2 Here it is indicated that based on the
3 modeling results it appears that these plumes
4 would be in effect extend no higher than 28 feet
5 above the tallest project structural component,
6 which would be the stacks.

7 Q Okay, so we add 28 to 90, is it? What
8 are we up to then?

9 A So that 118 feet.

10 Q Okay. So, let's take the folks in the
11 mobile home park at the periphery, they'd
12 certainly see that plume, wouldn't they?

13 A Yeah, there would be a small number of
14 mobile homes from the backyards of which, if
15 people were looking specifically out in that
16 direction at the times that the plumes were formed
17 they would see them.

18 Q And the plume is going to be there about
19 25 percent of the time, isn't it, sir? I think we
20 established that at one point in the testimony.

21 MS. LUCKHARDT: You haven't asked about
22 it until now, so we would have to double check the
23 numbers.

24 BY MR. BRECHER:

25 Q Okay, well, I'm asking you to assume it

1 for the moment. I'm sure your counsel will point
2 it out if I'm wrong.

3 A Okay, if you look at this table,
4 according to table 1, the plumes would be visible
5 15.8 percent of daylight hours.

6 Q I think that was changed to the 20s,
7 wasn't it?

8 A If you're looking strictly at the period
9 from November through April, during that -- if you
10 just take and copy out the daylight hours during
11 that period, then you would say of those hours, 21
12 percent of those hours would have a plume of this
13 type.

14 Q Okay. Sir, if that was your house and
15 you were looking out that window, you wouldn't be
16 annoyed? You wouldn't find it ugly or annoying or
17 distracting?

18 A Yeah, given the distance I'm not sure
19 that I would.

20 Q Okay, fair enough. How long is it going
21 to take the trees to grow before they do the
22 screening job that you're assuming?

23 A Yeah, we have the simulations that we
24 prepared show the tree screening as it would
25 appear at 20 years. And I have been consulting

1 with the project landscape architect to work on
2 measures to assure that we get, you know, maximum
3 feasible tree growth to provide as much screening
4 as is, you know, reasonable in a reasonable amount
5 of time.

6 Q Okay, so for at least five or so years,
7 maybe ten years, there's going to be virtually no
8 screening, isn't that right, because that's how
9 long it will take the trees to grow?

10 A They'll be -- first of all, there will
11 be a level of screening that is provided by the
12 sound walls in some views.

13 Q I'm talking about the places where the
14 trees are being provided for screenings. There
15 will be many years in which those screens will not
16 be in effect, right?

17 A I would say that the screening will be
18 evolving over time, will be getting taller and
19 will become more effective over time.

20 Q And is it not true that for several
21 years at the outset there will be virtually no
22 screening in the areas where the trees are --

23 A That is quite true. The plants will be
24 there, but they're not going to have a whole lot
25 of effect for the first few years, that's a fair

1 statement.

2 Q So, for several years that plant will be
3 visible. There will be no screening impact, and
4 people will be looking at it dead on, isn't that
5 correct, sir?

6 A Well, let's say that the effective --
7 yeah, the effectiveness of the screening will be
8 pretty limited during those first years.

9 Q And therefore the plant will be right
10 out there in plain view, and it won't be mollified
11 or mitigated to any extent by plants, isn't that
12 correct?

13 A By plants, see. The mitigation by the
14 plants will be very limited during those first
15 years.

16 Q And during those first years would that
17 be a significant visual impact?

18 A Actually my answer is no.

19 Q Okay. Now, there are objective methods
20 which you have mentioned in your testimony about
21 how to characterize the beauty of landscaping, is
22 that correct?

23 A There are systematic procedures that we
24 can follow in an effort to arrive at an objective
25 evaluation.

1 Q And there were five categories, from
2 highly scenic right down to --

3 A I think six.

4 Q Six. And if I took anybody in your
5 discipline and I showed them that landscape they'd
6 agree with the characterization that you imparted
7 to it? Because these are objective criteria? Is
8 that accurate?

9 A What I would say about these criteria is
10 that they involve consideration of range of
11 variables that are, I think, pretty well
12 understood among landscape professionals who
13 engage in this kind of effort.

14 And given that fact, it's highly likely
15 that they would come up with similar kinds of
16 conclusions.

17 Q So if I took ten landscape
18 professionals, I showed them this view, they'd all
19 say, they'd all give it the same ratings that you
20 gave it? Am I right?

21 A There, you know, there may well be, you
22 know, some range of variation, but it's likely
23 that there would be a central tendency.

24 Q Central tendency. Another subjective
25 criteria buried in the objective language that's

1 used there, beautiful, world class, or whatever
2 you used. Isn't the beauty partially in the eye
3 of the beholder, no matter what you do?

4 A To a degree. I think, you know, one of
5 the things that is very very useful about this
6 Boueloff scale is, in fact, that it is a scale
7 that is anchored at both ends by, you know,
8 situations, visual situations that I think are
9 fairly understandable to people.

10 The notion of say, a highly scenic world
11 class landscape at one end of the spectrum and at
12 the other a very very -- a landscape with very
13 very low scenic quality, with a lot of discordant
14 elements.

15 I think that creates a framework within
16 which one can begin to make classifications in
17 between.

18 Q So, how you define the visual impact of
19 the facility depends in part on the place where
20 it's being set down, doesn't it?

21 A Yes.

22 Q Okay. If you put the same facility in
23 Yosemite Valley I think even you would --

24 A Oh, yes.

25 Q -- agree this would have a visual

1 impact, right? So, aren't we saying to the folks
2 in Milpitas, too bad you live in an ugly area, so
3 no matter how many ugly things we pack in here, it
4 doesn't make any difference?

5 A Oh, no, we're not saying that to the
6 folks of Milpitas --

7 Q Why not?

8 A -- at all because the project that we
9 are talking about would not be particularly
10 visible from the City of Milpitas.

11 Q It wouldn't be visible from any of the
12 facilities in Milpitas, is that what you're
13 telling us?

14 A I'm not saying that. I'm not saying it
15 would be particularly visible from --

16 Q Well, it would be visible from some
17 portions of Milpitas, including the area that the
18 City's trying to develop for R&D parks, et cetera?

19 MS. LUCKHARDT: Could you describe
20 exactly where that area is? Or show it on one of
21 the maps or something so we can understand.

22 MR. BRECHER: I'll withdraw that
23 question.

24 BY MR. BRECHER:

25 Q Sir, getting to the Morro Bay situation,

1 you mentioned that it was more appropriate to have
2 many KOPs there, many more than in the present
3 case.

4 Is it true that in Morro Bay 180 degrees
5 is ocean, so that there would be no KOPs there,
6 isn't that accurate?

7 A That part is true, but you may recall
8 that there are other factors that I mentioned
9 which suggested the need for more KOPs in that
10 case.

11 Q Okay. And when you first selected the
12 KOPs, you selected two only, isn't that correct?

13 A That's correct.

14 Q And staff concluded that that wasn't
15 enough, is that right?

16 A That's correct.

17 Q Okay. Did you disagree with the staff
18 and feel that two was plenty?

19 A Well, I thought that two was sufficient.
20 I didn't really think that the one from Alviso was
21 necessary because of the distance of the viewpoint
22 from that location.

23 Q And when you select a KOP are you
24 looking for the total number of people who are
25 impacted, or what is the criteria to determine why

1 one place would be more appropriate than another?

2 A You know, we consider a range of
3 factors. It's the total number of viewers --
4 certainly it's the potential visibility of the
5 project from the location involved.

6 The total number of viewers, the
7 sensitivity of the viewers, and whether or not the
8 viewpoint is a publicly accessible location.

9 Q Okay, so you had no doubt that the KOP
10 along 237 was appropriate, did you not?

11 A No, I didn't have any doubt.

12 Q And is it true that the folks who would
13 be doing the viewing in KOP were drivers, probably
14 most of them who are not residents of the area?

15 A Well, you know, I can't answer that
16 part. I haven't seen any studies, origin/
17 destination studies that break down exactly the
18 mix of people who are, you know, more or less
19 local versus those who are commuting, versus those
20 who might be driving through.

21 Q Okay. Is it fair to say that from your
22 knowledge of the area, you mentioned that you're a
23 long-time Bay Area resident, you were familiar
24 with the area, that most of the people driving
25 past the KOP on route 237 would not be folks who

1 reside in homes that would otherwise view the
2 power plant?

3 A Yeah, I think that's a very very fair
4 assumption.

5 Q Okay. And about how long would the
6 average driver have the power plant in view as he
7 drives past the spot?

8 A Well, you know, it all depends on the
9 time of day.

10 Q Right, okay. That's fair enough because
11 they could be stuck in traffic and looking at it
12 for quite a long time. But let's say at the speed
13 limit.

14 A Yeah, it would be a very very brief
15 glimpse as people speed along.

16 Q Okay.

17 A Because as I indicated, because in
18 particularly -- well, in both directions there are
19 obstructions, so the little window within which,
20 you know, you would really have a full -- have
21 some kind of a view of the power plant would be
22 pretty limited.

23 Q Okay. So is it fair to say that the
24 drivers speeding along on 237 who views the power
25 plant for a minute or two is not going to be too

1 badly distracted in terms of what he's been
2 through during his day?

3 A I guess I'm trying to understand what
4 you mean when you say not too badly distracted.

5 Q Well, is it accurate to say that his
6 exposure to the power plant would be just a
7 momentary situation and then it would be gone?

8 A Well, you know, given -- assuming that
9 traffic is moving at the speed limit, the
10 visibility of the power plant would be for kind of
11 a brief period, particularly, of course, as you
12 move further along it gets outside the cone of
13 vision. And the faster you're going the narrower
14 your cone of vision is.

15 So it's a kind of a limited exposure.

16 Q So in terms of the visual impact
17 certainly the amount of time that one is exposed
18 to it is one of the factors we consider, is it
19 not?

20 A It's one of, yeah, one of the factors.

21 Q Okay. Now, let's take another extreme,
22 somebody whose window looks out on the power plant
23 day in and day out. Would the visual impact on
24 that person be a lot greater than on a driver
25 driving along --

1 A Yeah, and again, there'd be a whole
2 range of factors to take into account. One is the
3 distance of the residence from the power plant,
4 you know, what the relative scale of the power
5 plant is. The visibility of the power plant. The
6 context within which the power plant is seen. The
7 extent to which there are fences and vegetation
8 and so on in the backyard of the residence
9 involved that would block all or part of the view
10 and so on.

11 So I mean there's a range of
12 considerations that you would want to take into
13 account.

14 Q Sure. But surely there are one or two
15 or three or ten residences that are not screened,
16 not blocked, fairly close who will be looking at
17 that power plant every day for 30 or 40 --

18 A So, you're talking about the residences
19 in the mobile home community --

20 Q Or anywhere, or any residential areas
21 around there. You said there are several.

22 MS. LUCKHARDT: Well, can you point out
23 which residences --

24 MR. BRECHER: I don't know, he --

25 MS. LUCKHARDT: -- you're referring to?

1 MR. BRECHER: -- he stated that he
2 visited several residential areas. So I'm talking
3 bout the ones that he visited.

4 DR. PRIESTLY: So the ones that I
5 visited that are closest to the area are, you
6 know, most specifically the mobile home community
7 and then the Alviso neighborhood.

8 BY MR. BRECHER:

9 Q Yes.

10 Q And as I explained for Alviso, we did do
11 a full analysis and you can, you know, read the
12 analysis and see the analysis in the AFC. And in
13 that case, particularly because of the distance of
14 the project from that area, and all of the
15 background features with which the project merges.
16 The degree of visual impact is, you know, very
17 very low from that area.

18 Q And then you did that from the street,
19 right? You didn't do it from anyone's backyard or
20 back window, did you?

21 A No, I did not. And my understanding is
22 that a CEQA analysis it would not be proper to
23 base a visual analysis from a viewpoint on private
24 property.

25 Q Well, what's the source of that

1 understanding, sir?

2 A Yeah, I guess in terms of consultation
3 with other CEQA practitioners, there appears to be
4 a principle that key observation points should be
5 from publicly accessible areas.

6 Q That's interesting. So that the views
7 out of private property windows and so on cannot
8 be a significant environmental impact then, am I
9 right?

10 A I'm not saying that. What I would do
11 in, you know, I've encountered these kinds of
12 situations where in fact we are concerned about
13 views from residential areas toward, you know, a
14 facility of this type.

15 And what I would do is look for a
16 publicly accessible area in that neighborhood from
17 which the plant could be seen, and a view which
18 would be similar, you know, comparable to the
19 kinds of views that people might have.

20 Q Okay, now the picture that you took on
21 Grand Avenue there, with cars parked, the fence in
22 the way, garbage and so on, so that it's not the
23 same view that one would get out of one's back
24 window in --

25 A Well, in the case of Grand Avenue, I

1 don't know whether you've been up, been over there
2 or not. Grand Avenue, you know, is kind of a, oh,
3 northeast to southwest trending street that is
4 bordered on one side by lands that belong in part,
5 I think, to the wastewater treatment plant that
6 are used for sewage disposal; another portion is
7 owned by Cisco and it's going to be developed with
8 buildings.

9 So there's only homes on one side of the
10 street. So that case, the views would all be from
11 the fronts of the homes. And so like if you were
12 in your house, your view in this direction towards
13 all the trash on this wasteland out there would be
14 filtered by fences, trees and so on.

15 Q But the view from the folks' front
16 window wouldn't be quite as ugly as the -- you got
17 to admit, the photo you took was pretty ugly,
18 there, right?

19 A What's that?

20 Q You got to admit the photo you took on
21 Grand Avenue is a pretty ugly scene, isn't it?

22 A The photo I took on Grand Avenue is
23 reflective of what it is, of the conditions that
24 you see when you're along Grand Avenue. I mean I
25 can assure you I didn't go out there and park

1 those junk cars --

2 Q No, I didn't accuse you of --

3 A -- and put litter out and --

4 Q I just asked you if it's ugly. I just
5 asked you if it's ugly, that's all.

6 A Yeah, I would say, you know, to me,
7 let's say to me that's not an attractive view.

8 Q Is it ugly?

9 A I guess as a professional I probably --

10 Q -- use the word ugly --

11 A -- I probably make very fine
12 distinctions, and I wouldn't exactly call it ugly.

13 Q You wouldn't? Okay. I mean did you see
14 any scenes of the Grand Avenue area that were any
15 more attractive than this one? I mean I notice
16 you're down there, were you kneeling when you took
17 this picture?

18 A No. I was using my tripod when I took
19 that picture. And I did spend a fair amount of my
20 time at that corner trying to come up with a most
21 appropriate view.

22 Again, there were some very specific
23 reasons why I selected this view. There was an
24 advantage of being at that intersection where we
25 took into the views of the people coming from the

1 side street, as well as the views from the people
2 in the homes and so on.

3 So I kind of spent some time working
4 with that view to come up with a, you know, kind
5 of a framing of it that was as attractive as I
6 could make it and provide an unobstructed view
7 towards the site where the power plant would be.

8 Q This was as attractive as you could make
9 it?

10 A You know, without going out and, you
11 know, cleaning the litter up and getting people to
12 move the cars and so on.

13 Q And if you'd moved 20 feet to the right
14 would that have snazzed it up a bit?

15 A Yeah, so if I were to have moved 20 feet
16 to the right what would have happened is that
17 power pole you see would have moved more into the
18 middle of the view, and could well have obstructed
19 the view towards the power plant.

20 Q Now, there are homes in back of you?

21 A Yes, there are.

22 Q Okay, those homes are presumably off the
23 ground, windows probably ten feet in the air or
24 so, is that --

25 A Yeah, that's hard to say. In Alviso the

1 homes are elevated a bit.

2 Q So if you put your camera on the
3 windowsill in that picture would it look a little
4 better than this?

5 A Yeah, it probably would look a little
6 bit better, but --

7 Q You wouldn't have --

8 A -- assuming that I had permission to
9 enter someone's home to do this, it might have
10 been a struggle to find a view that would be as
11 open as this one. Because, again, as I indicated,
12 most people there have, you know, some kind of,
13 you know, fences and landscaping and so on in
14 their front yards.

15 The other thing that I could mention,
16 too, is of course, the side of the road where
17 people have their houses, they're more likely to
18 park their cars. So they'd be kind of looking
19 across parked cars, which would be right, you
20 know, in the foreground of the view.

21 Q The cars would be below, though,
22 wouldn't they? You're standing -- you're five and
23 a half feet tall, you're standing in your house,
24 you're looking out your window, that puts your
25 head somewhere like 15 feet above the street,

1 doesn't it, sir?

2 And if you were holding a camera there,
3 you're not going to see the fence occupying half
4 of the picture; you're not going to see these cars
5 occupying half of the picture. You're going to
6 get a look at this view unobstructed by any of
7 this stuff, aren't you?

8 And those are the folks who are going to
9 be looking at it day after day, isn't that right,
10 sir? Our their front windows --

11 A I guess to back up with a series of
12 statements that you have just made, --

13 Q Tell me where I'm wrong.

14 A Pardon?

15 Q Tell me where I'm wrong.

16 A Okay, I will try. There are several
17 things. One is as I indicated a number of times,
18 in many cases you're going to have landscaping and
19 other obstructions in the foreground of your view
20 so you're not going to have, in fact, as open a
21 view. And it's true that you may be looking over
22 the tops of these vehicles, but I don't really see
23 that it's going to significantly change the view.

24 And I think, here's something -- I know
25 you're making a lot of this point, but here's

1 something to consider. Is given the very very
2 small scale of this project in this view, I don't
3 know if you're looking at the simulation or not.
4 I'd be, you know, you might be hard pressed to
5 tell me that even with a view that is not taken
6 from the public right-of-way, if we were to, you
7 know, not follow standard practice and take the
8 view from a position that is not accessible to the
9 public, and enter someone's house, taken from
10 their window, you would have a slightly different
11 view.

12 But looking at the simulation can you
13 really tell me that the level of visual impact
14 would be significantly different, given the very
15 small size of this project in relationship to the
16 other features in that setting; the fact that it's
17 completely backdropped, and you know, is quite
18 well integrated in the overall landscape pattern?

19 Q Well, sir, I submit, I mean since you're
20 asking me a question, I would submit that I don't
21 want to be looking out my front window at a power
22 plant, no matter how -- especially we don't know
23 what color it is, especially if it turns out to be
24 shocking pink.

25 A Well, at this distance color is not

1 going to be a very important factor.

2 Q Nor is the plume, I take it?

3 A Yeah, in terms of its relationship, and
4 in terms of the scale of the plume in relationship
5 to this very large landscape that you're looking
6 at, in fact, it's not.

7 Q And how do you know that?

8 A How do I know that?

9 Q Yes.

10 A Well, we're assuming the plume goes up
11 to a total of 118 feet. We're looking at stacks
12 that are about 90 feet high. We would be seeing
13 these wispy plumes. That building to the right of
14 the project is the famous Crown Plaza Hotel.

15 The plumes, these wispy plumes would be
16 probably not much higher, or would appear to be
17 not a whole lot higher than that hotel structure.

18 Q Sir, I'd like you to look at visual
19 resources figure 14. That's the one that shows
20 the same view that you took with the power plant
21 virtually invisible in the background there.

22 MS. LUCKHARDT: Which figure are you
23 referring to? We're looking for it. Is that out
24 of --

25 MR. BRECHER: Visual --

1 MS. LUCKHARDT: -- the staff assessment
2 or out of the AFC, or is it a --

3 MR. BRECHER: This is KOP3 where you
4 added -- that is from the staff assessment, yes.

5 BY MR. BRECHER:

6 Q Apparently you took these photos, you
7 went out and took these photos after the staff
8 said they needed KOP3, as well.

9 MS. LUCKHARDT: I just want to make sure
10 we have the right --

11 MR. BRECHER: Sure.

12 MS. LUCKHARDT: -- the same photo you're
13 looking at.

14 MR. BRECHER: Sure.

15 MS. LUCKHARDT: You referenced a number
16 on there, it was --

17 MR. BRECHER: Yeah, it's visual resource
18 figure 14. It's over the two cars that we've been
19 talking about, only now we've tacked the power
20 plant in there.

21 DR. PRIESTLY: This is the view from --
22 are we talking about the view from KOP3?

23 BY MR. BRECHER:

24 Q Yes, sir.

25 A Visual simulation of the proposed

1 project at the end of construction --

2 Q Yes, sir, that's from Grand Avenue,
3 right?

4 A Okay.

5 Q Notice how the power plant is right
6 there in that jagged edge of the fence? Do you
7 notice how it's right there in the middle of that?
8 Is that coincidence?

9 A Yes. I can assure you that that is
10 coincidence.

11 Q Okay, but it's a happy coincidence from
12 your point of view because it makes the power
13 plant even less visible, doesn't it? As you're
14 looking at it through --

15 A I would not say that. I would say that
16 this is a view that will be very typical of what
17 you will be seeing if you're walking up, if you
18 were standing in front of one of those homes,
19 walking up the sidewalk, driving up and down the
20 street. This is a view that's reflective of what
21 it is that you're going to see.

22 Q And if you're looking out the window,
23 though, the plant would not be caught on the
24 fence, it would be out there in the open, wouldn't
25 it?

1 A It's quite -- yeah, it's quite likely
2 that the fence would -- that the power plant would
3 appear to be above the fence.

4 Q Okay. And now is it your testimony
5 therefore that it's not a significant impact if a
6 private viewer inside his home saw it, is that
7 what the CEQA experts say?

8 A I'm not saying that. I am saying that
9 it is standard practice to take KOP views from
10 publicly accessible areas.

11 Q Okay, that's fine. Now, would you
12 answer my question. Could it be a significant
13 impact, visual impact for the homeowners who line
14 that street and look out their windows and see the
15 plant --

16 A Okay.

17 Q -- above the fence line?

18 A From this particular area the answer is
19 no.

20 Q Okay.

21 A And what is that answer based on, sir?
22 What's the reason for that viewpoint?

23 A Yeah, as we have, you know, as I have
24 indicated before, given the distance of these
25 residences from this facility, given the small

1 size of the facility in relationship to its
2 surrounding landscape, given the fact that it is
3 backdropped by the surrounding hills and other
4 features, that it becomes a small part of the
5 overall landscape scheme, and does not, in a
6 substantial way, change the character or quality
7 of this landscape.

8 Q Okay, and is that a subjective or an
9 objective view on your part, sir?

10 A I would say it's a professional view
11 based on, you know, application of the series of
12 factors that I just described. And I would say
13 that these are principles that are fairly well
14 established.

15 Q And the principles here being it's a
16 long way away, --

17 A Okay, because of the distance it's a
18 relatively small part of a very large and complex
19 landscape in terms of its scale. It does not
20 dominate the view. It does not block the view in
21 any substantial way of important landscape
22 features and elements because of the fact that you
23 have this hill backdrop and building backdrop
24 behind it, it integrates into its surroundings.

25 Q The power plant integrates with the

1 hill, does it, sir?

2 A Yeah, because of the fact the hills are
3 behind it, it reduces the amount of visual
4 contrast. Yeah, it causes it to blend into the
5 overall landscape setting. You know, it might be
6 different if it were to be seen say skylined
7 against the sky, it would be more visible.

8 Q And when the plume is visible is it
9 still the same answer?

10 A Again, because of the distance the
11 plumes are going to be a relatively small feature
12 in this overall rather complex landscape.

13 Q And would your answer be the same for
14 nighttime views, sir?

15 A Yes, yes, it would be. Yeah, I don't
16 know the extent to which you have been involved in
17 some of these cases, but there has been a lot of
18 conversation about nighttime effects of power
19 plants.

20 So, for some of the projects I have been
21 working on we have, in order to help answer this
22 question, well, what, in fact, are the nighttime
23 lighting effects of projects, of projects approved
24 under Energy Commission jurisdiction and meet
25 their standards, you know, what is it that we're

1 seeing.

2 We did some very careful documentation
3 of a recently licensed project to really develop
4 an empirically derived idea of well, okay, what do
5 these things really look like at nighttime.

6 And based on that experience it's given
7 us some idea of the extent to which a project like
8 this would be creating lighting impacts. So we do
9 have a basis for saying that the nighttime
10 lighting impacts of this project would be minimal
11 and acceptable.

12 Q Sir, you took all the photos that turned
13 out to be KOP1, 2 and 3, yourself?

14 A Actually, I didn't. I took the photo
15 that was used for KOP3, but the photos for KOPs 1
16 and 2 were taken by Chuck Cornwall --

17 DR. GALE: They were taken by
18 Environmental Vision.

19 MR. BRECHER: Okay. Perhaps I can
20 address this to you, then, Dr. Gale.

21 Was KOP1 taken with a 28 mm lens or a 50
22 mm lens?

23 DR. GALE: KOP1 was taken with a 50 mm
24 lens.

25 MR. BRECHER: Then is the description in

1 the staff assessment 8.11.1.4.1 inaccurate? That
2 is on page 8.11-6.

3 DR. GALE: Of the staff assessment?

4 MR. BRECHER: Yes.

5 DR. GALE: Let us take a look at that,
6 and there may possibly be some minor editorial
7 problem there. Just one moment.

8 DR. PRIESTLY: Are we talking about the
9 staff assessment or the AFC?

10 MR. BRECHER: SAC.

11 DR. GALE: AFC?

12 MR. BRECHER: No, this is SAC.

13 DR. GALE: SAC 8. -- do we have an SAC.

14 MR. BRECHER: This is the supplement to
15 the staff assessment.

16 DR. GALE: Supplement to the staff
17 assessment.

18 MR. BRECHER: Page 8.11-6. I'm sorry,
19 I'm not familiar with these --

20 (Off-the-record discussion.)

21 DR. GALE: I think you have identified a
22 minor discrepancy between my submitted testimony
23 and the text in the AFC.

24 MR. BRECHER: Which is correct then,
25 ma'am?

1 DR. GALE: The testimony submitted by me
2 and presented this evening is correct. And I
3 believe the editorial glitch, if you will, the
4 photograph, as I said was taken with a 50 mm lens.
5 And the view, as presented in the AFC, is
6 essentially an equivalent to a view angle of a 28
7 mm lens.

8 MR. BRECHER: In terms of what it
9 accomplishes, but the parallax is different, isn't
10 it, the distortion factor is different, is that
11 not true, ma'am?

12 DR. GALE: The distortion factor between
13 a 28 mm and a 50 mm --

14 MR. BRECHER: Yes.

15 DR. GALE: -- lens is different.

16 MR. BRECHER: So that if it were a 28 mm
17 lens it would tend to widen and flatten things,
18 wouldn't it?

19 DR. GALE: To some extent.

20 MR. BRECHER: Yeah, so that one reading
21 this document before you came in here to set us
22 straight would naturally be concerned that this,
23 perhaps, was not the best way to give us an
24 accurate view of the scene, right?

25 Let me rephrase that question. If one

1 had used a 28 mm lens one would not have been
2 presented with the very best way to view the scene
3 in terms of its closest to what a human eye sees,
4 right?

5 DR. GALE: Well, we say that a 50 mm
6 lens represents a normal cone of vision. And the
7 28 mm lens would have some degree of distortion.

8 MR. BRECHER: Right, basically so it's
9 wide and flat, doesn't it? Smaller? Wide, flat
10 and smaller?

11 DR. GALE: I might not characterize it
12 in quite that way, but there is some degree of
13 distortion.

14 MR. BRECHER: Okay, well let's go over
15 the three things. Does it make -- it makes things
16 look wider, certainly, right? Gives you a wider
17 field of view?

18 DR. GALE: It is a wider field of view.
19 And if we're in a stationary position and we turn
20 out head to observe the landscape we will observe
21 a wider field of view.

22 So, if we -- well, --

23 MR. BRECHER: And if you use a 28 mm
24 lens, vertical components appear to be squished,
25 don't they?

1 DR. GALE: Yes, yes, I believe I said
2 something to that effect earlier this evening.

3 MR. BRECHER: Right. And so that if you
4 were to use a 28 mm lens, and you were then to
5 superimpose a building such as this power plant on
6 it, the building would appear to be squished and
7 not as high as it really --

8 DR. GALE: There would be some
9 distortion there in the vertical --

10 MR. BRECHER: Okay.

11 DR. GALE: -- dimension, yes.

12 MR. BRECHER: So without your testimony
13 today we really would have a somewhat distorted
14 view of the methodology that was used here,
15 because we would be told that we'd been using a 28
16 mm lens, right?

17 DR. GALE: Yes, I agree. And I think
18 this editorial problem is regrettable. We should
19 have pointed it out.

20 MR. BRECHER: All right. Now, let's
21 look at page 8.11-7. We're talking about KOP2.
22 There it says that you used a 35 mm lens, another
23 error?

24 DR. GALE: Yes, again what I would refer
25 to is the notion of a view angle that's equivalent

1 to a 35 mm lens, and I agree that that's not what
2 this says.

3 MR. BRECHER: Okay. And when you take -
4 - and the way you did it, as I understand it, for
5 KOP1 and 2 is you took two 50 mm pictures and you
6 pasted them together, right?

7 DR. GALE: We didn't use paste, but,
8 yes, we spliced them.

9 MR. BRECHER: You spliced them, okay.
10 Is there any possibility of distortion at the edge
11 where the splice occurs when you use that
12 methodology?

13 DR. GALE: We're fairly careful in our
14 techniques. There's usually a little bit of
15 overlap to eliminate the distortion right at the
16 edge.

17 MR. BRECHER: Okay, so there is -- there
18 would be distortion at the edge, is that correct?
19 Or not? And then I'll ask you if there's any in
20 your photos.

21 DR. GALE: Well, again what I'll say is
22 we're very careful in the way we do splice the
23 photos. And I think the 50 mm lens gives us the
24 optimal realistic view.

25 MR. BRECHER: Right, I'm not arguing

1 about the 50 mm lens, I'm talking about the
2 technique of splicing two photos together, which
3 is what you used here, right?

4 DR. GALE: Right, that was done
5 electronically, digitally.

6 MR. BRECHER: And when you do that isn't
7 it inevitable that you're going to have some
8 distortion in the middle, no matter -- I
9 understand you were careful, but no matter how
10 careful you are there's going to be some
11 distortion, at least at the pixel level, right?

12 DR. GALE: There might be some degree of
13 distortion.

14 MR. BRECHER: Now why is it that you
15 didn't use one 50 mm picture instead of using the
16 splicing technique?

17 DR. GALE: Okay, let me go back to my
18 earlier testimony because I tried to make that
19 clear.

20 In the case of KOP1, we were considering
21 it important to replicate a view angle that had
22 been analyzed previously.

23 MR. BRECHER: May I stop you for a
24 moment. Why was that important?

25 DR. GALE: This wasn't our sole

1 decision. I think as we came into the project it
2 was the idea that we were tiering off of a
3 previous CEQA document, and it would be
4 advantageous to the decision makers who had
5 reviewed that document and that analysis to see
6 another perspective comparable to what had been
7 analyzed previously.

8 MR. BRECHER: But there came a time when
9 you learned that your task here, at least one of
10 your tasks would be to present this as a stand-
11 alone analysis. And at that point there was no
12 need then to replicate what had been in the
13 previous EIR, is that correct?

14 DR. GALE: We never had that
15 understanding actually.

16 MR. BRECHER: Do you have that
17 understanding today?

18 DR. GALE: Actually, I'm not completely
19 clear on that aspect of the project, frankly.

20 MR. BRECHER: But if your task had been
21 to deal only with the Los Esteros Power Plant and
22 had nothing to do with the datafarm, do you agree
23 that it might have been advantageous in terms of
24 producing the very best quality photos to go out
25 and shoot again with a single 50 mm, a single 50

1 mm lens shot so that you would not have to use
2 splicing?

3 DR. GALE: Well, let me answer you this
4 way. That question, to me, is hypothetical. We
5 became involved in this project with certain
6 direction from the project management side of the
7 team, and it was our responsibility to work as
8 part of that team, and we followed that direction.

9 So to think about it differently for our
10 purposes, as a subcontractor, would be somewhat
11 hypothetical.

12 MR. BRECHER: I understand. So as you
13 understand it, the technique that you used was
14 driven by the staff's direction to you?

15 DR. GALE: The technique we used was
16 driven to some extent by the larger picture on
17 this project in terms of the context within which
18 we were working and we were tiering off of a
19 certified EIR.

20 MR. BRECHER: Okay, maybe I can ask it
21 another way. If you had never heard about the
22 tiering issue, and you were asked only to deal
23 with the Los Esteros plant, would you have used
24 the splicing technique?

25 DR. GALE: We might not have.

1 MR. BRECHER: Okay, and if you were
2 going to use the splicing technique, wouldn't it
3 be better to use three photos so the splice would
4 not occur in the middle where you were going to
5 superimpose the plant simulation?

6 DR. GALE: Again, it's a little
7 hypothetical. I would want to go back and look at
8 this image and study it from a blank canvas
9 standpoint, which is not what we did.

10 MR. BRECHER: What do you mean by a
11 blank canvas standpoint?

12 DR. GALE: A blank -- to start over
13 again. To redo our work with no previous
14 instruction or direction or context.

15 MR. BRECHER: But could you not have
16 simulated the 28 mm view by splicing together
17 three photos, or perhaps putting the splice in an
18 area other than the critical center of the picture
19 where you would be superimposing the power plant?

20 DR. GALE: I'm looking at the photo and
21 I don't see the power plant in the middle of the
22 image. Are we looking at KOP1?

23 MR. BRECHER: I think that's the one
24 that's --

25 DR. GALE: I see the transmission tower

1 just to the left of the freeway sign.

2 MR. BRECHER: One second, please.

3 The three towers are not right in the
4 middle?

5 DR. GALE: I don't think so. I believe
6 that the modeling and rendering of the proposed
7 facility exists primarily and almost exclusively
8 on the right-hand image. I'm sorry, the left-hand
9 image.

10 Yeah, I believe, again, I believe that
11 we're on the left-hand image, the left-hand side
12 of the splice.

13 MR. BRECHER: Okay. So the staff never
14 informed -- this is to both of you folks -- the
15 staff never informed you that, no, this is not a
16 tiering operation; we want you to do a visual
17 impact analysis for the Los Esteros plant alone,
18 is that correct?

19 DR. GALE: I'm not the best person to
20 answer that. As a subcontractor here on the team
21 I can't really speak to it, but --

22 MR. BRECHER: Yeah, --

23 MS. LUCKHARDT: I think -- I have to
24 object to this, as well, because this project
25 resulted from a jurisdictional investigation

1 originally conducted by the Commission. And there
2 was an agreed-upon format between the Commission
3 and the project proponents going forward on the
4 tiering off of the U.S. Dataport EIR, recognizing
5 the value of the environmental work that had
6 previously been completed, and the value of moving
7 this project from its originally proposed
8 configuration to the configuration that we're
9 looking at now.

10 MR. BRECHER: Well, that's all very
11 nice, but at this point we're not evaluating the
12 Dataport, as far as I know, and our visual impact
13 analysis concerns the power plant and only the
14 power plant.

15 What I'm trying to get at is is this the
16 very best way to allow the public to have access
17 to a high quality, detailed, accurate depiction of
18 the visual impact of this.

19 And what I'm seeing here with these
20 mistakes and with these ideas that we use a 28 mm
21 simulation for no other reason that I can tell
22 except that we're in this tiering mode.

23 Seems to me that we are deliberately
24 obscuring what we're after here, which is the Los
25 Esteros Plant minus the Dataport.

1 MS. LUCKHARDT: You know, I absolutely
2 take offense at the comments made by the attorney
3 for Milpitas that there's been a deliberate effort
4 to obscure or create an inaccurate image.

5 But leaving that aside, this Commission
6 only looks at power plant development. So when
7 the jurisdictional investigation and ultimate
8 settlement between the Commission and the original
9 proponents of this facility was entered into, it
10 was always contemplated that the Energy Commission
11 would be reviewing a power plant development.

12 MR. BRECHER: Precisely. And therefore
13 I am trying to get at whether or not the visual
14 analysis that's been presented to us is the very
15 best visual analysis for a power plant, as opposed
16 to a hybrid or combination situation.

17 MR. RATLIFF: Mr. Brecher, if I may, I
18 think it's important perhaps -- I don't think
19 there's any witness here, perhaps that can answer
20 the question that I think you're asking, which is
21 why it's been done this way.

22 And it was done this way because it
23 started out, the analysis started out being an
24 analysis of Dataport that was presented to the
25 Energy Commission. And the Energy Commission

1 said, we don't want an analysis of Dataport, we
2 want an analysis of the stand-alone facility and
3 Dataport, wanted two separate analyses.

4 So they started off with an analysis
5 that they already had, and a technique or an
6 approach to that analysis that they had, and they
7 had to supplement it to make up for that.

8 And so, I think it's quite
9 understandable, perhaps you think it's not the
10 best technique, it's still quite understandable
11 that the analysis originally used, presented with
12 regard to Dataport became incorporated into that
13 analysis that was used to depict a stand-alone
14 facility.

15 I realize that your questions, all these
16 questions about the splicing may have some
17 materiality, but I think we heard, at least I
18 thought I heard the witness say that basically the
19 image of the power plant was on one side of the
20 splice. So therefore I don't really understand
21 the relevance of the point.

22 MR. BRECHER: Well, the point is that
23 we're attempting to simulate a 28 mm view, and the
24 only reason we're trying to do that is because
25 we're trying to make this compatible with the

1 Dataport.

2 Now, the staff at one point had comments
3 and asked for more views, and it would have been
4 very simple for the staff to say, we want single
5 shot 50 mm views, just like we want another KOP
6 and then we --

7 MR. RATLIFF: But on if it matters. And
8 when we get to our witness you can ask him if it
9 matters, okay?

10 MR. BRECHER: Dr. Priestly, did you talk
11 to any residents or political leaders in the town
12 surrounding the power plant site to determine what
13 their views were concerning the obtrusiveness of
14 the power plant in their area?

15 HEARING OFFICER WILLIAMS: Mr. Priestly,
16 before you answer that, can we take a break. I
17 think it's probably past time that we had a break.
18 Let's take ten minutes.

19 (Brief recess.)

20 HEARING OFFICER WILLIAMS: We're back on
21 the record.

22 BY MR. BRECHER:

23 Q Dr. Priestly, did you compose most of
24 the text that went into the AFC on visual
25 resources?

1 DR. PRIESTLY: Yes, I did.

2 MR. BRECHER: Okay. And do you
3 understand the purpose of the AFC is -- it's a
4 public document to inform the public as to the
5 methodology that you use and the reasons that you
6 came to your conclusions?

7 DR. PRIESTLY: So --

8 MR. BRECHER: Should I ask that question
9 again?

10 DR. PRIESTLY: No, I'm not asking you to
11 ask the question, but where are you finding the
12 guidelines?

13 MR. BRECHER: I'm just asking you your
14 understanding of what audience you were writing
15 for.

16 DR. PRIESTLY: Oh, okay, maybe I didn't
17 understand the question then.

18 MR. BRECHER: Yes. It is your
19 understanding that the purpose of the AFC document
20 is to inform the public and the Commission of your
21 conclusions and the methodology you used to reach
22 those conclusions concerning visual resources?

23 DR. PRIESTLY: Yes.

24 MR. BRECHER: Okay. And in order to do
25 that you want to present the clearest and most

1 useful description of your methodology, do you
2 not?

3 DR. PRIESTLY: Yeah, of my methodology
4 and of my findings, yes.

5 MR. BRECHER: Yes. And Dr. Gale's
6 testimony adds some details in response to the
7 questions that the City of Milpitas put that
8 clarified the methodologies, do they not?

9 DR. PRIESTLY: Yes, they do.

10 MR. BRECHER: And is there any reason
11 why these comments by Dr. Gale could not have been
12 included by you at the outset in the AFC?

13 DR. PRIESTLY: Yeah, I guess my answer
14 to that would be several-fold. Until now there
15 hasn't been the interest in these very very
16 technical details of our analysis approach, you
17 know, demanding this level of detail.

18 MR. BRECHER: Well, we're talking about
19 an extra page and a half. I mean we're not
20 looking at a treatise from --

21 MS. LUCKHARDT: You know, I have to kind
22 of object to this line of questioning. There are
23 specific guidelines provided by the Commission on
24 what is and is not included in an application for
25 certification. The level of detail that is being

1 requested by the attorney from Milpitas is not
2 typically included, nor is it required in an
3 application. And would normally be expected to
4 come out through the discovery process, should
5 anyone have interest in such issues.

6 It's just in this instance they weren't
7 brought up until now.

8 MR. BRECHER: But in fact the level of
9 detail is an extra page and a half which answers
10 all the questions, ma'am. So it seems to me
11 there's no reason why this couldn't have been
12 placed in the AFC so that everybody, not just
13 those who have any interest and come to this
14 hearing would be apprised of this methodology
15 which answers several questions about exactly how
16 this method was done, rather than using
17 generalizations.

18 And I ask you if there's any reason why
19 this couldn't have been put into the original AFC?

20 MS. LUCKHARDT: And, again, I would have
21 to object to the fact that it goes beyond any of
22 the requirements under the Commission's standard
23 requirements for applications for certification.

24 MR. BRECHER: Where is this testimony?
25 I don't think we have a copy -- was it mailed out?

1 MS. LUCKHARDT: It was emailed on -- it
2 should have -- it was emailed on Friday. And that
3 was the email that was sent to John Bakker's
4 office instead of the new counsel.

5 MR. BRECHER: Mr. Chairman, the reason
6 I'm making such a big deal about this is that this
7 covers half of our testimony; and in fact,
8 answers, you know, half of our questions. And it
9 could have and should have been put in the AFC.

10 MS. LUCKHARDT: And, again, --

11 MR. BRECHER: And instead -- please,
12 don't interrupt, you'll have your chance.

13 And instead it's provided at the very
14 last second, admittedly in response to our
15 testimony. And now only the hardy members of the
16 public who want to hang out here until 10:00 are
17 finding the answers to these questions which
18 should have been provided earlier.

19 MS. LUCKHARDT: And, again, I have to
20 object to this. There is a whole discovery
21 process that is conducted by the Energy Commission
22 which Dr. Clay is absolutely dead on familiar with
23 in his involvement with Morro Bay. And to make
24 those kinds of accusations at this late date in
25 this proceeding I find just to be completely out

1 of context with how the Energy Commission runs its
2 business and --

3 HEARING OFFICER WILLIAMS: Well,
4 counsel, the fact is that --

5 MS. LUCKHARDT: -- discovery process --

6 HEARING OFFICER WILLIAMS: -- we now are
7 faced with a situation where we have new
8 testimony, for whatever reason. Right? Is that
9 correct? We now have a situation where we have
10 new testimony and new testimony has to be
11 considered.

12 So, to the extent that we have new
13 testimony it doesn't matter whose fault it is, you
14 know, we've got to consider it. And I think the
15 question is an appropriate question.

16 BY MR. BRECHER:

17 Q So all the material that's presented by
18 Dr. Gale, you knew, didn't you sir? There's
19 nothing new here? Dr. Gale presented a page and a
20 half of testimony, data as to the simulation
21 methods, the simulation photographs, the
22 simulation data. That material was all known to
23 you, was it not?

24 DR. PRIESTLY: I would say that the part
25 that is more clear than it had been at the time

1 that we had initially communicated about the
2 project is the details of the procedure with the
3 use of the 15 mm photos, merging them to create
4 images that had the -- were the same size as 25
5 and 28 mm. In the communication that had taken
6 place earlier, that part was not entirely clear.

7 MR. BRECHER: And, in fact, it wasn't
8 even accurate?

9 DR. PRIESTLY: Well, again, there was
10 the communication wasn't clear, so as a
11 consequence what was described in the AFC is
12 slightly at variance with what Environmental
13 Vision actually did in this case --

14 MR. BRECHER: And in fact it wasn't
15 accurate?

16 DR. PRIESTLY: Pardon?

17 MR. BRECHER: And in fact it was not
18 accurate, is that right?

19 DR. PRIESTLY: You'll have to tell me
20 what part you're referring to.

21 MR. BRECHER: The part that says 28 mm
22 and 35 mm photos were taken.

23 DR. PRIESTLY: Those statements were not
24 accurate, that is correct.

25 MR. BRECHER: And also in Dr. Gale's

1 testimony we have for the first time an actual
2 description of the simulation methods which was
3 not located -- could not be found in the AFC,
4 where she discusses what kind of USGS data was
5 used and so on and so forth.

6 And that's two paragraphs. This is
7 hardly a highly detailed concept. Could you not
8 have supplied this information in the AFC?

9 DR. PRIESTLY: Yeah, I--

10 MR. RATLIFF: I'd ask the Chair if they
11 can direct the questions to be relevant and to the
12 point, and not just editorials. We've had this
13 question about four or five times now. The point
14 has been made that it was not in the testimony,
15 that it was not in the AFC prior to the testimony
16 being filed most recently.

17 But, I mean, the hour is late. We don't
18 have all night to have these kinds of questions.
19 I think the questions need to be to a relevant
20 point, not just to try to -- making the same
21 editorial point.

22 MR. BRECHER: Well, I can't think of
23 something that's more relevant than whether the
24 AFC presented to the public an accurate view of
25 the methodology --

1 MR. RATLIFF: You have made that point
2 repeatedly, and the point has also been made that
3 no one asked, until you filed your testimony,
4 anything about the analysis in this case.

5 MR. BRECHER: That's right, that's
6 another point that I'm trying to make. That staff
7 didn't do that. Perhaps --

8 MR. RATLIFF: No, staff asked, but you
9 did not.

10 MR. BRECHER: Okay.

11 BY MR. BRECHER:

12 Q Did the staff ask you the kinds of
13 questions that prompted Dr. Gale's testimony here?

14 DR. PRIESTLY: I don't recall that they
15 did in this case, although as we have indicated to
16 you, before in previous cases the staff has
17 looked, you know, very closely at the work that
18 Environmental Vision has prepared.

19 MR. BRECHER: Okay. So are you saying
20 that the staff in this case was not as thorough-
21 going with respect to their questions concerning
22 say simulation methods as they have been in other
23 cases?

24 DR. PRIESTLY: Well, no, probably I
25 think what I am trying to communicate is my

1 assumption, when you talk to staff they can tell
2 you if I'm wrong, my assumption is that staff,
3 through its previous experience with Environmental
4 Vision, through its previous investigations,
5 detailed investigations of their work, is
6 satisfied that the approach that Environmental
7 Vision takes is thoroughly professional and quite
8 adequate to serve as a basis for environmental
9 assessment under the CEC process.

10 That's my assumption and that's my
11 hypothesis that you'll have to check out with the
12 CEC Staff.

13 MR. BRECHER: So as you understand it,
14 the staff at this point, rather than asking for a
15 detailed explanation say about simulation methods,
16 was willing to rely on the past performance of
17 your organizations and simply didn't need to ask
18 the question or have it presented in the AFC --

19 DR. PRIESTLY: Well, I want to say this
20 without -- I want to be careful to say this
21 without sounding flip, but this is the real world;
22 it's not an academic setting.

23 I know that staff really has a lot of
24 work to do. They have to use their best judgment
25 about these things. And again, I'll let them

1 address this question. But it seems like a very
2 reasonable and prudent thing for them to do under
3 the circumstances.

4 MR. BRECHER: You went to the Crown
5 Plaza Hotel and spent the night there, did you,
6 sir?

7 DR. PRIESTLY: Excuse me?

8 MR. BRECHER: The Crown Plaza Hotel, you
9 spent the night there?

10 DR. PRIESTLY: I did, yes.

11 MR. BRECHER: And the purpose of that
12 was to take a look at the power plant site?

13 DR. PRIESTLY: Yes, I happened to be
14 here anyway to attend an evening meeting, so I
15 thought, well, I'll get here early, do some field
16 work, stay at the Crown Plaza, have the
17 opportunity to look at the nighttime view from
18 there. Then in the morning rise early enough to
19 look out the window to identify steam plumes. And
20 then use that as a base of operations for going
21 out and observing close up any steam plumes that
22 might be in the area.

23 I don't know -- perhaps you're from the
24 Bay Area and familiar with the traffic, but the
25 thought of getting -- the logistics of getting

1 down here early enough to look at the plumes, no,
2 was not in the cards, so --

3 MR. BRECHER: Which plumes were those
4 that you were looking at, from what sources?

5 DR. PRIESTLY: The plumes that are most
6 visible within the project area. At first there's
7 an Agnew's facility south along Zanker Road. And
8 they have a small power plant that's located in
9 the midst of actually, it's in the midst of --
10 it's actually the power plant in the portion of
11 the Agnew site which has been sold to Cisco and
12 developed as a Cisco campus. So it's in the midst
13 of a Cisco office park.

14 And then the other one is over by Santa
15 Clara. There is some kind of an asphalt operation
16 that makes very large large plumes. And also in
17 that area there are a number of industrial
18 operations that have apparently chillers or
19 something that make smaller plumes that were
20 evident on a coolish morning.

21 MR. BRECHER: And the power plant at the
22 Cisco location, is that about the same size as the
23 one we're discussing?

24 DR. PRIESTLY: Oh, no, this power plant
25 is much smaller.

1 MR. BRECHER: Much smaller. About how
2 far away was it from your viewpoint?

3 DR. PRIESTLY: From --

4 MR. BRECHER: From your window.

5 DR. PRIESTLY: From the Crown Plaza.

6 Yeah, I would have to look at a map to tell you
7 for sure, but I would say more or less somewhere
8 in the vicinity of say a mile.

9 MR. BRECHER: Okay, that's further away
10 than the Los Esteros site, is it not?

11 DR. PRIESTLY: Yes, it is.

12 MR. BRECHER: And were you able to see
13 the plume clearly?

14 DR. PRIESTLY: Pardon?

15 MR. BRECHER: Were you able to see the
16 plume from the Cisco Power Plant clearly from your
17 window?

18 DR. PRIESTLY: It was a hazy morning,
19 kind of an overcast slightly foggy morning, but I
20 could make them out, but their degree of contrast
21 was reduced by the fact that it was generally kind
22 of hazy out.

23 MR. BRECHER: And from your experience
24 in looking at things like that, on a crystal clear
25 morning would that plume have been quite visible,

1 easily visible from the Cisco plant from your
2 window at the Crown Plaza?

3 DR. PRIESTLY: Yes, yes, it would have
4 been visible.

5 MR. BRECHER: Okay. Is it fair to say
6 then the plume from the Los Esteros plant, from
7 the same vantage point, would be even more
8 visible?

9 DR. PRIESTLY: You know, yes and no.
10 But because, again, as we just made reference to
11 the staff assessment, the plume analysis in the
12 staff assessment, and it would appear that the
13 plume height will be on the order of should we say
14 about 35 feet above the tallest structure, or 118
15 feet in all.

16 And as I recall the staff assessment
17 also indicates that this plume will be somewhat
18 wispy in character, so there are, you know, a
19 number of variables going on here that are going
20 to affect the viewing experience.

21 I think it's fair to say that because
22 it's closer it's going to be more visible, but in
23 terms of the size, and I don't have any data on
24 the size characteristics of the plume at the
25 Cisco/Agnew site, so I can't tell you about that

1 part. But it will be closer, but we know that
2 it's not going to be not too terribly tall, and
3 that it will be wispy.

4 MR. BRECHER: Okay. And how many
5 stories does the Crown Plaza have?

6 DR. PRIESTLY: The Crown Plaza has ten
7 stories.

8 MR. BRECHER: So that is it accurate to
9 say that from the top floor you'd be looking down
10 on the site, down on the Los Esteros plant?

11 DR. PRIESTLY: Well, you're far away, so
12 it's not like you're in the Empire State Building
13 like looking down at people on the street.

14 MR. BRECHER: Right.

15 DR. PRIESTLY: I mean, so you're
16 looking, you know, at an angle in the direction of
17 the power plant site.

18 MR. BRECHER: Okay, but clearly the
19 entire plant from top to bottom would be visible
20 from a ten-story window, would it not?

21 DR. PRIESTLY: Yeah, well, I have to
22 tell you the tenth floor is the executive club, so
23 I had to stay on the ninth. So I can tell you --

24 MR. BRECHER: The ninth --

25 DR. PRIESTLY: -- I can tell you what

1 the view is from the ninth floor.

2 MR. BRECHER: Let's use that.

3 DR. PRIESTLY: So, yeah, it would be
4 generally visible, but we'd have to take a look at
5 the distance. It's certainly well over a quarter
6 of a mile from there, maybe getting up to be about
7 a half. Again, we'd have to take a look at a map.
8 It's not like it's immediately like right next
9 door.

10 MR. BRECHER: But it would be more
11 visible and more prevalent than the plant at
12 the -- the power plant at the Cisco site, is that
13 correct?

14 DR. PRIESTLY: Well, if you're talking
15 about views specifically from the Crown Plaza --

16 MR. BRECHER: Yes.

17 DR. PRIESTLY: -- Hotel, yeah, that
18 would be the case.

19 MR. BRECHER: Okay. How many hotel
20 rooms were there would you estimate in the Crown
21 Plaza that face the same direction that you were
22 looking?

23 DR. PRIESTLY: All I could tell you is,
24 you know, half. Those on the north side I did not
25 do --

1 MR. BRECHER: About how many?

2 DR. PRIESTLY: -- I did not do a count
3 of the rooms in that hotel.

4 MR. BRECHER: Okay. Do you think
5 there's over 100 rooms?

6 DR. PRIESTLY: Yeah, I, you know, again,
7 without like looking at the floor plan I'd
8 hesitate to say.

9 MR. BRECHER: Do you know what kind of
10 hotel the Crown Plaza is? By that I mean is it a
11 luxury hotel? Is it one that appeals to business
12 travelers and so on?

13 DR. PRIESTLY: All I can tell you, you
14 know, based on my observations from my stay there,
15 my assessment is that it is a slightly up-market
16 businessperson's hotel. It did not appear to have
17 any of the accoutrements of a, you know, of a
18 hotel that's more oriented toward, you know, the
19 vacationer or the tourist.

20 MR. BRECHER: Okay. And did you speak
21 to the hotel manager about whether he would
22 consider the siting of the Los Esteros plant at
23 the location proposed an amenity for his guests?

24 DR. PRIESTLY: No, I did not. And I did
25 not consider it necessary to do that.

1 MR. BRECHER: Because you knew what the
2 answer would be to that question, didn't you?

3 DR. PRIESTLY: Not necessarily. And I
4 don't think that you can presume to know what his
5 answer would be, either. Sorry to sound that way,
6 and I know, because I've done some project work,
7 in fact, where I've gone out to talk to people
8 about plumes, and I was, you know, really kind of
9 surprised at the range of answers. It hasn't
10 always been a negative one.

11 MR. BRECHER: But you were surprised
12 when it was not a negative one, right?

13 DR. PRIESTLY: Pardon?

14 MR. BRECHER: It surprised you when you
15 got positive answers about plumes, didn't it?

16 DR. PRIESTLY: You know, initially, yes.
17 But, you know, as I began to talk to more people I
18 realized yeah, there's a range of opinion about
19 these kinds of things.

20 MR. BRECHER: Okay, fair enough. So
21 then it's your professional experience that one
22 can't assume that folks viewing a power plant and
23 the plume will be annoyed or consider it negative,
24 is that right?

25 DR. PRIESTLY: Yeah, that's my

1 professional opinion. I can tell you that this
2 power plant steam plume issue has come up on a lot
3 of projects. And I have actually been expending a
4 lot of time looking for empirical research that
5 will establish that whether or not the view of a
6 steam plume is perceived as being a negative, you
7 know, component of the environment.

8 And I have not found say survey-based,
9 any survey-based studies that, you know, that
10 verify that it is.

11 MR. BRECHER: Okay, and therefore in
12 making your conclusion that there's no significant
13 visual impact, you took into account the data that
14 you just related to us in concluding since people
15 are all over the map about whether a power plant
16 or a steam plume is a negative, that therefore we
17 don't have a significant impact, is that correct?

18 DR. PRIESTLY: Well, I'll tell you why I
19 did not consider there to be a potential for an
20 impact on the Crown Plaza Hotel. And that is my
21 working assumption, which apparently is shared by
22 Energy Commission Staff, is that for transients,
23 you know, people who are transient, people who are
24 staying at a business hotel, that the sensitivity
25 of their view is not as high as that of, say, a

1 resident. Somebody who is in their home, who's
2 seeing this view, you know, day-in and day-out,
3 from one of their, you know, living spaces.

4 MR. BRECHER: And the latter type of
5 folks would be much more likely to conclude that a
6 power plant and its plume are a visual minus, is
7 that correct?

8 DR. PRIESTLY: I wouldn't make that
9 conclusion. I would say that we would -- that for
10 these kind of folks this is a question that we
11 would really want to look into, but, you know, the
12 fact is we don't have the empirical data that the,
13 you know, the visibility, the presence of a steam
14 plume, ipso facto a negative for everyone.

15 MR. BRECHER: Well, really, if you don't
16 have that data how do you come to a conclusion
17 whether it's a significant negative impact?

18 DR. PRIESTLY: Do you mean in this case,
19 or in --

20 MR. BRECHER: In any case.

21 DR. PRIESTLY: -- in general?

22 MR. BRECHER: In any case. If you don't
23 know if folks consider it a negative how do you
24 determine whether it's a significant negative
25 impact?

1 How could you ever come to that
2 conclusion?

3 DR. PRIESTLY: Yeah, I think to date the
4 standard and you might take a look at some of the
5 recent Energy Commission decisions, again this is
6 the real world. We have to make decisions without
7 always having, you know, that last piece of data.
8 And we just have to make the best judgments that
9 we can, informed by, you know, reason and whatever
10 data we can get our hands on.

11 I know that the thinking of the
12 Commissioners has been to think about well, how
13 big does the plume have to be in a specific
14 context before it can be considered to create a
15 significant impact.

16 You might want to take a look at the
17 Contra Costa decision.

18 MR. BRECHER: Well, frankly, sir, I'm
19 interested in each case standing on its own. And
20 I'm trying to get my arms around the fact that you
21 don't know whether people think views of power
22 plants are visually impactful, and yet you, based
23 on your expertise, are able to conclude that there
24 are no significant impacts.

25 And if we're not looking at the

1 perception of ordinary folks in making that
2 judgment, whose perception are we looking at? CEC
3 Commissioners, is that who we care about?

4 DR. PRIESTLY: I guess my response to
5 that is if we had this data we would certainly be
6 using it. And I, in fact, have been an advocate
7 of the Energy Commission in sponsoring some
8 research of this type that will give us these
9 kinds of, you know, give us this kind of empirical
10 data to improve our decisions.

11 So, you know, lacking this kind of data
12 here in the real world we just have to do the best
13 we can drawing on the sources of knowledge that we
14 have; and again, drawing on plans and the policies
15 and so on that provide some clue as to those
16 places that are sensitive and deserve some special
17 protections.

18 MR. BRECHER: So to sum up the way we
19 determine whether it's significant is we looked at
20 the Commission decisions to see what the
21 Commission has determined is significant in the
22 past, is that a good way to do it? In the absence
23 of data?

24 DR. PRIESTLY: That's one -- I think
25 it's, in the absence of data, that's one of the

1 things that we have to look at. Again, a kind of
2 a logic, a kind of a commonsense logic of the
3 decision, or of the, you know, kind of decision
4 rules.

5 MR. BRECHER: So we're going to use
6 commonsense, then, is that commonsense of an
7 expert such as yourself, or is it any person in
8 the street? Or are they the same?

9 DR. PRIESTLY: Yeah, I guess I want to
10 be very careful in the way that I answer this, so,
11 you know, I come off the right way. But I would
12 say the commonsense, or let's say the logical
13 systematic evaluation of somebody with
14 professional training, somebody who has read the
15 available literature and research and tries to,
16 you know, take into account and apply anything
17 that's available that's relevant to help make a
18 better informed decision.

19 MR. BRECHER: Dr. Priestly, in all of
20 your visual evaluations have you ever found that a
21 project that you were asked to evaluate had a
22 significant visual impact?

23 DR. PRIESTLY: Yes, I have.

24 MR. BRECHER: Tell me about that.

25 DR. PRIESTLY: Yeah, a few years ago I

1 was working on the Valley Alt powerline project in
2 Riverside County in southern California. I don't
3 know if you're familiar with that area or not.
4 It's in kind of a quickly transforming area that's
5 kind of quasi-desert; it's going from rural
6 residential to, you know, kind of mainstream urban
7 development rather quickly.

8 Southern California Edison was proposing
9 a transmission line through this area. Kind of
10 the unique thing about the topography in that area
11 is that it's basically kind of a plain, but it has
12 all of these really interesting buttes.

13 And there were a number of areas where
14 this transmission line, which actually was
15 following an existing line, but it would involve
16 much much bigger towers, was routed like right
17 over the top of these buttes, in a few cases
18 creating a very high degree of skylining.

19 And in that case my opinion was that
20 this project would have a significant impact if
21 they were to maintain the routes that went over
22 the tops of the buttes.

23 MR. BRECHER: Was that a CEC project?

24 DR. PRIESTLY: No, that was a PUC
25 project.

1 MR. BRECHER: And aside from that
2 occasion were there any other times when you found
3 significant visual impact?

4 DR. PRIESTLY: There have been cases
5 where I have found significant visual impacts that
6 could be mitigated with additional mitigation
7 measures.

8 MR. BRECHER: Okay. Now, you mentioned
9 that folks looking out of a hotel window,
10 transients, are not likely to be bothered as much
11 by the presence of a power plant as other
12 observers, is that right?

13 DR. PRIESTLY: Yeah, I think in general
14 terms, and you know, there are a lot of contextual
15 factors involved, but I think in general terms,
16 particularly in an urban area like this, I think
17 it is fair to say that the mere presence of a
18 power plant within a half a mile radius of the
19 hotel is, you know, not likely to be -- that
20 occupants of the hotel are not likely to be
21 sensitive.

22 MR. BRECHER: Okay, but there are other
23 kinds of observers who might be more sensitive.
24 Let's look at one possible example. How about
25 folks walking along a hiking trail, enjoying a

1 rural experience.

2 DR. PRIESTLY: I guess I --

3 MR. BRECHER: -- would be bothered by
4 it?

5 DR. PRIESTLY: Yeah, so I guess I'm
6 going to have to ask you what hiking trail you're
7 referring to.

8 MR. BRECHER: I'm talking about the
9 possible trail along the Coyote Creek, which
10 admittedly does not exist today.

11 DR. PRIESTLY: Yeah, no, so which side
12 of the creek are you talking, or yeah, which side
13 of the creek are you talking about?

14 MR. BRECHER: We'll get to all of those
15 places.

16 DR. PRIESTLY: Pardon?

17 MR. BRECHER: I'm talking about in the
18 abstract that kind of observer is more likely to
19 be bothered by a power plant say than a transient
20 in a hotel room, is that right?

21 DR. PRIESTLY: In the abstract, if you
22 had some scale of sensitive, yeah, these people
23 would be, you know, much higher up on the scale of
24 sensitivity --

25 MR. BRECHER: Right, and might they also

1 be higher up the scale of sensitivity than a
2 driver who's in a car who is going past there for
3 a few seconds?

4 DR. PRIESTLY: Yes, yeah, that would be
5 fair to say.

6 MR. BRECHER: Okay. But your conclusion
7 was that folks who would be hiking along the
8 proposed Coyote Creek trail would not find a
9 significant visual impact, is that correct?

10 DR. PRIESTLY: Well, this then gets into
11 a discussion again of what trail are we talking
12 about.

13 MR. BRECHER: I'm talking about any that
14 you find the possibility of a significant visual
15 impact for hikers along any trail within five
16 miles of the power plant --

17 MS. LUCKHARDT: I think we --

18 MR. BRECHER: -- existing or proposed.

19 MS. LUCKHARDT: I think we have to refer
20 to which trail. There are a variety of trails
21 involved.

22 MR. BRECHER: Well, I'm asking him if he
23 found any. And I think the answer is no, he
24 didn't find any significant --

25 DR. PRIESTLY: Well, again, my analysis

1 really turns, again, on what we are talking about
2 when we say trail. Because, for example, if you
3 were talking about the trail from which there
4 would be the best view toward the power plant
5 would be the trail along the levee along the west
6 side of Coyote Creek.

7 However, this is a trail which has been
8 shown in some general plans. It's now shown on a
9 recently released City of San Jose plan for
10 extension of the Bay trail.

11 But my judgment is that this trail is
12 not reasonably foreseeable. So it's a trail that
13 does not now exist. I went out on that levee,
14 myself, but I am afraid to say I was trespassing
15 to do it, you know, there's a fence and there are
16 big signs saying keep out. I guess it's Santa
17 Clara Valley Water District property. It is not
18 now open to the public.

19 Although this alignment appears in the
20 plan for the Bay trail, to my knowledge and if
21 there's anyone here from the City they can confirm
22 this, but the last time I checked no money had
23 been allocated for development of trails in that
24 area. No schedule had been prepared for
25 development of trails in that area.

1 So, I mean we don't see signs that
2 development of that trail is imminent. And
3 there's another factor that makes me wonder how
4 soon -- that makes it, yeah, how soon that trail
5 will be developed, or at least the other part of
6 the equation is my professional judgment is that
7 after such time that a trail along that alignment,
8 or along kind of the interface between the
9 Dataport property and the waste treatment
10 property, my judgment is the time that a trail is
11 going to be developed in that area is going to be
12 timed to the development of the Dataport project.

13 Which means that when a trail appears in
14 this area people will to use in this area will
15 also be a time that the Dataport buildings are
16 present, that the landscaping associated, in fact
17 we have a landscape plan over here, the
18 landscaping associated with that project will be
19 present.

20 And that users of those trails would not
21 have a view toward the power plant structure.

22 MR. BRECHER: And if neither of those
23 eventualities occur, would it be a significant
24 impact on those hikers, sir?

25 DR. PRIESTLY: Well, if -- and this is,

1 you know, kind of a theoretical, because again you
2 have no evidence of just how foreseeable it is a
3 trail were to be developed, I would say if a trail
4 were to be developed along that alignment in the
5 absence of the Dataport then there would be a need
6 to be concerned about the, you know, the impacts
7 of the project on those hikers.

8 MR. BRECHER: I almost got you to say
9 significant, didn't I? It was close, right?
10 Wouldn't it be significant?

11 MS. LUCKHARDT: I think -- oh, go ahead.

12 DR. PRIESTLY: Well, you know, until --
13 let me say a couple of things. You know, I'm not
14 sure that it would be, but we would need to do an
15 analysis to determine that.

16 And, again, that's in the unlikely event
17 that a trail were to materialize along that
18 alignment in the absence of either Dataport or a
19 similar kind of project.

20 MR. BRECHER: And what about a trail
21 along Coyote Creek, you're convinced that there's
22 no possibility that --

23 DR. PRIESTLY: Well, yeah, well,
24 actually I was talking both about a trail along
25 the west side of Coyote Creek, and along the north

1 side of the Dataport project.

2 MR. BRECHER: You think there's no
3 significance in either of those places for the
4 same two reasons?

5 DR. PRIESTLY: Because first of all
6 those trails do not now exist. They are not part
7 of the existing environment. And, you know, based
8 on my understanding of the status of the plant,
9 the status of the project, too, which development
10 of those trails is attached to, that it is highly
11 unlikely that those trails would be present
12 without the presence of the Dataport or a project
13 similar to it.

14 MR. BRECHER: No further questions.

15 HEARING OFFICER WILLIAMS: Okay. We're
16 back to staff, is that right?

17 MR. RATLIFF: No further cross-
18 examination, or I believe I already did, actually.
19 We're ready to put on our witness.

20 HEARING OFFICER WILLIAMS: Yeah,
21 let's --

22 MS. LUCKHARDT: I have just a couple of
23 questions in redirect. Honestly, this will not
24 take long.

25 //

1 REDIRECT EXAMINATION

2 BY MS. LUCKHARDT:

3 Q At the very beginning of this
4 discussion, Dr. Priestly, you were questioned
5 about the color of the facility. If you refer
6 to -- are there any restrictions on the colors
7 that can be placed on this facility?

8 DR. PRIESTLY: Restrictions as technical
9 restrictions, or restrictions that would be
10 imposed by the City or County or CEC?

11 MS. LUCKHARDT: I'm specifically
12 referring to condition of certification VIS2.

13 DR. PRIESTLY: Yeah, VIS2 is very clear
14 that the project structures of buildings should be
15 treated in appropriate colors or hues -- and this,
16 I think, rules out pink -- that minimize visual
17 intrusion and contrast by blending the surrounding
18 landscape, and shall treat those items in a
19 nonreflective appropriately textured finish.

20 MS. LUCKHARDT: Thank you. There was
21 some discussion about landscape screening of the
22 facility. And I'm wondering if you could comment
23 on whether there are projected to be other
24 developments that might also screen the facility?

25 DR. PRIESTLY: Yeah, there are two

1 things that we should mention. First is the Los
2 Esteros substation, which, as I understand it,
3 should be underway shortly.

4 This will be located on the rather large
5 parcel directly to the north of the proposed
6 project site. And it would have the effect, in
7 fact, of screening views of the project to any
8 potential trail views, if, in the very unlikely
9 case say that a trail were to be developed along
10 the southern edge of the wastewater treatment
11 plant, this substation would, to some degree,
12 screen views of the proposed power plant project
13 from that area.

14 And as I understand it, PG&E has plans
15 for landscaping along the northern side of that
16 facility, that as it grows would screen not only
17 the substation structure, but would screen the
18 slightly more distant views of the power plant.

19 And because this landscaping would be
20 closer to any potential users on a trail on the
21 southern edge of the wastewater treatment
22 facility, would be, you know, fairly effective in
23 screening views toward the project.

24 MS. LUCKHARDT: And then --

25 DR. PRIESTLY: And -- should I mention

1 Dataport? Yeah, so, then the other project that I
2 have mentioned a little earlier is the U.S.
3 Dataport project that would have buildings that
4 would be up to 90 feet tall, which would, in fact,
5 be as tall as the very tallest elements of the
6 proposed power plant.

7 So the buildings, themselves, would have
8 the effect of screening views toward the power
9 plant and surrounding area.

10 We have the landscape plan for this
11 project over here. Perhaps during the break you
12 can come over and take a look at it. The
13 landscaping would provide further screening of
14 views into the project site from the surrounding
15 vantage points.

16 MS. LUCKHARDT: And then in regards to
17 the trails that you were just discussing, are you
18 aware of which ones are dependent upon U.S.
19 Dataport going forward?

20 DR. PRIESTLY: The specific trail that
21 is explicitly dependent upon U.S. Dataport is the
22 trail that would go along the northern edge of the
23 Dataport project, along the edge of the wastewater
24 treatment facility.

25 As I understand it, the conditions for

1 approval of Dataport project require Dataport to
2 dedicate a right-of-way for trail development in
3 that area.

4 So, my assumption is that the
5 development of the trail along Coyote Creek is
6 unlikely to take place until such time as the
7 connector between Coyote Creek and Zanker Road is
8 developed at the time that Dataport is developed.

9 I know that funds for trail development
10 in the City are very limited and based on
11 discussions that I have had with City Staff about
12 trail development in the area around the Metcalf
13 project, I am well aware that funding, you know,
14 short trail segments that deadend is not a
15 priority for the City at this time.

16 MS. LUCKHARDT: And there's a trail that
17 exists along the Milpitas side of Coyote Creek, is
18 that correct?

19 DR. PRIESTLY: That trail does not yet
20 exist. There is a levee there and there is a road
21 along the levee. And, again, I believe that there
22 are signs saying no trespassing. So it is not, at
23 the moment, a formal trail, although I will
24 acknowledge that there does appear to be some
25 informal use of this area.

1 I am also aware that the City of
2 Milpitas, you know, has a plan for the development
3 of a formal trail in that area.

4 But one of the things that I will just
5 mention is that I have taken a close look at the
6 plan for that trail. And in terms of the
7 environmental concerns, one of the concerns has to
8 do with the effect that the presence of people on
9 that trail would have on the wildlife in the trail
10 corridor.

11 And I have read a provision in that plan
12 which is calling for screening vegetation to be
13 planted along the western side of the trail,
14 presumably to screen the views of the people from
15 the wildlife that's in the corridor.

16 So, my sense is if this provision of
17 that plan were to be implemented as a wildlife
18 mitigation measure, it would further screen views
19 from this trail corridor toward the power plant
20 site.

21 And I should also say, and I think this
22 has been mentioned before, at that present there
23 is a pretty thick corridor of riparian vegetation
24 along Coyote Creek. So, for most portions of this
25 trail corridor views toward the project site are

1 substantially screened.

2 There is one exception. There is an
3 area in the vicinity of the Veritas project where
4 there is a break in this vegetation. I think it
5 was removed to accommodate some kind of a
6 facility. Okay, a cross-over facility. So there
7 is that one portion where there is a break, but
8 the rest of it is pretty thickly vegetated.

9 MS. LUCKHARDT: Thank you. I have
10 nothing further.

11 HEARING OFFICER WILLIAMS: Counsel,
12 we're going to mark Ms. Gale's testimony for each
13 one, and it will be admitted as such.

14 MR. BRECHER: Short recross, Your Honor?

15 HEARING OFFICER WILLIAMS: Sure.

16 RECCROSS-EXAMINATION

17 BY MR. BRECHER:

18 Q You talked about the possibility that
19 the trail on the Milpitas side of Coyote Creek
20 would -- it's a lot more likely than the other
21 trails you discussed, is that correct?

22 A Yes, yes, I would say, yeah, that is
23 quite correct.

24 Q Okay. And is there any screening at
25 present at the overcrossing area that would

1 prevent a hiker from viewing the power plant?

2 A At the moment, as I indicated, that area
3 is generally open. And at present if there were a
4 hiker in that location they would have a view
5 toward the power plant which at that point might
6 be something on the order of about 1200 feet in
7 the distance.

8 Q Okay, 1200 feet, that's somewhat less
9 than the view from your window in the Crown -- in
10 the hotel, is that right?

11 A Excuse me?

12 Q That's a smaller distance than the view
13 from your hotel window?

14 A Yes, it is.

15 Q Okay. But a hiker, it's your testimony
16 that a hiker confronting that power plant with the
17 power plant plume, looking out across the
18 distance, would not find a significant visual
19 impact?

20 A Yeah, based on my observations of that
21 view my contention would be that the impact on
22 that particular view would be less than
23 significant. And in making this determination I
24 am assuming that the substation -- that the power
25 plant would be seen in the context of the Los

1 Esteros substation.

2 Q So, can I take it that because of the
3 presence of these other ugly facilities this is
4 sort of a sacrifice area, and that there couldn't
5 be any visual impact simply because there's all
6 this other junk around, is that accurate?

7 A I wouldn't make that generalization.
8 No, there's more to it than that. In this case
9 it's a function of the fact that we have one
10 limited view in a trail corridor that goes all the
11 way from highway 237 all the way up to the
12 entrance to the, is it -- what's the name of the
13 road where the dump is located -- to Dixon Landing
14 Road. It's a length of several miles along that
15 trail.

16 There's one very short segment within
17 which this power plant would be potentially
18 visible. So, you know, my professional judgment
19 is the extent to which the view in that area is
20 changed, it would still not add up to be a
21 significant impact on the experience of trail
22 users in that area.

23 MR. BRECHER: And why wasn't that
24 location used as a KOP?

25 DR. PRIESTLY: For some of the reasons

1 that I've just indicated to you. Because of,
2 first of all, it is not now a trail. There are
3 not, you know, like legal viewers in that area.

4 My perception is that this trail plan is
5 something that has just recently been released.
6 And even if we had taken that into account at the
7 beginning there are other reasons, again why we
8 don't consider that area to be significant.
9 Because for the most of that trail corridor
10 screen, this is just one small break.

11 I think if you look at the staff's
12 assessment, they have correctly indicated that, as
13 well, that as people are moving up and down the
14 trail corridor, the view towards the power plant
15 will not be in their primary cone of vision. In
16 fact, it's not likely to be the center of their
17 attention because, in fact, as you are walking
18 that trail corridor I would say that the most
19 interesting visual feature, the one that is most
20 dominant and attracts your attention is the view
21 towards Mission Peak and the East Bay Hills.

22 MR. BRECHER: And the other three KOPs
23 were similarly found to be insignificant, but you
24 did decide to use them. And the distinction
25 between them and this one is?

1 MS. LUCKHARDT: And this relates to my
2 redirect how?

3 MR. BRECHER: Well, we're talking about
4 the trail, whether we use the KOP -- whether we
5 have a KOP here.

6 MS. LUCKHARDT: But you've moved beyond
7 my redirect on the trails to talking about
8 generally other KOPs and I --

9 MR. BRECHER: I'm trying to compare and
10 contrast this area which was the subject of your
11 redirect, and determine whether it was an
12 appropriate spot for a KOP.

13 MS. LUCKHARDT: You've asked him that
14 question. Now you're moving on to --

15 HEARING OFFICER WILLIAMS: Counsel, I
16 think you're beyond the scope in terms of --

17 MR. BRECHER: Okay, I give up.

18 HEARING OFFICER WILLIAMS: Okay.

19 MS. LUCKHARDT: We're done.

20 HEARING OFFICER WILLIAMS: Okay, so, did
21 we admit your exhibits?

22 MS. LUCKHARDT: I'd like to move at this
23 point the applicant's exhibits 4H and 4H-1 into
24 the record.

25 HEARING OFFICER WILLIAMS: So admitted.

1 Staff.

2 MR. RATLIFF: Yes, the staff witness is
3 Michael Clayton. He needs to be sworn.

4 Whereupon,

5 MICHAEL CLAYTON

6 was called as a witness herein, and after first
7 having been duly sworn, was examined and testified
8 as follows:

9 DIRECT EXAMINATION

10 BY MR. RATLIFF:

11 Q Mr. Clayton, did you prepare the
12 testimony in exhibits 1 and 1A that are in the
13 staff testimony on Los Esteros case?

14 A Yes.

15 Q Are they true and correct to the best of
16 your knowledge and belief?

17 A Yes.

18 Q Do you have any changes to make?

19 A No.

20 MR. RATLIFF: I think we will assume
21 that everyone has read this testimony and forego
22 any summary just for the sake of time here, and
23 get down to some questions that go directly to
24 issues that have been raised.

25 //

1 BY MR. RATLIFF:

2 Q Have you read the testimony of Dr. Clay
3 in this case?

4 A Yes, I have.

5 Q That testimony states that three KOPs
6 used in the staff analysis were insufficient; that
7 about a dozen would be more appropriate. What is
8 your view on this?

9 A I can't agree with that. In the context
10 of this case I think these three KOPs very
11 adequately cover the most sensitive public viewing
12 points and most sensitive viewers.

13 When we evaluated the project initially
14 we did a thorough review of the locations, the
15 area around the power plant project, views of the
16 project site, both in terms of from the east side
17 of Coyote Creek, and from various locations along
18 highway 237.

19 And in general these locations were felt
20 to be adequate. I did have actually three
21 possible new locations to add to the applicant's
22 selection of two KOPs. One of those was the
23 viewpoint from Grand Boulevard, which was
24 subsequently added as viewpoint three

25 There was another question about whether

1 or not we should add a viewpoint to represent the
2 views from the Bay trail. However, at that time
3 we did not have sufficient information, detailed
4 information to be able to know exactly where the
5 alignments would be for the Bay trail or the
6 status of that trail.

7 We subsequently dropped that requirement
8 at the time of the original staff assessment. We
9 also questioned the advisability of including a
10 viewpoint to be representative of the residences
11 to the southeast of the project site. There were
12 the two, actually the three residences. We did
13 additional site discovery work at the location and
14 agreed that because of the limited visibility of
15 the project site from those locations based on
16 screening view orientation that a viewpoint would
17 not be required at that location.

18 With the preparation of supplemental
19 testimony at that time we had received from the
20 City of San Jose sufficient information about the
21 Bay trail alignment and the status. I conducted
22 additional survey work out along the various
23 reaches of the Bay trail alignment and provided
24 that information in the supplemental testimony.

25 Q Dr. Clay's testimony also suggests at

1 pages 3 and 4 of his testimony that staff did not
2 review or question these KOPs or the
3 appropriateness of the KOP on highway 237.

4 What is your view on this?

5 A Well, of course, one of the first things
6 that we do in our analysis is to thoroughly
7 investigate the appropriateness of the KOPs. And
8 I just described some of the additions that we
9 made.

10 The highway 237 location, I believe, is
11 appropriate for reasons that the applicant has
12 already characterized. Again, moving either west
13 or east, if you move west you have the influence
14 and the screening by the overpass; that becomes
15 problematic. If you move further east then the
16 power plant begins to move further away from your
17 direct line of sight, out of your primary cone of
18 vision.

19 So, that location was deemed to be
20 adequate.

21 Q We've heard testimony tonight about the
22 splicing of two 50 mm photos that were taken from
23 the KOP on highway 237. And also about the
24 appropriateness of cameras used.

25 In your view are these critical to the

1 accuracy of the simulations used in this analysis?

2 A Not particularly. Let me elaborate on
3 that. First of all, with regards to splicing,
4 generally, you know, with the sophistication of
5 the available software, it's pretty easy to splice
6 these images together and not have a great deal of
7 distortion in the image.

8 As a personal preference I probably
9 wouldn't do it that way. I'd probably use a large
10 format camera just to avoid having to take that
11 step.

12 However, having said that, I have also
13 done splicing of images, and it's like I said,
14 it's pretty effective in accomplishing that task.

15 However, I think it's important to keep
16 in mind what we're talking about. To the extent
17 that there might be some distortion from bringing
18 two images together, we're talking about the
19 background aspects of the image and the landscape
20 so you're talking about whether you might see some
21 pixel distortion in this case, maybe in the trees,
22 the trees behind the project or in the foreground
23 grass areas in the fields or maybe the hills
24 beyond.

25 Ultimately you're going to be

1 superimposing the power plant structures on top of
2 that, so the distortion really isn't going to
3 necessarily affect the quality of the actual
4 structure, itself.

5 You know, in terms of appropriate camera
6 lenses that isn't really too much of a concern.
7 Because, again, you might get some distortion in
8 terms of using let's say a wide angle lens, but
9 here, again, the amount of distortion that would
10 be perceived by the average viewer would not be
11 particularly noticeable.

12 What I mean by that is that we have a
13 requirement in the Energy Commission's methodology
14 where we require that the applicant provide their
15 images in a life size scale when viewed at a
16 standard reading distance.

17 And the purpose of that is basically to
18 standardize any possible variations if you use
19 different lenses and present images at different,
20 using different focal length lenses.

21 What this requires if that, you know, if
22 I'm sitting at a table here or in a chair reading
23 a document, I'm generally holding an image at a
24 certain distance from my eyes. We've identified
25 that as being, or a reasonable distance being

1 approximately 18 inches. So that, you know, after
2 all the purpose of a simulation is to communicate
3 to the reader a reasonably realistic
4 representation of the viewing experience at that
5 location.

6 So if I look at this image at my desk or
7 if I'm standing at that location, the image should
8 look pretty close to what I would experience in
9 the field.

10 By requiring a life size scale, if you
11 use a 28 mm lens, or a 50 mm lens, really it
12 becomes more of a question of to what degree do
13 you need to scale up or enlarge your image to
14 present it at a life size scale.

15 And, again, if there's some distortion
16 using a wider angle lens, usually that's not
17 particularly apparent, and once you've brought
18 your image up to a life size scale.

19 So, in that regard, you know, it's
20 certainly better as a practical matter, I think,
21 to construct a process that is efficient in terms
22 of use of your time or use of your equipment. But
23 there certainly is flexibility in how you choose
24 to do that. So long as you achieve, according to
25 our requirements, that life size scale.

1 Q Dr. Clay's testimony states at the top
2 of page 7 that the Energy Commission assumed that
3 the simulations were correct and that it did not
4 perform the kind of verifications necessary to
5 determine that those simulations were accurate.

6 What is your view on this?

7 A I disagree with that. Always one of the
8 first steps that we undertake in the review of the
9 application materials is to verify the quality and
10 the accuracy of the simulations.

11 First of all, we will digest, if you
12 will, the application information. We will look
13 at descriptions of the site. We will look at site
14 plans, perspective drawings, elevational drawings.
15 In some cases there are perspective images
16 provided; some cases there are not.

17 We will also look at information that
18 describes heights of structures; in some cases we
19 may know the heights of existing structures in the
20 area or have an understanding of some of the other
21 landscape features or structures in the area.

22 Based on that information we can
23 evaluate in the office the quality of the
24 simulation; the apparent accuracy of the
25 simulation.

1 We can then go out in the field and then
2 review all that information with the simulations,
3 walking the site, viewing it from different
4 perspectives.

5 It's not really that difficult to arrive
6 at a conclusion as to how accurate or how
7 reasonably accurate the simulation is.

8 Once you've done this for awhile it's
9 just not -- it becomes, I think, relatively
10 apparent if an image or simulation appears to be
11 problematic, either in terms of scale or in terms
12 of the structural relationships among the various
13 components of the power plant images, or in terms
14 of its relationship to other landscape features.

15 Normally my experience has been that we
16 rarely actually see too many problems in that
17 regard with regards to the applications that are
18 submitted to the Commission.

19 There are some occasions where we do see
20 problems with the simulations, they're usually
21 pretty easy to spot. You know, I can think of
22 cases where we had, for example, a transmission
23 line structure that was with a known height. It
24 was depicted as being taller than the tallest
25 element of the power plant structure, when in

1 fact, the power plant structure would be taller
2 than the adjacent transmission line structure.

3 There have been times when, occasionally
4 when an image shows a power plant structure to be
5 of questionable scale and size. And sometimes
6 those can be easily figured out by doing a
7 relatively straightforward line of site drawing by
8 plotting the distance between the viewer and the
9 power plant site and the other landscape features.

10 And basically constructing a line of
11 sight -- constructing site-lines to verify whether
12 or not, for example, a power plant stack should
13 actually be protruding above the horizon line of a
14 hill ridge line and so forth. That's pretty
15 straightforward.

16 But normally those problems we don't
17 encounter too much, or I don't encounter too much
18 on these power plant projects.

19 Most oftentimes the two problems that we
20 do encounter are either just a sub lifesize scale
21 which we do require. And then also sometimes
22 there are components of the power plant design
23 that are not included in the simulations, and we
24 typically will require those to be added back into
25 the simulations upon revision.

1 Q Dr. Clay's testimony states on pages 7
2 through 11 the numerous shortcomings with regard
3 to the analysis, particularly in regard to visual
4 change. And suggests that those shortcomings
5 invalidate the analysis.

6 Do you agree with that opinion?

7 A No, I don't. First of all, just sort of
8 a matter of fact, we do not rely upon the
9 applicant's methodology or conclusions. We
10 certainly look at them. We learn from the
11 information that they provide.

12 We make use, certainly, of the
13 simulations that they generate. But after we have
14 reviewed them for accuracy and, if necessary, have
15 adjustments to them.

16 But in terms of invalidating, for
17 example, the Commission's analysis, we do our own
18 independent analysis. And so I would say that
19 that is not an issue for us.

20 Q At page 10 of the testimony there's
21 reference to Duke Energy's analysis of the Morro
22 Bay project, and it describes this method, the
23 method being used by Duke, as being scientifically
24 defensible in its depiction of visual change.

25 In your view is such a method

1 scientific, and therefore appropriate in this
2 case?

3 A Well, I'm not absolutely certain what
4 scientifically defensible means here. I certainly
5 wouldn't say that that methodology is any more
6 scientific than any other methodology that's used
7 by applicants to the Commission.

8 I think what it does mean to me is that
9 it's more quantitative in the fact that you're
10 actually doing pixel counts, you're actually
11 working with quantifiable data. But that
12 particular methodology works, I think, in my
13 opinion, much better for a situation like Morro
14 Bay where you have a fixed baseline of pixels
15 which are represented by the existing power plant
16 image in the photograph.

17 You take that out because Morro Bay is
18 coming out and a new plant is being built. So you
19 have an easy reference to, in terms of the number
20 of pixels you've taken out and the number of
21 pixels you're putting in that represent the new
22 power plant project.

23 So, there you can actually do a
24 quantitative assessment as to that degree of
25 change.

1 However, I think it's very important to
2 point out that that methodology really only looks
3 ta one aspect of what the Commission evaluates in
4 terms of visual change. And that has to do with
5 view blockage.

6 What that methodology from Morro Bay
7 does is it looks at the change in view blockage of
8 various landscape features in the coastal
9 landscape there, whether it's blocking more of
10 Morro Rock, or more sky or more coastal features.
11 But that equates to what the Commission looks at
12 in terms of view blockage.

13 In addition to that, our methodology
14 includes an assessment of visual contrast. And
15 also project dominance. So with those three
16 factors as opposed to just the one that they
17 looked at for the Morro Bay project.

18 This project, Los Esteros, I don't think
19 that that particular methodology is necessarily
20 appropriate given that we don't have that
21 exchange. We don't have an established baseline
22 of pixels with which to compare a new pallet of
23 pixels we'd be adding into the image. So, I would
24 not agree that that would be an appropriate method
25 to use for this project.

1 Q Dr. Clay's testimony states on page 11
2 in the middle of the page with regard to the CEQA
3 guidelines that there is a contradiction between
4 the AFC's characterization of the site and the
5 staff assessment's because of their differing
6 conclusions.

7 Do you agree?

8 A Well, it is not uncommon for the
9 Commission, the staff's characterization of
10 landscape quality or existing landscape
11 characteristics to be different from that of the
12 applicant. That does happen. And sometimes it's
13 a matter of using different descriptors.

14 I will also tell you that most of the
15 time their conclusions about impact significance,
16 to some degree, vary from the conclusions that
17 staff reaches. We do our own independent analysis
18 and we may not agree with their conclusions that
19 they reach in terms of impact significance.

20 But that's common across, I would say,
21 probably most, maybe all projects.

22 Q The testimony states at page 12 that the
23 staff has shown little interest in whether or not
24 there's compliance with the San Jose general plan,
25 is this correct?

1 A Well, not at all. I mean we are
2 required to evaluate all local LORS, I mean that's
3 part of our methodology, part of our analysis. We
4 look at the way that the applicant treats the
5 analysis of LORS.

6 In some cases we ask them to provide
7 additional information, whether it's either
8 providing clarification of their consistency
9 determinations, or if we feel they may have not
10 included some things.

11 But then again we will do our own
12 independent analysis of that, and we will
13 oftentimes reach different conclusions than they
14 reached in terms of the significance or the
15 consistency of the project with those LORS.

16 Q The testimony states on pages 12 and 13
17 that whether or not U.S. Dataport project is built
18 that it would have significant visual impacts on
19 the Veritas campus, McCarthy Ranch and the Crown
20 Plaza Hotel in Milpitas. Do you agree?

21 A No, I do not agree. Those two
22 facilities will experience adverse visual impacts.
23 Will it be significant? Not in my opinion.

24 Taking Veritas first, here again we do
25 not, I do not consider that particular land use,

1 that particular group of viewers to be sensitive,
2 to have a high degree of visual concern. They
3 will experience an adverse impact. There is some
4 degree of screening provided by the corridor of
5 riparian vegetation. There will be opportunities
6 for the upper floors of some of those structures
7 to be able to view down toward the site.

8 Without Dataport and with Dataport, of
9 course that view is much more screened. But even
10 without Dataport, there will be some degree of
11 visual impact. I don't consider that particular
12 viewing population to be sensitive.

13 There's a situation where unless the,
14 you know, for a commercial structure like that,
15 unless there is some intrinsic necessity, or
16 intrinsic value of the external environment, or
17 the view of the external environment to the
18 activities ongoing within that building, it's hard
19 to make a case as to why someone viewing out of
20 their window of that commercial structure would
21 constitute a negative visual impact. So I don't
22 consider that to be a sensitive viewing
23 population.

24 With respect to Crown Plaza Hotel, the
25 impact there is going to be, again, adverse, but

1 it's definitely not significant. What you see
2 from the Crown Plaza Hotel as you look out the
3 north side of the building, and it's not visible
4 from the south side, the primary visual features
5 in the landscape is the McCarthy Ranch development
6 in general. And the hotels, as well, on the south
7 side of highway 237.

8 Also the highway, itself, the new
9 connectors between 237 and highway 880. These are
10 all the most prominent features in that entire
11 landscape. Your view, your primary cone of view
12 out any of those rooms is basically going to
13 encompass that development.

14 Is the power plant site visible from
15 there? Yes, it is. It's off further to the west.
16 At that distance and in the context of that
17 existing development, the McCarthy Ranch
18 development, directly in front of the hotel, that
19 feature would appear what I would characterize as
20 a subordinate feature in that landscape.

21 So I would not consider the adverse
22 impact that would occur for Crown Plaza to be
23 significant. And also we would not -- I would not
24 consider that viewing population to be a sensitive
25 viewing population, either.

1 You can argue as to whether or not
2 there's a predominance of the guests at that
3 hotel, you know, looking out the windows during
4 the day when you'd have visibility of the project
5 site. But in general it is a transient population
6 and typically not for that location identify
7 either a significant visual impact or identify
8 them as a sensitive viewing population.

9 Q There's been discussion tonight about
10 the visible vapor plumes from the project. And
11 the testimony states on page 13 that those plumes
12 would constitute significant impact.

13 What is your view on that?

14 A I would not agree with that. Staff has
15 done its own modeling of the project plumes. And
16 based on the operating characteristics and
17 formation of the plumes that would occur under the
18 proposed operating characteristics of that plant,
19 the nature of the plume that would be emanating
20 from the cooling towers is such that it would not
21 be particularly visible.

22 It is not -- it would not appear like
23 what you typically consider an opaque billowing
24 kind of a plume. What staff has determined is
25 that that would actually appear more as sort of a

1 translucent haze in a wispy moisture plume.

2 So the character of the plume is much
3 different than what you might see in the landscape
4 currently, either with Agnew's or with the other
5 power plant project -- excuse me, the other plume
6 sources in that area.

7 And also the height of the plume is not
8 particularly great, as was mentioned earlier
9 tonight. And I should point out that there has
10 been some corrected testimony based on a new run
11 of the model. And that has been presented as
12 supplemental testimony. And the height of the
13 plume changed a little bit, so that the actual
14 height instead of 118 feet now has been determined
15 to be 121 feet.

16 At 121 feet that would place those
17 plumes approximately 31 feet over the tallest
18 elements of the power plant project, which would
19 be the HRSG stacks, which stand about I think it's
20 90 feet.

21 Q Finally, in the summary critique on page
22 14 of the testimony there is a discussion of
23 objectivity and subjectivity. The testimony
24 states that the AFC's approach was not
25 particularly objective. And that subjectivity,

1 quote, "is a dominant element of its conclusions."

2 How do you respond to these comments?

3 A Well, I found that portion of the
4 testimony just a little bit confusing. It almost
5 seemed to be referring more to an issue of bias as
6 opposed to objectivity.

7 But, you know, from my perspective, of
8 course, visual impact analysis is, by its very
9 nature, subjective in that anyone's professional
10 or nonprofessional impression, visual impression
11 is formed, to a great degree, by their viewing
12 experience and their personal preferences.

13 Subjectivity in visual analysis is often
14 raised as sort of a negative, or a problem, or a
15 deficiency somewhat of the analysis. I don't
16 particularly find subjectivity to be problematic.

17 What is important is that the analysis
18 and the conclusions do not appear to be arbitrary.
19 And so to avoid that potential problem, the CEC
20 methodology is very transparent. We fully
21 describe the various factors that contribute to
22 both the characterization of the environmental
23 setting, as well as our determination of visual
24 change and how those come together.

25 That, in my mind, makes the process very

1 clear. There can be differing opinions as to the
2 significance of some of those conclusions, but my
3 experience has been -- my personal experience has
4 been, and experience I have noted from others, is
5 that generally if people read these documents,
6 they come to the table with an unbiased view,
7 either for or against the project, that more often
8 than not my experience has been that the folks
9 will generally reach a similar conclusion as we do
10 in these analyses.

11 So, in that regard, subjectivity I don't
12 find is a particular problem.

13 Q Thank you, Mr. Clayton.

14 MR. RATLIFF: The witness is available
15 for cross-examination.

16 HEARING OFFICER WILLIAMS: Thank you.
17 Applicant?

18 MS. LUCKHARDT: No questions.

19 MR. BRECHER: Yes, I have a few.

20 CROSS-EXAMINATION

21 BY MR. BRECHER:

22 Q Mr. Clayton, you're an Energy Commission
23 Staffer, is that correct?

24 A A consultant to the Energy Commission.

25 Q I see, and for whom -- by whom are you

1 employed?

2 A Directly by Aspen Environmental Group.

3 Q I see. And do you do visual impact
4 analysis for other organizations besides the
5 Energy Commission?

6 A Yes.

7 Q And have you done any for power plant
8 companies?

9 A Yes.

10 Q About how many of them have you done?

11 A One.

12 Q What was that?

13 A Name of the company or name of the
14 project?

15 Q Both.

16 A The name of the company I believe was
17 AES, although I'm not certain about that. The
18 client was URS.

19 Q Okay.

20 A The name of the project was Pastoria.

21 Q Where was that located?

22 A That's located down in Bakersfield, just
23 south of Bakersfield, Kern County.

24 Q Did you perform an analysis that was
25 similar to that which occurred in the present case

1 in that situation?

2 A There were similarities in the
3 methodology. I'd have to go back and review that
4 particular study to clarify.

5 Q And you selected KOPs there, did you?

6 A Yes.

7 Q How many did you use?

8 A For that project?

9 Q Yes.

10 A Let's see, I think that was three; I
11 believe it was three.

12 Q Did you find that there were significant
13 visual impacts for that project?

14 A No.

15 Q Have you ever found that there were
16 significant visual impacts for any power plant
17 project?

18 A Oh, sure.

19 Q Tell me about one of those.

20 A This project.

21 Q You found that there was significant
22 visual impacts for this project?

23 A Yes.

24 Q And could you elaborate on exactly what
25 they are?

1 A Sure. We found significant impacts for
2 two locations, one was KOP1 on highway 237. And
3 the other location in our supplemental testimony
4 we provide a conclusion of significant impact for
5 the reach 1 of the Bay trail, which is on the west
6 side of Coyote Cree, but that is from a southbound
7 perspective from the northeast corner of the
8 project site.

9 Q And were those significant visual
10 impacts capable of being mitigated to a level of
11 insignificance?

12 A Yes.

13 Q And by what methodology?

14 A Vegetative screening.

15 Q In both instances, is that correct?

16 A Yes, that's correct.

17 Q And the vegetative screening -- there
18 were, in the testimony there were simulations of
19 what the vegetative screening would look like at
20 five and 20 years, do you recall those --

21 A Yes.

22 Q -- those depictions? And at five years
23 was the vegetative screening significant to render
24 the view insignificant?

25 A No.

1 Q So then for five years there would be a
2 significant impact at that location, is that
3 correct?

4 A Correct.

5 Q Okay. And is that true with KOP2, as
6 well?

7 A KOP2, no.

8 Q No, with respect to the trail, I'm
9 sorry.

10 A Oh, the trail?

11 Q Yes.

12 A Yes.

13 Q And there --

14 A Well, let me back up. I can't say that
15 with respect to the trail because there was no
16 simulation for the trail, and there was no
17 landscaping simulation for the trail. But I think
18 based on the five-year simulation of landscaping
19 that we did see for KOP1 and 2, I think it would
20 be safe to assume that as proposed for that five-
21 year period, the impact would be significant for
22 that perspective from the trail.

23 Q And isn't, to your knowledge, a
24 condition of approval of the project that
25 screening be adopted to make sure that ultimately

1 the view from the trail would be rendered
2 insignificant?

3 A Yes, that is correct.

4 Q That is one of the conditions?

5 A Right. I think it's VIS3, I have to
6 review that.

7 Q Okay. So it's your testimony then at
8 least for a five-year period there will be
9 significant visual impacts that would not be
10 mitigated within the five-year period, is that
11 correct?

12 A As shown in the simulations of
13 vegetation for five years there would be an impact
14 that would extend for that period of time, yes.

15 Q And it would be significant, is that
16 correct?

17 A Yes, correct.

18 Q Thank you. Okay. Now, you mentioned
19 that you did not consider the population viewing
20 the power plant site from the window of the hotel
21 as constituting a significant impact because that
22 was a transient population. Do you recall that
23 testimony?

24 A My testimony was that it would not be a
25 significant impact because of two factors. One,

1 the view of the project would be limited, and
2 would appear subordinate in the landscape compared
3 to the impact of the view with the prominence of
4 the existing McCarthy Ranch development.

5 And then the other aspect is that the
6 viewing population again would be not considered
7 to be sensitive.

8 Q And it's true, as a general proposition,
9 that the views by transient populations do not
10 constitute significant impacts?

11 A No.

12 Q Okay, how do we determine whether one
13 set of transient population would constitute a
14 significant impact while another would not? What
15 are the variables?

16 A Well, for any KOP, let's assume that
17 we're talking about a KOP that's representing some
18 transient population. For any KOP we arrive at a
19 determination of impact significance based on an
20 evaluation of existing landscape and viewing
21 characteristics.

22 We look at visual quality; we look at
23 viewer concern; we look at viewer exposure to
24 identify the visual sensitivity of that landscape.
25 And then we'll look at three factors for visual

1 change, which includes, as I said previously,
2 visual contrast, the degree of project dominance
3 and the extent that view blockage occurs.

4 Evaluating those various factors we will
5 arrive at a determination of impact significance.
6 And depending on what those factors are telling
7 us, it may or may not be significant for a
8 transient population. Depends on the
9 circumstances.

10 Q Is it true that the drivers along the
11 highway 237 passing KOP1 would constitute a
12 transient population?

13 A Yes.

14 Q But that transient population
15 constituted in your view a population whose
16 viewpoint needed to be simulated in order to
17 arrive at an analysis of significant visual
18 impact, is that correct?

19 A Correct.

20 Q Even though their exposure to the plant
21 would only be for several seconds, is that
22 correct?

23 A Correct.

24 Q Now, could you explain why a several-
25 second exposure to the plant would trigger the

1 need for a visual impact analysis at that
2 location?

3 A KOP1 is representative of the views from
4 highway 237 which is the primary point of visual
5 access or visual exposure for the project.
6 Because of the large number of viewers that pass
7 by that point in a given day, that is an
8 appropriate location to establish a KOP.

9 The Crown Plaza Hotel was not considered
10 to be an appropriate location for establishment of
11 a KOP because one, the view there of the project
12 site is somewhat limited; and the project would
13 appear very subordinate to the overall view from
14 the hotel. And also that the population, the
15 potential viewing population during daylight hours
16 would be substantially limited.

17 Q Mr. Clayton, are you aware of any data
18 or do you agree with the proposition that most
19 folks would think that power plants are ugly?

20 A Yes. I would -- I don't have any
21 information, but my opinion would be that most
22 folks would think that power plants are not
23 particularly pleasing to look at.

24 Q Okay, thanks.

25 MR. BRECHER: No further questions.

1 HEARING OFFICER WILLIAMS: Okay. Is
2 there any --

3 MR. RATLIFF: No recross.

4 HEARING OFFICER WILLIAMS: No recross,
5 okay. So we can move on to --

6 MR. RATLIFF: I mean no redirect.

7 HEARING OFFICER WILLIAMS: We can -- all
8 right.

9 MR. BRECHER: Dr. Clay, do you have with
10 you a copy of the testimony prepared for this
11 project?

12 DR. CLAY: Yes.

13 HEARING OFFICER WILLIAMS: Oh, yes.

14 (Off-the-record discussion.)

15 MR. RATLIFF: Mr. Williams, I forgot to
16 move the testimony.

17 HEARING OFFICER WILLIAMS: It is
18 received.

19 (Pause.)

20 Whereupon,

21 GARY R. CLAY

22 was called as a witness herein, and after first
23 having been duly sworn, was examined and testified
24 as follows:

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DIRECT EXAMINATION

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BY MR. BRECHER:

Q Dr. Clay, do you have a copy of your testimony you presented in this proceeding with you?

A Yes.

Q Did you prepare that testimony?

A I did.

Q Does it represent a fair and accurate reflection of your views on the topics contained therein?

A Yes, it does.

Q Because of the late hour -- oh, and does it contain a summary of your qualifications?

A Yes, it does.

MR. BRECHER: All right, because of the late hour I'm not going to ask Dr. Clay to discuss or summarize what's in this testimony. It's been the subject of a lengthy questioning.

There is one area that I think Dr. Clay wants to mention, but aside from that I'll just present him for cross-examination.

DR. CLAY: I must say, after ten and a half hours I get to say something.

(Laughter.)

1 DR. CLAY: And another thing, I've got
2 to tell my wife that nobody said they liked
3 anything about my paper. How can I talk to her
4 tonight?

5 I think many things have been discussed
6 tonight, and I mean obviously I'm not going to
7 tit-for-tat this, so I'll really kind of eliminate
8 a lot of those.

9 The one thing that I think I would like
10 to discuss is the whole concept of assessing or
11 analyzing visual change. And one reason why is
12 because that tended to form the basis of my
13 dissertation, and really a lot of the research
14 that I've been doing.

15 And I think there's been a lot of
16 discussion in regards to laws and regulations and
17 all these other legalese type of things, in
18 regards to what should and shouldn't be done as
19 far as assessing that. But I guess maybe if I can
20 just speak briefly in terms of more of an
21 academic; what an academic might think.

22 And I think one of the best ways to
23 describe the concept of landscape change, or the
24 idea of visual quality is to look at it in terms
25 of what a colleague of mine, Irv Zubby, said at

1 Arizona. And in his famous 1982 paper, he
2 described the idea of visual quality as a three-
3 way interaction between humans, landscape leaning
4 to outcomes.

5 And the outcomes, in essence, are
6 someone's either acceptance or rejection of a
7 certain landscape.

8 I think ultimately one of the dilemmas
9 that we have in this paper, and we have in the
10 methodology that was developed, is that while they
11 did use what I would call a fairly productive and
12 robust methodology, done by a fellow by the name
13 of Greg Bioff, one thing that tends to fall short
14 in that methodology is that the idea of the human
15 or the observer really wasn't discussed in that.

16 And I think it's what is important, very
17 much like you could argue in some of these other
18 issues, such as Duke or some of these other cases,
19 where if you come up with either some metric or
20 some quantitative discussion of some percentage of
21 change, or some relationship of different sort of
22 the transition in the landscape, ultimately the
23 person who really should be qualified, or should
24 be qualified in really making the decision is it a
25 positive or a negative change in the landscape,

1 are the end users.

2 And I think if there's one thing that is
3 systematically missing in this report, in this
4 discussion, is just that. I think we hinted on
5 some of that tonight. And I think, as
6 professionals, we, in fact, can garner certain
7 relationships and come up with certain view angles
8 and develop some discussions of this, but
9 ultimately it's going to be the people who, in
10 fact, live with this facility day in and day out.

11 And I think that is something that
12 unfortunately and sadly has been missing in this
13 development.

14 In using, in fact, Bioff's discussion
15 and the concept of how, in fact, we can assess
16 change what might have been a more productive
17 thing to do would be to say, let's say, set up
18 some of these simulations after they're done.

19 And then instead of having maybe say an
20 expert come in and give us his or her testimony on
21 what is an impact or what isn't, maybe you could
22 have then brought that out to the public and try
23 and garnered some interest from different citizen
24 groups or other things to see if, in fact, there
25 is an impact, and they perceive that and they

1 don't like it.

2 As an example, some of these homes, some
3 of these residents that we talked about, clearly
4 from my point of view I would not want to live
5 across the street from a power plant. I would be
6 willing to bet there are a lot of people that
7 would not be interested in living across the
8 street from a power plant.

9 I don't know about you, if it's a half a
10 mile away or ten feet away or a mile away, I feel
11 that that would be a significant impact on my
12 life, and I would not like it.

13 Therefore I think it's important that
14 possibly some of those people would have been
15 polled to find out sort of really what their
16 opinions are on that situation.

17 I think another thing that from my point
18 of view that is missing in this document is, and
19 again we don't want to beat this to death, but we
20 keep on talking about this issue of screening.

21 And over the last two weeks I've spent a
22 lot of time in the architectural library back at
23 my university. I've looked at a lot of documents.
24 I've yet to find a book that says there is a rule
25 that says that a power plant has to be ugly. I

1 don't think there is any book that says that. In
2 other words, a power plant could be an actual
3 amenity or an attraction.

4 So, I guess from my point of view
5 instead of just viewing as we have an ugly beast
6 on our hands, let's screen it, is there, in fact,
7 a way to do something positive or productive about
8 it. And I don't think that was addressed at all
9 in this, as well.

10 So, those two points, and again, I mean
11 it's getting late in the hour here. I just feel
12 that the concept of change has not been thoroughly
13 reviewed and what the implications of those
14 changes are to the common person on the street,
15 the person who will see it every day, or to the
16 causal traveler.

17 And then the idea of instead of just
18 staying it's a negative beast, let's hide it, how
19 about let's try and make it into a diamond from
20 the rough and see if we can do something positive
21 about it.

22 MR. BRECHER: Dr. Clay is available for
23 cross-examination.

24 MS. LUCKHARDT: Mercifully I don't have
25 a lot.

CROSS-EXAMINATION

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BY MS. LUCKHARDT:

Q I understand from looking at your r, sum,, Dr. Clay, that your primary experience has been in creating simulations, if I'm correct, with your background in the computer generated information. You can correct me if I'm not characterizing your background correctly.

And then currently it's within an academic experience, is that correct?

A I guess you could say those are two of the hats that I've worn, yeah.

Q And then other than your work on the Morro Bay Power project, could you describe other specific CEQA projects that you've worked on in the past or Energy Commission projects?

A There's been none.

Q Okay. Now isn't it true that you have not completed a visual analysis of this project?

A Correct.

Q And you mentioned that you had toured, potentially toured the area of the site. Was that one visit that you had in the area?

A Actually what is interesting about this site is serendipitously I've actually been past

1 the site many times in the last several years.

2 My wife and I, well, my wife, she likes
3 to come up and shop at San Jose quite a bit, and
4 we actually have been driving by that like every
5 two, three months to go to, was it Ranch 99, or
6 these stores over there.

7 And so what has happened is we've
8 actually gone past the site quite often. And one
9 of the things that I've found that's been so
10 interesting for me is as I've driven by I've
11 always said to myself, this is one of the few open
12 places left. I mean there's so much crap all over
13 the -- there's so much clutter all over the place,
14 that it's refreshing to see sort of a clear, open
15 landscape void of a lot of this negative
16 influence.

17 So there's actually been several times
18 that I've gone by that and I've actually admired
19 that site for its simplicity, which is one thing
20 that I've argued with your consultant. I actually
21 view that landscape quite highly from a visual
22 context because not only is it a very pleasant
23 change from the norm around here, but it provides
24 a lot of views and vistas to the surrounding
25 mountains and the surrounding countryside. So I

1 found that a real positive amenity to the area.

2 And then the other day I was here for
3 several hours and I did drive around and see the
4 site from the perimeter and go to all the KOPs.

5 Q So then the description that you've
6 giving of the site, is it true that you see the
7 site as having been open, vacant land?

8 A I think it is far more open than what is
9 around in other areas. In other words, visually
10 there are opportunities to see long distances
11 through the site, and actually use the perimeter
12 trees and some of the perimeter landscape to bring
13 it in and actually develop some sort of a
14 character statement with the landscape on the
15 site.

16 Q Are you aware or familiar with the
17 greenhouses that used to be on the site?

18 A Yeah, I think I've seen some aerial
19 photographs of that, yeah.

20 Q And you would still consider that a
21 pleasing view?

22 A Well, it's an issue of scale, again.
23 And, again, it's sort of like one person's ceiling
24 is another person's floor. In other words, to me
25 the opportunity to be able to actually look out

1 and look at distant vistas, and you actually have
2 an opportunity to see elongated views.

3 I really -- I find that very desirable.
4 And, also I must say that even while you would say
5 that those greenhouses, I guess you could
6 characterize them as not being the most beautiful
7 architectural statement in the world, I think for
8 their scale and their size, and also because they
9 maybe have some semblance of sort of a different
10 character that was once here or maybe like sort of
11 going back to more of an agricultural past, I find
12 it very desirable.

13 Q Have you stayed at the Crown Plaza?

14 A No, but it sure sounds fun. I might do
15 it tonight.

16 (Laughter.)

17 DR. CLAY: Was it the tenth floor?

18 (Laughter.)

19 DR. CLAY: I'm curious, what room number
20 did you stay at? Maybe I can stay there.

21 (Parties speaking simultaneously.)

22 BY MS. LUCKHARDT:

23 Q Have you hiked any of the trails or
24 proposed trail corridors?

25 A Actually, I did. The other day that

1 trail that, I forget, someone described that it
2 was against the law to walk on. I actually walked
3 on it; it was very nice. Is it Coyote Creek? And
4 actually several people were there hiking.

5 Q And was that one or the other --

6 A Saw some raptors, some nice birds.

7 Q Was that one or the other side, do you
8 know --

9 A Can I point? This.

10 Q Okay, I believe he's pointing to the
11 Milpitas side of the trail. From my
12 understanding.

13 A A rose by another name.

14 Q And in your comments on KOP location
15 from 237, you say you've driven that quite a bit.
16 Do you disagree with Dr. Priestly's testimony
17 about visibility of the site from different
18 locations on 237?

19 A Actually I probably would have used that
20 KOP, but I think at least another four to five
21 along that highway are desirable.

22 As an example, what might be nice would
23 be to keep that one, because it's a fairly close-
24 in view looking at that direction from that
25 distance or that mode -- and then the other way

1 from the same spot. Then maybe about a quarter of
2 a mile down, so that what you get is you get sort
3 of a variety of visual experiences going out on
4 the site.

5 Because ultimately when you're driving
6 along you're going to be getting sporadic quick
7 bursts of visual information off of that. So it
8 might have been nice to look at a series, because
9 that's really how, in fact, someone would be
10 looking at that. Maybe like quickly from a half a
11 mile off, and then a quarter mile, and then right
12 at it, and then off you go.

13 Q Isn't it true that there's some view
14 blockage along 237?

15 A Yeah, there is some.

16 Q Based upon the elevated structures, the
17 overpasses and elevated ramps?

18 A I never thought of that. Actually in
19 some ways they might be nice, because you could
20 get up and look down on the site.

21 Q Isn't it true that the Veritas
22 development on the Milpitas side is much closer to
23 the Bay trail system that it sounds like you hiked
24 along than this project will be?

25 A Yes.

1 Q And I gather from the list of documents
2 that you reviewed that you did not review
3 applicant's data adequacy submission?

4 A No, I think I did.

5 Q Then you would be familiar with table
6 VR1 of that submission?

7 A Can I take a minute and find it?

8 Q Absolutely.

9 MR. BRECHER: Is this a data request for
10 response --

11 MS. LUCKHARDT: No, this is the data
12 adequacy responses.

13 DR. CLAY: It's probably going to take
14 me awhile to find it, so if somebody already has
15 it --

16 (Pause.)

17 MS. LUCKHARDT: I guess we only have one
18 copy. I can show you what it looks like to see if
19 you've seen it.

20 MR. BRECHER: I may have it, I just
21 don't know --

22 MS. LUCKHARDT: Yeah, see if you've seen
23 it before. This isn't the whole package, this is
24 just the one set.

25 (Pause.)

1 HEARING OFFICER WILLIAMS: Has that one
2 been marked?

3 MS. LUCKHARDT: That is part of exhibit
4 2.

5 HEARING OFFICER WILLIAMS: Okay.

6 MS. LUCKHARDT: It's the data adequacy
7 filing that became part of the application --

8 HEARING OFFICER WILLIAMS: Okay.

9 MR. BRECHER: If you're going to ask
10 questions on it, we're having trouble locating it,
11 so you may have to -- you may have to stand over
12 here and show him.

13 BY MS. LUCKHARDT:

14 Q Isn't it true that that table goes
15 through a detailed description of compliance for
16 description of local laws and ordinances, and how
17 this project complies with those?

18 A Yes.

19 Q In your review of this project did you
20 look specifically at the different general plans
21 and applicable plans and ordinances?

22 A I just very briefly looked at a few of
23 the policies that in fact were presented to me in
24 some of this photocopied material.

25 Q Okay, and that would include perhaps the

1 staff assessment where you --

2 A Right.

3 Q Okay. So you didn't independently look
4 at the plans, themselves?

5 A I think what is important maybe to state
6 is what my mission was on this project, okay. I
7 was asked to really to look into the potential for
8 visual harm or visual damage as a result of the
9 plant.

10 I wasn't necessarily asked to see if
11 everything was compliant to a law or a regulation.
12 My goal was really to try and determine if there
13 was potential for visual damage.

14 Q So you did not complete a visual
15 analysis of the project, isn't that correct?

16 MR. BRECHER: That's asked and answered;
17 he already said he didn't.

18 BY MS. LUCKHARDT:

19 Q And isn't it true that you have not
20 performed an analysis to show inaccuracies in the
21 simulations prepared by the applicant?

22 A I didn't have any raw data, I couldn't
23 do that.

24 Q Did you ask for the raw data?

25 A Actually I asked the other legal

1 consultant, Mr. Bakker. I said that was
2 advisable.

3 Q Okay, but to your knowledge it never
4 came through --

5 A I think to do a thorough analysis like
6 that would take a significant amount of time.

7 Q And then from my review of your
8 background isn't it true that you -- you have
9 degrees in landscape architecture and you have a
10 masters in --

11 A I have a bachelors in landscape
12 architecture; a masters in landscape architecture;
13 and a doctorate from the School of Renewable
14 Natural Resources from the University of Arizona.

15 Q And the doctorate is in?

16 A Would you like to know the name of my
17 dissertation? Integrated scenic modeling of
18 environmentally induced color agents in a
19 coniferous forest canopy.

20 Q Great. I gather from that that -- and
21 you didn't conduct any kind of economic analysis
22 on this project, did you?

23 A No, no.

24 Q So then --

25 A Is there a relationship between money

1 and visual quality?

2 Q You have indicated that there are
3 economic implications due to this project. And
4 you haven't completed an economic analysis.

5 A Right.

6 Q And I don't see a degree in economics or
7 business or related subjects, is that correct?

8 A Correct.

9 Q So that I would gather you have no
10 detailed analysis or studies to support your
11 conclusion that this project would have an
12 economic impact on Milpitas?

13 A Correct.

14 MS. LUCKHARDT: Thank you, I have
15 nothing further.

16 HEARING OFFICER WILLIAMS: Staff, do you
17 have anything?

18 MR. RATLIFF: I want to ask questions
19 because I want to argue with Mr. -- with Dr. Clay,
20 and I want to ask questions because I want to know
21 what you think about certain things. But I think
22 I won't ask any questions at all.

23 Thank you.

24 HEARING OFFICER WILLIAMS: Okay. So, I
25 think we're prepared to close out visual

1 resources.

2 The exhibits are in, the testimony's in.
3 It's closed. Two, project description and
4 alternatives.

5 So, what?

6 MS. LUCKHARDT: So that moves us to
7 project description and alternatives.

8 HEARING OFFICER WILLIAMS: Yes, our
9 final chapter.

10 MR. BRECHER: Excuse me, Mr. Chairman,
11 has our exhibit been accepted by the Committee?
12 Is it in the record?

13 HEARING OFFICER WILLIAMS: Which?

14 MR. BRECHER: Dr. Clay's testimony.

15 HEARING OFFICER WILLIAMS: Yes, yes, it
16 is.

17 (Pause.)

18 MS. LUCKHARDT: We would propose to
19 present both the project description and the
20 alternatives. That's the way it's kind of boxed
21 in the information presented in appendix A. And I
22 think we'll allow our team to answer as many
23 questions as possible that the Coalition may have
24 in the most efficient manner.

25 HEARING OFFICER WILLIAMS: Okay. Do you

1 need maybe five minutes? Let's take five minutes
2 off the record.

3 (Brief recess until 11:15 p.m.)

4 HEARING OFFICER WILLIAMS: Back on the
5 record.

6 MS. LUCKHARDT: Okay, in the areas of
7 project description and alternatives, the
8 applicant calls Todd Stewart and Jerry Salamy.
9 Both of them have previously been sworn.

10 DIRECT EXAMINATION

11 BY MS. LUCKHARDT:

12 Q Mr. Stewart, do you have a copy of
13 applicant's project description testimony?

14 MR. STEWART: Yes, I do.

15 MS. LUCKHARDT: And was this testimony
16 prepared by you or at your direction?

17 MR. STEWART: Yes, it was.

18 MS. LUCKHARDT: And does this testimony
19 include a description of your qualifications, and
20 was your r, sum, filed with applicant's prehearing
21 conference statement?

22 MR. STEWART: Yes.

23 MS. LUCKHARDT: And do you have any
24 corrections or clarifications you'd like to make
25 to your prefiled testimony?

1 MR. STEWART: No.

2 MS. LUCKHARDT: And are the facts
3 contained in this testimony true to the best of
4 your knowledge?

5 MR. STEWART: Yes.

6 MS. LUCKHARDT: And do the opinions
7 contained therein represent your best professional
8 judgment?

9 MR. STEWART: Yes, they do.

10 MS. LUCKHARDT: And do you adopt this
11 testimony on project description as your testimony
12 in this proceeding?

13 MR. STEWART: Yes, I do.

14 MS. LUCKHARDT: And, Mr. Salamy, do you
15 have a copy of applicant's alternatives testimony?

16 MR. SALAMY: Yes.

17 MS. LUCKHARDT: And was this testimony
18 prepared by you or at your direction?

19 MR. SALAMY: Yes.

20 MS. LUCKHARDT: Does this testimony
21 include a description of your qualifications and
22 were your qualifications filed with applicant's
23 prehearing conference statement?

24 MR. SALAMY: Yes, they were.

25 MS. LUCKHARDT: And do you have any

1 corrections or clarifications to make to your
2 testimony?

3 MR. SALAMY: Yes, I do. I'd like to
4 correct a typographical error in the last sentence
5 of the last paragraph under summary, item A.

6 The sentence should read: Furthermore,
7 no project alternatives would be required -- would
8 require the U.S. Dataport facility to either
9 install backup generators which were expressly
10 prohibited in the City of San Jose's approval of
11 the U.S. Dataport environmental impact report, or
12 the development of. And the word "of" is the
13 correction. It's indicated "on" here.

14 MS. LUCKHARDT: Okay. And with that
15 change are the facts contained in this testimony
16 true to the best of your knowledge?

17 MR. SALAMY: Yes, they are.

18 MS. LUCKHARDT: And do the opinions
19 contained therein represent your best professional
20 judgment?

21 MR. SALAMY: Yes, they do.

22 MS. LUCKHARDT: And do you adopt this
23 testimony on alternatives as your testimony in
24 this proceeding?

25 MR. SALAMY: I do.

1 MS. LUCKHARDT: Mr. Stewart, could you
2 -- there were some questions in the prehearing
3 conference regarding the project schedule. Could
4 you give us a brief description of the project
5 schedule going forward, as you see it?

6 MR. STEWART: Yes, yes. The applicant
7 intends to commence site mobilization and
8 construction of the power plant immediately upon
9 approval from the Commission, and then we expect
10 to fully expedite all construction activities
11 within the bounds of the project's conditions of
12 certification.

13 Construction period is expected to last
14 approximately five to six months. Project
15 operation as early as the end of July, as late as
16 September 2002.

17 MS. LUCKHARDT: And do you have an
18 opinion on the future of the datacenter?

19 MR. STEWART: Yes, I do.

20 MS. LUCKHARDT: And what would --

21 MR. STEWART: I'm very optimistic about
22 the datacenter going forward. Indications are
23 that with the economy recovering that the
24 datacenter will go forward and this power plant
25 was designed to support that datacenter. And it's

1 the best use support in its operating lifetime.

2 MS. LUCKHARDT: And, Mr. Salamy, was
3 this project rated as an alternative?

4 MR. SALAMY: To the U.S. Dataport
5 project, yes.

6 MS. LUCKHARDT: And how does this
7 project improve the original proposal?

8 MR. SALAMY: The original proposal
9 included a smaller power block, a 40 megawatt
10 block, and the inclusion of approximately 89
11 diesel-fired generators.

12 This project uses four combustion
13 turbines in simple cycle mode, which are more
14 environmentally sound than the diesel-fired backup
15 generators.

16 MS. LUCKHARDT: And can you explain why
17 this project needs to proceed ahead of the
18 datacenter?

19 MR. SALAMY: As public comment from Mr.
20 Sedgewick was received today, he indicated that
21 the datacenter would be a selling point -- or the
22 power plant would be a selling point --

23 MR. FREEDMAN: Objection, hearsay.

24 HEARING OFFICER WILLIAMS: Continue.

25 MR. SALAMY: He indicated that it would

1 be a selling point for the leasing of the
2 datacenter, so that the power plant being in place
3 prior to the datacenter being constructed would be
4 advantageous.

5 Additionally, if the datacenter were
6 constructed first there will still be the
7 discrepancy in demand for power supplied in the
8 San Jose area.

9 MS. LUCKHARDT: And in your opinion has
10 the applicant completed a typical alternatives
11 analysis for this project?

12 MR. SALAMY: I believe we have.

13 MS. LUCKHARDT: And in conjunction with
14 the analysis done for Metcalf, has an exhaustive
15 alternatives analysis been completed?

16 MR. SALAMY: I'm sorry, one more time?
17 It's late.

18 MS. LUCKHARDT: Yeah, I understand. I
19 lost myself in the middle.

20 The analysis the you conducted for --
21 the alternatives analysis conducted for this
22 project, in combination with that conducted for
23 Metcalf, would you consider that to be an
24 exhaustive alternatives analysis?

25 MR. SALAMY: Yes, I would.

1 MS. LUCKHARDT: And Dr. Priestly talked
2 about the differences between the alternatives
3 analysis conducted for Metcalf and the project
4 reviewed in this application, do you have anything
5 to add to that?

6 MR. SALAMY: Actually, this project
7 site, the Los Esteros project site and the buffer
8 lands were considered in the Metcalf project as
9 one of the alternatives by the Energy Commission,
10 I should add.

11 The applicant in that case, which also
12 was Calpine, did not consider this project site an
13 alternative project site to Metcalf, but an
14 additional project site to Metcalf.

15 So this site was looked at previously by
16 the applicant as well as the Commission.

17 MS. LUCKHARDT: And then lastly, Mr.
18 Stewart, can you describe your plans for
19 conversion of this project from simple cycle to
20 combined cycle?

21 MR. STEWART: Yes. The conversion from
22 simple cycle to combined cycle will incorporate
23 the installation of two steam turbines coupled to
24 two electric generators, additional cooling towers
25 and installing the tubes within the HRSGs in order

1 to enable the steam and water cycle.

2 MS. LUCKHARDT: Thank you. That's all I
3 have at this time. I would like to move
4 applicant's exhibits, this would be 4J, 4K and 2G.

5 HEARING OFFICER WILLIAMS: What were
6 the --

7 MS. LUCKHARDT: 2G, as in go.

8 HEARING OFFICER WILLIAMS: Okay. I see
9 with respect to 2K, that evidence on cultural
10 resources came in unopposed. So 2K will be
11 admitted, as well.

12 MS. LUCKHARDT: That should also
13 include, since we're talking about cultural
14 resources, 2H, 2I, 2Q and that's it, to complete
15 the cultural stuff.

16 HEARING OFFICER WILLIAMS: Those will be
17 admitted.

18 MS. LUCKHARDT: And then also since
19 we're at the end of applicant's testimony, I would
20 like to move in some of the more general items,
21 such as the data responses that have not yet been
22 moved, and that would be 2D, 2F --

23 HEARING OFFICER WILLIAMS: I think we
24 moved those in already.

25 MS. LUCKHARDT: Did we move those in?

1 HEARING OFFICER WILLIAMS: Yes.

2 MS. LUCKHARDT: 2L.

3 HEARING OFFICER WILLIAMS: 2L, yeah, 2L
4 was definitely moved in.

5 MS. LUCKHARDT: And 20.

6 HEARING OFFICER WILLIAMS: 20, 20 is in.
7 The ones that I don't show as being admitted thus
8 far are 2Q. Did you just move 2Q.

9 MS. LUCKHARDT: Yes.

10 HEARING OFFICER WILLIAMS: 2S, that's
11 the resolution --

12 MS. LUCKHARDT: On the height limit?

13 HEARING OFFICER WILLIAMS: Pertaining to
14 the general plan amendment, yes.

15 MS. LUCKHARDT: That's the height limit?

16 HEARING OFFICER WILLIAMS: Yes.

17 MS. LUCKHARDT: I'd be happy to move 2S.

18 MR. GARBETT: I'd object as to relevancy
19 because that is outside the scope of their
20 application to the City. There is a chain of
21 events within the City, and the general plan
22 amendment was prior to this last City approval,
23 but subsequent to the previous one. Because this
24 particular last approval allegedly by the City is
25 based on using the document from the first land

1 development, and basically it doesn't wash. It
2 was in between, and it is not included, even
3 though it was a modification to the Alviso master
4 plan, itself, it's not covered. And there is a
5 applicability of what time does it go into effect.
6 And that's the first --

7 HEARING OFFICER WILLIAMS: I understand
8 that you have a continuing objection to those, Mr.
9 Garbett. And that's so noted. But these are
10 public documents and we will admit them, subject
11 to your continuing objection.

12 MR. GARBETT: They're not necessarily
13 public because when I go to get ahold of a copy,
14 for instance the general plan amendment, even
15 though there were copies of the preliminary text
16 available, the final text has never been made
17 available by the City. Although technically it
18 should be on file in the City Clerk's office.

19 HEARING OFFICER WILLIAMS: Well, I'm
20 assuming that at some point it will be made
21 available as a public document.

22 2X, data adequacy response.

23 MS. LUCKHARDT: That's one it would be
24 good to move in now; and 2W if it has not been
25 previously moved.

1 HEARING OFFICER WILLIAMS: Okay, those
2 will be received.

3 2DD, the archeological survey, that
4 would come in unopposed --

5 MS. LUCKHARDT: Cultural resources.

6 HEARING OFFICER WILLIAMS: Cultural
7 resources.

8 MS. LUCKHARDT: As well as 2HH.

9 HEARING OFFICER WILLIAMS: Okay. So
10 that puts all your exhibits in.

11 And staff, of course, subject to cross-
12 examination, your staff assessment and the
13 supplement will be admitted.

14 Okay, so with that, I believe you have
15 no questions?

16 MR. RATLIFF: I have no questions.

17 MR. FREEDMAN: I will try to be brief.

18 CROSS-EXAMINATION

19 BY MR. FREEDMAN:

20 Q I think I'd like to start on schedule
21 with Mr. Stewart, to follow on to what you were
22 just saying in your direct testimony. You
23 mentioned immediate site mobilization activities,
24 is that correct?

25 MR. STEWART: Yes, upon approval by the

1 Commission.

2 MR. FREEDMAN: And those would be what
3 Calpine has defined as preconstruction activities
4 designed to expedite the construction process if
5 it's approved by the Commission?

6 MR. STEWART: Actually site mobilization
7 we separated out as installation of trailers,
8 creation of staging areas, parking lots, things
9 like that.

10 MR. FREEDMAN: Which are intended to
11 expedite the construction process, is that
12 correct?

13 MR. STEWART: They would advance our
14 ability to start our construction center, yes.

15 MR. FREEDMAN: And you mentioned five to
16 six months of construction, that's assuming triple
17 shifts, is that correct?

18 MR. STEWART: Actually it's not a triple
19 shift, it's a double shift.

20 MR. FREEDMAN: So the references to
21 triple shifts that we've heard about are
22 misleading, not true?

23 MR. STEWART: I think it's just a
24 different characterization. We're talking about a
25 lot of hours during the day, but we're structuring

1 it in a different way. We'll be talking about two
2 ten-hour shifts in a day.

3 MR. FREEDMAN: So effectively around the
4 clock?

5 MR. STEWART: Effectively.

6 MR. FREEDMAN: Now, in the event that
7 there were construction delays or unanticipated
8 obstacles during the construction process, there's
9 not a lot of give in the schedule, is there?

10 MR. STEWART: No, sir, there's not.

11 MR. FREEDMAN: So it's possible that it
12 could slip further due to unforeseen obstacles
13 that arise in the coming months, isn't that fair
14 to say?

15 MR. STEWART: It's possible.

16 MR. FREEDMAN: Why is Calpine in such a
17 rush to get this plant online?

18 MS. LUCKHARDT: I don't -- okay, go
19 ahead.

20 MR. STEWART: I can answer part of that.
21 What we're looking to do is to try to get this
22 thing online to try to take advantage of some of
23 the summer peak. So, we can get some of the
24 summer peak, it gives us more of an opportunity to
25 get dispatched.

1 MR. FREEDMAN: So, --

2 MR. STEWART: It's not uncommon that
3 Calpine double shifts and expedites construction.
4 It was done for Los Medanos and the Delta plant,
5 as well.

6 MR. FREEDMAN: So having the facility on
7 line by the end of September is about taking
8 advantage of summer peak demand opportunities?

9 MR. STEWART: That's part of it.

10 MR. FREEDMAN: Isn't it true that
11 according to the ISO witness that this facility
12 might require an SPS protection system as part of
13 the temporary interconnection that would reduce
14 its ability to operate during peak periods?

15 MS. LUCKHARDT: That's really a
16 transmission system engineering question. I don't
17 know --

18 MR. FREEDMAN: Well, this is directly
19 relevant to the issue of whether or not this plant
20 can take advantage of the summer peak. I
21 understand this crosses issue areas, but it's not
22 possible to have every single witness up here
23 simultaneously.

24 MS. LUCKHARDT: That's true, but we did
25 have those witnesses here earlier today --

1 MR. FREEDMAN: And we established that
2 there were limitations on the plant's ability to
3 operate during peak periods. And I want to ask it
4 now with relation to the scheduling.

5 MR. RATLIFF: But I do think it's very
6 important to characterize carefully and accurately
7 what the ISO's testimony was. I think I know what
8 it was; maybe you think you know what it was, too.
9 I'll restate what I think I know it was, if that
10 helps. We could -- as I understood her testimony
11 it was that you may need those kinds of procedures
12 if certain reconductoring is not done by the time
13 the plant comes on line.

14 And during the specific peak periods of
15 demand. Those were the two elements that were
16 part of that situation which she did not say
17 positively would occur, but may occur depending on
18 how fast the conductoring goes.

19 MS. LUCKHARDT: We actually may need a,
20 you know, I mean it's too bad none of the
21 transmission witnesses are here at this point, and
22 I don't know if anybody else recalls. My
23 recollection is that those are only required in
24 the N-1 or N-2 situations.

25 So they are not a normal overload. It

1 is an emergency, a line down, a plant down
2 overload only. But that's just my recollection.

3 MR. FREEDMAN: Well, let me ask it in a
4 general sense, then, rather than trying to be too
5 specific.

6 BY MR. FREEDMAN:

7 Q Isn't it fair to say that the terms of
8 interconnection might limit the ability of the
9 plant to operate during certain peak conditions on
10 that part of the transmission system?

11 MR. STEWART: The way I understand it,
12 it may reduce the ability for the plant to output
13 at full load during some of those circumstances.
14 That's what I recall.

15 MR. FREEDMAN: And that condition is
16 likely to be resolved in future years as
17 additional transmission upgrades are put into
18 place, you think?

19 MS. LUCKHARDT: Again, this is really
20 diving into transmission. And if Mr. Stewart is
21 capable of answering them, I'm fine with that.
22 But I mean we're moving into some transmission
23 modeling up a year or two beyond now.

24 MR. STEWART: I'm sorry, that's
25 transmission engineering and that's outside of

1 what I can answer.

2 MR. FREEDMAN: Okay, but so it's your
3 testimony, though, that the goal of bringing the
4 plant online quickly is to meet summer peak demand
5 regardless of any transmission issues that may or
6 may not be out there?

7 MR. STEWART: Yes.

8 MR. FREEDMAN: Now, you are aware that
9 there is currently a challenge pending at the
10 Federal Energy Regulatory Commission to Calpine's
11 contract with the State of California, are you
12 not?

13 MS. LUCKHARDT: I would object to this
14 question as being outside the scope of this
15 proceeding --

16 MR. FREEDMAN: This relates to schedule,
17 only to schedule.

18 HEARING OFFICER WILLIAMS: We're already
19 ruled that we're not going to get into those
20 issues. Whether or not it relates to schedule --

21 MR. FREEDMAN: Well, it's a contingency
22 that I'm trying to explore to understand if a
23 successful challenge is mounted whether the plant
24 will still come online in the time that the
25 applicant is claiming it seeks to develop the

1 plant out.

2 I think this is very relevant to the
3 four-month siting process --

4 HEARING OFFICER WILLIAMS: I don't argue
5 with you that it's relevant. The Committee's
6 already ruled, though, that it's not on the table.
7 We're not going to discuss it.

8 MR. FREEDMAN: Regardless of whether
9 it's a fact or relevant to the statutory
10 guidelines?

11 HEARING OFFICER WILLIAMS: Regardless.

12 MR. FREEDMAN: Okay.

13 HEARING OFFICER WILLIAMS: The
14 Committee's already deemed that that evidence is
15 not germane.

16 MR. FREEDMAN: Okay.

17 BY MR. FREEDMAN:

18 Q Now, Mr. Stewart, you say that you are
19 optimistic about the Dataport center going
20 forward. You heard the comment this morning from
21 the representative of U.S. Dataport, did you not?

22 MR. STEWART: Yes.

23 MR. FREEDMAN: And did he not say that
24 the earliest possible online date for the first
25 phase of that project is effectively early 2004,

1 with an 18-month time between the securing of the
2 first tenant until the facility becomes
3 operational, is that not what he said?

4 MR. STEWART: Not precisely. I believe
5 he said 12 to 18 months.

6 MR. FREEDMAN: When I asked him earlier
7 today whether he agreed that early 2004 was the --

8 MS. LUCKHARDT: We're conferring on
9 recollections of the conversation, so --

10 (Pause.)

11 MR. STEWART: I'm sorry. I stand by
12 what I said.

13 MR. FREEDMAN: So when I asked the
14 representative from Dataport this morning whether
15 early 2004 was sort of a realistic timeline in the
16 event that a tenant signs a contract soon, did he
17 not agree that that was sort of a realistic
18 timeframe?

19 MR. STEWART: I don't recall that. I
20 think he --

21 HEARING OFFICER WILLIAMS: I recall his
22 comment, and his comment was you're right, he did
23 answer yes to your question, but he also did say
24 that 12 to 18 months was also something that, you
25 know, was in the realm of reason.

1 MR. FREEDMAN: Okay.

2 MR. STEWART: I took some reasonably
3 detailed notes during his discussion or his
4 comment, and what he indicated was that they would
5 need seven months for shell construction; they
6 would need six months for engineering, that's both
7 infrastructure and the shell, landscaping, things
8 of that nature. And four months of tenant
9 improvements.

10 Theoretically you would want power to
11 the site for the tenant improvements. So that
12 totals to about 17 months of actual construction
13 for a tenant to actually get in the facility.

14 MR. FREEDMAN: Okay. That's consistent
15 with what I heard, as well.

16 And just one last question on the
17 project description end of this. If the U.S.
18 Dataport facility is not constructed how does
19 Calpine plan to operate the Los Esteros facility
20 in terms of conversion to combined cycle or just
21 its plans for operating this facility in the
22 future in the absence of Dataport?

23 MR. STEWART: Since we don't have the
24 luxury of looking that far into the future, and we
25 are going to go right back into the application

1 process for the combined cycle as soon as we
2 finish the simple cycle application process, I
3 really couldn't answer a hypothetical like that
4 since we're moving on to the combined cycle
5 anyway.

6 MR. FREEDMAN: Okay, let's go to that
7 for one second. When will the conversion to
8 combined cycle occur?

9 MR. STEWART: We estimate right now
10 2003.

11 MR. FREEDMAN: And when does Calpine
12 plan on filing an application for that conversion?

13 MR. STEWART: Shortly after receiving
14 the certification for the simple cycle.

15 MR. FREEDMAN: And would Calpine accept
16 as a condition of its license in this proceeding a
17 time requirement for conversion to combined cycle
18 operation?

19 MS. LUCKHARDT: I think in this instance
20 we need to note that the statute requires
21 conversion within three years. I think there
22 already is a statutory conversion requirement.

23 MR. FREEDMAN: My understanding is that
24 Calpine is currently representing that it plans to
25 convert that facility substantially sooner than

1 the three-year statutory deadline, so I'm
2 wondering whether or not that's a commitment that
3 the company will make as part of its licensing of
4 the first phase of the facility.

5 MR. STEWART: The answer to that is no.

6 MR. FREEDMAN: So somewhat wishful
7 thinking then next summer, perhaps, but certainly
8 within three years of the plant shuts down, is
9 that fair to say?

10 MR. STEWART: That's correct.

11 MR. FREEDMAN: And when the conversion
12 occurs how long does it take in terms of
13 construction on the facility?

14 MR. STEWART: I guess I'm having a hard
15 time answering that since I don't know detailed
16 how long it will take to install the tubes in the
17 HRSG, the steam cycle equipment, steam turbine and
18 the generator.

19 MR. FREEDMAN: A series of months that
20 the facility would be down, is that fair to say?

21 MR. STEWART: No.

22 MR. FREEDMAN: Weeks?

23 MR. STEWART: That would be our best
24 estimate is weeks.

25 MR. FREEDMAN: Okay. I'd like to move

1 on to alternatives.

2 Now, Mr. Salamy, in your testimony you
3 criticize the no-project alternative. And you say
4 it's not considered feasible because it doesn't
5 meet the objectives of Calpine C*Power's business
6 plans for the development of new merchant power
7 generation facilities. Do you see that?

8 MR. SALAMY: Yes, I do.

9 MR. FREEDMAN: So, is it your belief
10 that Calpine's business plan should be used by the
11 Commission as a criteria for assessing
12 alternatives?

13 MR. SALAMY: It is an objective for this
14 project, yes.

15 MR. FREEDMAN: For the Commission in
16 establishing whether alternatives are feasible?

17 MR. SALAMY: I don't know.

18 MR. FREEDMAN: Now, despite the
19 unwillingness to discuss the issue of the
20 contract, I notice that in the second paragraph
21 here you specifically do mention the consequences
22 of the no-project alternative on contract
23 performance with the California Department of
24 Water Resources, do you not?

25 MR. SALAMY: That's correct.

1 MR. FREEDMAN: Despite the fact that
2 we're not allowed to bring it up as intervenors, I
3 notice that Calpine, itself, is using this issue
4 as a justification to argue for or against --

5 MS. LUCKHARDT: We're willing to scratch
6 that testimony.

7 MR. FREEDMAN: Well, I'm not asking for
8 it to be scratched, and there were no --

9 MS. LUCKHARDT: I know you're not --

10 MR. FREEDMAN: -- corrections made.

11 MS. LUCKHARDT: -- but we're willing to
12 scratch it. It was an oversight on our part and
13 it slipped through.

14 MR. FREEDMAN: Well, I'd like to ask a
15 question about it, because it obviously is an
16 argument that Calpine has been making. It appear
17 repeatedly throughout numerous sections of the
18 testimony. The applicant cannot have it both
19 ways.

20 MS. LUCKHARDT: We are willing to
21 scratch it wherever it appears.

22 MR. FREEDMAN: Right, well, I'm not
23 asking for it to be scratched.

24 MS. LUCKHARDT: But we're responding to
25 the direction of the Committee.

1 MR. FREEDMAN: Well, I guess I'd just
2 like to throw the question out there. In your
3 opinion, is Calpine's inability to perform on its
4 obligations detrimental --

5 HEARING OFFICER WILLIAMS: Counsel,
6 we're not going to get into testimony about that.
7 You can have the testimony stricken.

8 MR. FREEDMAN: No, I would prefer that
9 it not be stricken.

10 HEARING OFFICER WILLIAMS: Okay.

11 MR. FREEDMAN: And I would, in fact,
12 oppose it being stricken at this point.

13 So the third reason you give is you say
14 that the no-project alternative would require the
15 U.S. Dataport facility to either install diesel
16 backup generators, or require the development of
17 another energy project. Do you see that?

18 MR. SALAMY: Yes, I do.

19 MR. FREEDMAN: Now, in the parentheses
20 section of that you specifically say that diesel
21 backup generators have been rejected by the City
22 of San Jose, is that correct?

23 MR. SALAMY: That is correct.

24 MR. FREEDMAN: So, how would you --

25 MR. SALAMY: For the Dataport project,

1 yes.

2 MR. FREEDMAN: For the Dataport project.

3 MR. SALAMY: Yeah.

4 MR. FREEDMAN: So how would the Dataport
5 project be able to use diesel backup generators if
6 the City of San Jose has already rejected that
7 application?

8 MR. SALAMY: They would have to provide
9 power some way. I threw out diesel as one
10 option --

11 MR. FREEDMAN: But that's your --

12 MR. SALAMY: You're absolutely correct.
13 It is inconsistent.

14 MR. FREEDMAN: So it's not fair to say
15 that in the absence of Los Esteros that the
16 facility will revert to the original plan that had
17 been rejected?

18 MR. SALAMY: It cannot revert to the
19 original plan. It would have to develop a new
20 independent power source.

21 MR. FREEDMAN: Okay. On the next page
22 of your testimony page, I have it as 15, but again
23 I think my numbering is wrong, you talk about
24 alternatives.

25 MR. SALAMY: Sites or locations.

1 MR. FREEDMAN: Alternative generating
2 technology, I'm sorry --

3 MR. SALAMY: Yes, sir.

4 MR. FREEDMAN: Now, the third criteria
5 that you mention here as being important for
6 understanding whether an alternative generating
7 technology is acceptable is cost effectiveness.

8 MR. SALAMY: That's correct.

9 MR. FREEDMAN: You state that the
10 technology had to be cost competitive, not only
11 with existing generating units, but with units
12 that will probably enter the newly deregulated
13 market near the time the Los Esteros facility
14 begins commercial operation. And cost included
15 both capital and operation and maintenance costs,
16 so that was the criteria that you used in
17 comparing cost effectiveness?

18 MR. SALAMY: Yes.

19 MR. FREEDMAN: So what figures did you
20 use for the cost effectiveness of the Los Esteros
21 facility?

22 MR. SALAMY: The figures we used were
23 the actual installation costs on a dollars per
24 kilowatt hour -- or kilowatt basis.

25 MR. FREEDMAN: And are those provided

1 anywhere in materials that you've submitted?

2 MR. SALAMY: No, they were not.

3 MR. FREEDMAN: And why not?

4 MR. SALAMY: It's something that we
5 typically don't include in an AFC because the
6 Commission hasn't required it in the past.

7 MR. FREEDMAN: But do you happen to
8 know, for example, any of these numbers, or have
9 them with you today?

10 MR. SALAMY: No, I do not, I'm sorry.

11 MR. FREEDMAN: So it's difficult for
12 others to evaluate whether or not this comparison
13 was conducted in a manner that others would find
14 as --

15 MS. LUCKHARDT: I object in this
16 instance because the Coalition has been a member
17 of this proceeding from the beginning and if it
18 had questions on that specific issue it could have
19 asked them.

20 MR. FREEDMAN: I'm just asking now. If
21 you don't have the data with you, I understand.
22 I'm trying to find the basis for the statement
23 that the technology is cost effective by
24 comparison to alternatives.

25 MR. SALAMY: That wasn't the only

1 criteria that was used to evaluate.

2 MR. FREEDMAN: I understand. It was one
3 of three criteria, is that correct?

4 MR. SALAMY: That's correct. One of the
5 other criteria was to get the energy center up and
6 running as quickly as possible to facilitate the
7 initiation of construction for the Dataport
8 project.

9 Most of the other technologies reviewed
10 had a longer lead time, both for licensing, as
11 well as construction.

12 MR. FREEDMAN: And that's the four- to
13 five-month construction period that you're
14 referencing?

15 MR. SALAMY: That's correct.

16 MR. FREEDMAN: But again we've discussed
17 that Dataport is let's say extraordinarily
18 unlikely that Dataport will be ready to operate --

19 MS. LUCKHARDT: I object --

20 MR. FREEDMAN: -- prior to the end of
21 this year --

22 MS. LUCKHARDT: I object --

23 MR. FREEDMAN: -- this year.

24 MS. LUCKHARDT: -- to counsel -- oh,
25 this year.

1 MR. FREEDMAN: This year.

2 MR. SALAMY: Well, bear in mind the AFC
3 wasn't written this year; it was written in the
4 middle of last year. And at that point when the
5 AFC was written, the likelihood of Dataport going
6 forward in a more rapid fashion was certainly
7 present.

8 MR. FREEDMAN: And that no longer
9 appears to be the case with respect to operation
10 this year, does it?

11 MR. SALAMY: I believe that the Dataport
12 representative provided comment on that issue.

13 MR. FREEDMAN: So looking at
14 alternatives that could come online only in the
15 next four to five months, might be inconsistent
16 with the projections for Dataport's expected
17 operation. Wouldn't it simply limit the range of
18 technologies that could be considered?

19 MR. SALAMY: I'm sorry, it's late, can
20 you repeat the question again?

21 MR. FREEDMAN: That's why I had to ask
22 it two different ways, even, not understanding it,
23 myself.

24 (Laughter.)

25 MR. SALAMY: Good, I don't feel bad.

1 MR. FREEDMAN: Would some of the
2 technologies that you ruled out in your analysis
3 of alternatives potentially be feasible given a
4 longer timeline that did not involve a four- to
5 five-month period for bringing them online?

6 MR. SALAMY: Not with -- no, actually.
7 The only other technology that really met the
8 criteria was a combined cycle plant. It was going
9 to be pretty difficult to license a combined cycle
10 plant in four months or even six months.

11 Additionally, there's a two-year lag on
12 construction from the time you initiate till you
13 start up. So that would push whatever Dataport
14 development that was going to occur out an
15 additional period.

16 MR. FREEDMAN: In your direct testimony
17 that you gave right at the outset here, you said
18 that having Los Esteros in operation in advance of
19 Dataport is, in effect, a selling point for the
20 datacenter, is that correct?

21 MR. SALAMY: I believe I was reiterating
22 testimony from Mr. Stewart from earlier in the
23 day -- Mr. Sedgewick, excuse me.

24 MR. FREEDMAN: Well, do you agree with
25 that statement?

1 MR. SALAMY: From my experience with
2 these server farms, yes, that does make sense.

3 MR. FREEDMAN: And how much in advance
4 of Dataport's operation would Los Esteros need to
5 be operating to be a valid selling point?

6 MR. SALAMY: I'm not competent to give
7 you a guesstimate on that.

8 MR. FREEDMAN: So you don't know whether
9 it being available and operating three months
10 before Dataport goes online would be a sufficient
11 selling point, do you?

12 MR. SALAMY: I would think without a
13 structure in the ground generating megawatts you
14 have very little selling point. Unless you have
15 an operating facility there is no selling point
16 from the Dataport's standpoint.

17 MR. FREEDMAN: Why do you say that?

18 MR. SALAMY: The power demands and the
19 reliability demands of the server farms is very
20 critical to the operation of them. Momentary
21 blips in power to these facilities and voltage
22 drops results in every single piece of electronic
23 equipment turning off. Which means the clients
24 have to then reboot them.

25 MR. FREEDMAN: But all I'm asking you

1 about is the amount of time in advance of
2 Dataport's operation that Los Esteros would need
3 to be operating, not whether or not failing to
4 have Los Esteros in operation would have any
5 adverse impacts on the facility.

6 MR. SALAMY: Two days.

7 MR. FREEDMAN: Okay, fair enough.

8 In the interests of time I will end my
9 questioning there.

10 HEARING OFFICER WILLIAMS: Okay, do you
11 have any?

12 MS. LUCKHARDT: I have no redirect.

13 HEARING OFFICER WILLIAMS: Okay. Staff?

14 MR. RATLIFF: No.

15 HEARING OFFICER WILLIAMS: Mr. Garbett.

16 MR. GARBETT: Yes.

17 CROSS-EXAMINATION

18 BY MR. GARBETT:

19 Q On the project before the City -- the
20 project came before the City and the City was a
21 party to the land action, themselves. Is this the
22 reason why the City now has a particular agreement
23 not to generate any more power at its treatments
24 plant, and has held off any installation of any
25 power generating facilities for one year? Is this

1 a collusion between the parties?

2 MR. SALAMY: I have no idea what you're
3 talking about, Bill.

4 MR. GARBETT: Okay. This here is a
5 memorandum passed this last week where the City
6 has basically stated that they would generate no
7 power, and would suspend any operations for any
8 plants of generation of the treatment plants for
9 one year.

10 With this you say there that you're
11 intending your licensing for peaking up to
12 baseline loads on the power plant, is that
13 correct? Licensing will allow baseline
14 operations.

15 MR. SALAMY: Yes.

16 MR. GARBETT: Okay. With that you say
17 that you also have an intent to provide power for
18 U.S. Dataport, is that correct?

19 MR. SALAMY: When it's constructed, yes.

20 MR. GARBETT: When it's constructed.
21 Would this power be directly fed to Dataport, or
22 would it be through the Los Esteros substation?

23 MR. SALAMY: I believe that it goes
24 directly from our switchyard into the Dataport.

25 MR. GARBETT: The testimony of the ISO

1 representative basically represented that for the
2 next five years all power would be fed to the grid
3 in their analysis.

4 How does this affect supplying any power
5 for Dataport if it's all going to the grid?

6 MR. STEWART: You got me, Bill. That
7 particular testimony that you're referencing I
8 don't believe is correct.

9 MR. GARBETT: Okay, but that was
10 submitted by the ISO representative. If the Los
11 Esteros project is needed to supply power in the
12 area, it is on hold right now because the
13 particular power line has risen too expensive to
14 install so the PUC has a project temporary --

15 HEARING OFFICER WILLIAMS: Mr. Garbett,
16 you're testifying again.

17 MR. GARBETT: Yes.

18 HEARING OFFICER WILLIAMS: You need to
19 ask a question.

20 MR. GARBETT: The question is, is
21 Calpine willing to subsidize this unbuilt power
22 line in order to get the Los Esteros substation
23 operational?

24 MS. LUCKHARDT: I think that assumes
25 facts not in evidence, but --

1 MR. GARBETT: I know it's not in
2 evidence, but this here's a hypothetical
3 situation.

4 MR. STEWART: I think I would fall back
5 on the testimony of Mr. Solhtalab and Mr. Amirali
6 earlier today where they talked about the
7 discussions that happened between PG&E and the
8 applicant as far as what costs are attributed to
9 whom.

10 MR. GARBETT: Along with those
11 particular discussions there's also been a PG&E
12 memo basically stating that the particular direct
13 connect of the Los Esteros generator to the grid
14 may be impacted because of general order 138A of
15 the Public Utilities Commission that may even
16 require a separate EIR.

17 If this delay is introduced in your
18 project what options do you have?

19 MS. LUCKHARDT: I think as Mr. Ratliff
20 kindly pointed out earlier, the environmental
21 review for this project, including transmission
22 lines to the first point of interconnection are
23 all covered by this application.

24 And so the idea of a subsequent EIR
25 would be for a project or a system that would be

1 beyond that point, that wouldn't necessarily be
2 required by this project.

3 MR. GARBETT: Isn't it true that an
4 override consideration would have to be considered
5 by the CEC in order for the CEC to have
6 jurisdiction over the PUC on this issue of a
7 required EIR under general order 138A?

8 MS. LUCKHARDT: For Energy Commission
9 projects they are licensed by the Energy
10 Commission and reviewed by the Energy Commission
11 up to the first point of interconnection. So that
12 would either, in this case it is the temporary
13 line. And once PG&E builds a substation it is the
14 connection from the Los Esteros switchyard to the
15 PG&E Los Esteros substation.

16 MR. GARBETT: With the current
17 situation, given the fact that Los Esteros is an
18 assumption and not a reality, and that Dataport is
19 an assumption, not a reality, is it most likely
20 that this temporary connection may be the
21 permanent connection as is found in the ISO report
22 having baseline for into five years?

23 MR. STEWART: That is highly unlikely,
24 Bill, as PG&E has began condemnation proceedings
25 on the north part of our property for purposes of

1 installing their substation there.

2 So we sort of expect the Los Esteros
3 substation to show up before too long.

4 MR. GARBETT: When you're doing your
5 conversion of this power plant to combined cycle,
6 what is going to be the total amount of your off-
7 time, no power generation, or is it going to be
8 staggered between the various turbine units?

9 MR. STEWART: It would be staggered
10 between the various turbine units.

11 MR. GARBETT: Obviously at least sag
12 down to about 50 percent output for a period of
13 time. How long is the maximum that you anticipate
14 this would occur for?

15 MR. STEWART: At this point I couldn't
16 give you a specific timeframe, Bill. Sorry.

17 MR. GARBETT: Would this go into months,
18 but perhaps not years?

19 MR. STEWART: No, it would be more on
20 the order of magnitude of weeks.

21 MR. GARBETT: Okay. Is the weeks
22 possibly to exceed four?

23 MR. STEWART: I think I've already
24 answered your question, thank you.

25 MR. GARBETT: In the very beginning we

1 asked about alternative fuel sources. And one of
2 the fuel sources discussed was methane and you
3 stated it was not available.

4 Most recently the City of San Jose has
5 taken a contract with the Newby Island landfill
6 for below-market rates of methane for power. Is
7 there any reason why this here was not admitted to
8 being available by Calpine C*Star Power earlier in
9 the proceedings, the availability of this methane
10 for their power plant, where you could use
11 landfill gas to power the Los Esteros project?

12 MR. SALAMY: I'm unaware of any
13 installations of gas turbines firing landfill gas.
14 Typically landfill gas is a very low quality Btu
15 gas, and unfortunately it tends to entrain muds
16 and silt that would severely impact the air
17 quality control equipment on the project.

18 Other projects that have tried to use
19 digester and other types of naturally occurring
20 gases like that have run into very serious
21 problems with fouling of the SCR and oxidation
22 catalyst systems.

23 So, it wasn't considered a viable
24 alternative fuel source for this project.

25 MR. GARBETT: The City of San Jose

1 normally uses digester gas presently in their
2 Cooper engines and this methane will also be used
3 for these. And they are anticipating other power
4 projects at their treatment plant.

5 With this, we also have the Zanker Road
6 landfill, which is even closer than the Newby
7 Island landfill, and the methane flaring which is
8 basically being mined --

9 MS. LUCKHARDT: Do we have a question?

10 MR. GARBETT: -- is mined by the same
11 company that is selling the power to the City of
12 San Jose. Is there any reason why this could not
13 be explored by Calpine C*Star Power?

14 HEARING OFFICER WILLIAMS: I think he's
15 already answered that --

16 MS. LUCKHARDT: Yeah, I think that's
17 been asked and answered.

18 HEARING OFFICER WILLIAMS: That's been
19 answered.

20 MR. STEWART: Landfill gas in a turbine
21 with controls is not a good idea.

22 MR. GARBETT: Is there any reason why it
23 cannot be blended?

24 MR. STEWART: Landfill gas in a turbine
25 blended with natural gas on a turbine that has SCR

1 and oxidation catalysts is not a good idea. It
2 has not been achieved in practice in the past, and
3 has caused significant damage to the oxidation
4 catalyst on previous projects.

5 MR. GARBETT: Are you aware of the other
6 projects using landfill gas the CEC has already
7 licensed?

8 MR. STEWART: Yeah, they're typically on
9 lean-burn engines, IC engines. They're not
10 usually on gas turbines with oxidation catalysts
11 controls.

12 MR. GARBETT: Looking once again back a
13 little bit in time to the Public Utilities
14 Commission EIR that was done on the Los Esteros
15 substation, in the draft report it basically
16 stated that there would be no need for additional
17 power substation if there was an interconnect made
18 between the two 500,000 volt grids through a
19 buried cable through Milpitas.

20 Is that still a viable option that would
21 be a no-project alternative where Los Esteros
22 would not be needed?

23 MS. LUCKHARDT: I think that that's --

24 MR. GARBETT: These are facts in
25 evidence.

1 MS. LUCKHARDT: I think that's more
2 appropriately a question for transmission. If you
3 have any knowledge you can answer it.

4 MR. STEWART: It was already addressed
5 by the transmission system engineers earlier
6 today.

7 HEARING OFFICER WILLIAMS: Do you recall
8 what they said?

9 MR. STEWART: Well, what I recall that
10 they said is that there are two components.
11 There's the transmission component and the voltage
12 support component. And that the location of Los
13 Esteros in the San Jose pocket, I think that was
14 the term that they used, provided -- it was an
15 advantageous location for generation as it
16 provided the voltage support that you cannot get
17 from pure transmission.

18 And I'm paraphrasing --

19 HEARING OFFICER WILLIAMS: Yeah, I
20 recall that.

21 MR. GARBETT: In a Public Utilities
22 Commission document in the draft EIR it basically
23 said that this interconnection would go and
24 provide both feed forward and feed back power to
25 basically go and coincide with the different

1 demands on the two different grids associated with
2 these lines.

3 Isn't this effectively reactive power in
4 disguise?

5 MS. LUCKHARDT: I think we're referring
6 now to the analysis of the PG&E Los Esteros
7 substation, which I don't think anyone here has
8 specific enough knowledge of to testify.

9 MR. GARBETT: In the project description
10 you basically stated that one of the uses for this
11 was as mitigation for the Dataport project diesel
12 generators.

13 In the most recent City documents that
14 were presumed passed by the Council, Planning
15 Commission and Planning Director, they basically
16 make use of a cheering going back to the original
17 Dataport EIR as a reference for them, and it is
18 allegedly a mitigated EIR basically using this
19 particular document, the staff assessment, and
20 they do not mention the staff assessment that has
21 a supplement to it. And therefore, it is an
22 incomplete EIR.

23 Since the City does not have a valid EIR
24 for the documentation they've passed, how can the
25 Energy Commission proceed forth using the --

1 HEARING OFFICER WILLIAMS: Mr. Garbett,
2 I don't know why they wouldn't have it. I mean,
3 they met on the 19th of February and the
4 supplement to the --

5 MR. RATLIFF: In fact they specifically
6 waited to have that document before they acted.

7 HEARING OFFICER WILLIAMS: They waited
8 to have the document.

9 MR. GARBETT: But in fact the City did
10 not have it in a timely manner to comply with the
11 Brown Act, their own documents --

12 HEARING OFFICER WILLIAMS: Well, again,
13 that's a question that you'd have to take up, I
14 think, with the City independently.

15 MR. GARBETT: I've taken it up at the
16 council meetings, in which case the project
17 manager and your counsel was present at, and I put
18 it on the record both in writing and in testimony.

19 HEARING OFFICER WILLIAMS: As far as
20 we're concerned, though, the counsel certainly had
21 both documents available, and they were completely
22 published by the council meeting on the 29th.

23 So, I mean, I think we have to rest on
24 that.

25 MR. GARBETT: Isn't it true that a

1 particular decision by the Commission would amount
2 to basically a CEQA equivalent process amounting
3 to an EIR?

4 MS. LUCKHARDT: Jerry, can you answer
5 that?

6 MR. GARBETT: This is a question to the
7 applicant.

8 MR. SALAMY: I'm not even sure I
9 understand the question. Can you repeat the
10 question, please?

11 MR. GARBETT: A Commission decision
12 granting a license would be an equivalent CEQA
13 process, the equivalent of an EIR, is that
14 correct?

15 MR. SALAMY: That is my understanding,
16 that the Presiding Member's Decision is the
17 equivalent of an EIR. That and the staff
18 assessment.

19 MR. GARBETT: Okay. And part of that
20 staff assessment is the staff assessment
21 supplement, is that correct?

22 MR. SALAMY: I would assume so.

23 MR. GARBETT: In the basic ordinance of
24 the City of San Jose that was allegedly passed,
25 they make only reference to the staff assessment

1 and not the staff assessment supplement simply
2 because they had not received it timely.

3 For that reason the City's process is
4 not complete according to CEQA, and therefore the
5 LORS are inapplicable even in spite of the
6 Commission may give the decision favorable --

7 HEARING OFFICER WILLIAMS: You're
8 testifying again, Mr. Garbett. I don't think you
9 can represent --

10 MR. GARBETT: Do you anticipate
11 litigation slowing your project even further?

12 MS. LUCKHARDT: I think that's beyond
13 the scope of this proceeding.

14 MR. GARBETT: Thank you.

15 HEARING OFFICER WILLIAMS: Thank you.

16 Staff.

17 MR. RATLIFF: We have a witness.

18 HEARING OFFICER WILLIAMS: He's been
19 sworn?

20 MR. RATLIFF: He's been sworn -- has he?

21 MR. WORL: I've not been sworn.

22 MR. RATLIFF: He's not been sworn.

23 (Laughter.)

24 MR. WORL: I've been sworn at, but not
25 in.

1 (Laughter.)

2 HEARING OFFICER WILLIAMS: It's been a
3 long day.

4 Whereupon,

5 ROBERT WORL

6 was called as a witness herein, and after first
7 having been duly sworn, was examined and testified
8 as follows:

9 DIRECT EXAMINATION

10 BY MR. RATLIFF:

11 Q Mr. Worl, did you prepare the staff
12 testimony for the two areas, project description
13 and alternatives that are part of exhibits 1 and
14 1A of this Los Esteros testimony?

15 A Yes, I did.

16 Q Is it true and correct to the best of
17 your knowledge and belief?

18 A To the best of my knowledge and belief,
19 yes.

20 MR. RATLIFF: The witness is available
21 for cross-examination.

22 MR. FREEDMAN: Thank you. I have
23 questions on the alternative section. Is this the
24 fair time to ask that? Are you sponsoring both
25 pieces of testimony now?

1 MR. RATLIFF: Yes, both.

2 MR. WORL: I'm sponsoring both.

3 MR. FREEDMAN: And both of you are
4 witnesses for the alternative --

5 MR. RATLIFF: No, no, I'm not a witness.

6 MR. WORL: No, that was a clerical error
7 in the initial staff assessment that included Mr.
8 Ratliff as an author.

9 MR. FREEDMAN: Oh, fair enough.

10 MR. WORL: It was corrected in the
11 supplement.

12 CROSS-EXAMINATION

13 BY MR. FREEDMAN:

14 Q Okay, I'd like to go through your
15 alternative section, Mr. Worl. In the
16 introduction on the first page you mention that
17 the purpose of the staff's alternatives analysis
18 involves evaluating whether there are alternatives
19 capable of reducing or avoiding potential
20 significant impacts, is that a fair summary of --
21 I'm paraphrasing from that first section.

22 A Yes.

23 Q Now, in the consideration of
24 alternatives is financial benefit to the applicant
25 a relevant criteria in considering various

1 alternatives?

2 A No.

3 Q So whether or not an applicant would
4 make excessive profits or modest profits, that's
5 not relevant?

6 A No.

7 Q I'd like to ask you to turn to the next
8 page marked 5.6-2. Down at the bottom you list a
9 series of project objectives for this facility, do
10 you see those?

11 A Yes, I do.

12 Q Five different ones. So one of the
13 project objectives involves providing a reliable
14 source of energy to U.S. Dataport, that's correct?

15 A That's correct.

16 Q And you've listened to all the comments
17 and testimony today about Dataport and whether it
18 will or will not come on line by various different
19 dates, have you heard all this?

20 A Yes.

21 Q It's fair to say that this project
22 objective cannot be satisfied in this year, isn't
23 it? In the year 2002?

24 A I think that that's fair based on Mr.
25 Sedgewick's statement of availability of Dataport,

1 yes.

2 Q Okay. The next point down, I guess this
3 would be the fourth bullet, you talk about adding
4 support and reliability to the North San Jose
5 Transmission Reinforcement Project.

6 A Correct.

7 Q Will this project be operational in
8 2002?

9 A Which project?

10 Q The North San Jose Transmission
11 Reinforcement Project. Will that be --

12 A Essentially that's the Los Esteros
13 substation and associated lines.

14 Q And what's the expected completion date
15 for that? Am I correct in assuming sometime next
16 year?

17 A I wouldn't want to testify for PG&E in
18 terms of when their online date is going to be for
19 sure. However, the statements I have heard was
20 2003 availability.

21 Q So bringing Los Esteros on this year
22 doesn't support that objective in 2002, does it?
23 Wouldn't provide reliability to a facility that
24 doesn't exist?

25 A Being online in 2002 doesn't support all

1 of that objective, no.

2 Q Okay. Another -- the last point you
3 have is a project objective, having the facility
4 online for the summer of 2002. Why is this a
5 project objective?

6 A This project was originally considered;
7 it was originally proposed last year in the midst
8 of the energy crisis. And was consistent with the
9 then-extant Governor's existing executive orders.
10 And the characterization by most experts that, in
11 fact, reliable energy or generation was, in fact,
12 needed.

13 Q Now is the criteria for having the
14 facility online by the summer of 2002, does that
15 limit the consideration of alternatives?

16 A I would say no it doesn't necessarily
17 limit them; but it's a factor in considering an
18 alternative, yes.

19 Q Surely there is some alternatives --

20 A Not necessarily a limitation.

21 Q Surely there are some alternatives that
22 don't satisfy that project objective?

23 A Yes.

24 Q Fair enough? And I'd like to ask you to
25 take a look at your supplemental testimony that

1 was dated February 6th. On 5.6-1 and carrying
2 over into 2, --

3 A 5.6-1?

4 Q Yeah, at the very bottom it's titled
5 MIL-40, do you see that?

6 A Yes.

7 Q Okay. And the question is why -- what's
8 the purpose of having the project online by the
9 summer of 2002. Do you see that?

10 A Yes.

11 Q Could you please read the response?

12 A The applicant's stated online objective
13 serves the purpose of meeting a contractual
14 obligation to provide electricity for an existing
15 DWR or Department of Water Resources contract.

16 Q So is this the rationale for having the
17 summer of 2002 operation listed as a project
18 objective?

19 A It's a legitimate answer to the question
20 that was asked, yes.

21 Q Now, the next response, MIL-41, you
22 referenced the Edenvale redevelopment area.

23 A Correct.

24 Q And that being a possible alternative
25 site.

1 A That was one of the alternatives that
2 was looked at, yes.

3 Q And you state it was rejected because it
4 couldn't meet the objective of having the project
5 online by the summer of 2002, is that correct?

6 A That's correct.

7 Q So that would be one of the alternatives
8 that I had referenced that could not be considered
9 because of the summer of 2002 online date, is that
10 fair to say?

11 A That's fair.

12 Q So if summer 2002 is no longer a project
13 objective, then does this site represent a viable
14 alternative?

15 A This site was looked at because it was a
16 potential viable alternative. I think that that
17 answers your question.

18 As far as 2002, that was one basis for
19 rejecting it. But there were others that also
20 came up in looking at the new Edenvale
21 development.

22 Q Okay. In the next response, just going
23 down, MIL-42, you mention in your response to that
24 item, you mention that the conditions of approval
25 in the U.S. Dataport EIR contain a caveat for

1 allowing diesel generation at the facility. Do
2 you see that?

3 A Yes.

4 Q Is it your understanding that the City
5 of San Jose will approve Dataport with diesel
6 generation operating onsite?

7 A When I wrote this my understanding was
8 based on conversations and a look at a copy of
9 702-59, that the statement by the City was that
10 should the applicant fail to secure Energy
11 Commission licensure of the required or requested
12 modern plant, that they would, in fact, reconsider
13 permitting of Dataport and allowing the diesel
14 generation backup as backup generation.

15 Q So it's your understanding that that's
16 still on the table?

17 A As far as I know, yes.

18 Q Now did you just hear what the witnesses
19 for Calpine were saying when they were asked that
20 same question?

21 A I think what they responded to was a
22 question was the reliable energy center, which is
23 the diesel project, a viable alternative to LECEF.
24 The answer to that is really no.

25 Q But yet you're saying that diesel

1 remains an alternative?

2 A As backup. The backup generation, under
3 this scenario they would have to be drawing power
4 from the grid, and the generation -- the diesel
5 generation would only be used should the grid go
6 down, or cut the Dataport facility off.

7 Q In emergencies --

8 A In emergency generation system.

9 Q Not as a regular supplement --

10 A Not as a source of power, no.

11 Q I'd like to ask you to turn to 5.6-8 and
12 -9 from your December 31st filing. In the, I
13 guess it would be the third paragraph, you
14 mention, you say in light of the above, do you see
15 that sentence there?

16 A On 5.6-8, yes.

17 Q You say in light of the above the
18 critical Los Esteros project objective is to
19 provide the electrical backup reliability for the
20 U.S. Dataport project. The critical project
21 objective, that's what you're saying?

22 Let me ask the specific question. If
23 Dataport is not constructed, isn't it fair to say
24 that Los Esteros will not fulfill its critical
25 project objective?

1 A I would say a critical, but --

2 Q You did say the critical?

3 A -- yeah, I would say that that would be
4 a fair characterization of the way that that's
5 written.

6 Q And at the bottom of that paragraph you
7 say there were no generation alternatives that
8 could meet the fundamental project objective.
9 There you refer to it as the fundamental project
10 objective of serving U.S. Dataport, do you see
11 that?

12 A Correct.

13 Q Now, would your review of alternatives
14 have been different if serving U.S. Dataport was
15 not the fundamental project objective?

16 A No, not necessarily because the
17 aforementioned alternatives would not have
18 supplied the required power or the similar amount
19 of power under any of the objectives.

20 Q What do you mean by that, supplied a
21 similar amount of power?

22 A There's no way that any single or
23 combination of those would have fueled a power
24 plant at this location.

25 Q Is the objective to fuel a power plant

1 or is it to serve electrical needs?

2 A I think that they're similar in this
3 instance.

4 Q Well, this leads me to the next page
5 where you mention your review of conservation and
6 demand side management. Isn't it fair to say that
7 a kilowatt not used is the same as a kilowatt
8 produced and used?

9 A I think that's fair.

10 Q Okay. Now, can't demand side management
11 and load shedding programs like the ones that the
12 Energy Commission is very actively involved in
13 promoting, can't they be used to reduce peak
14 demands on the system?

15 A Certainly.

16 Q To provide reduced load in times of peak
17 system operation to protect reliability?

18 A I wouldn't say that I could testify to
19 those specifics. That, again, is a transmission
20 system aspect.

21 Q Well, I guess I'm referencing the Energy
22 Commission's own programs. For example, under AB-
23 970 that Commissioner Rosenfeld has been very
24 active in promoting, saving large amounts of peak
25 electrical demand through various technologies.

1 Are you familiar with any of these?

2 A Yes, you asked the question specific to
3 reliability, and I'm not qualified to answer that
4 particular one.

5 Q Um-hum. But you are familiar with the
6 Energy Commission's active promotion of these
7 types of programs. Did you look at any of these
8 specific programs as an alternative?

9 A These were considered and based on
10 analysis by the Energy Commission Staff were not
11 viewed as adequate to provide power for all of the
12 area's purposes for which the Los Esteros project
13 was proposed.

14 Q Have you seen the testimony that the
15 Coalition has presented in written format? Did
16 you have a chance to look at that?

17 A I've looked at it, yes.

18 Q And are you familiar with it's called
19 attachment 4, it's an Energy Commission news
20 release dated March 1st entitled, Research Funds
21 Okay for Energy Efficient --

22 A I glanced at it, I did not read it, no.

23 Q Would you accept, subject to check, that
24 the -- press releases announcing programs that
25 could reduce server load by up to 30 percent using

1 various demand side technologies?

2 A Again, as I said, I looked at it, but
3 I'm not an expert in the area. I wouldn't
4 characterize my understanding of it as being
5 adequate to the scope of your question.

6 Q So when you looked at alternatives, did
7 you consider programs that the Energy Commission
8 is running to try and reduce demand at server
9 farms in California?

10 A I believe that that came out after we
11 looked at this, and no, I did not.

12 Q I'll just ask one more line of questions
13 here. Are you familiar with the Coalition's
14 testimony calling for the U.S. Dataport
15 alternative as an alternative that should be
16 considered by the Commission?

17 A If you're referring to the one that
18 links the two projects and says that Los Esteros
19 should be conditioned upon the development of
20 Dataport, I'm familiar with that.

21 Q And was that considered as an
22 alternative?

23 A No, it was not.

24 Q Why not?

25 A We're looking at a power plant plan, an

1 application for a power plant. We were not
2 looking for potential combinations thereof, I
3 guess you would say.

4 Basically this project was, in fact
5 proposed as part of a project that did, in fact,
6 include Dataport. But there were other factors in
7 the proposition of this plant that did not
8 necessarily require that Dataport be built first,
9 or that the project be conditioned solely upon the
10 development of Dataport.

11 Q Didn't you say that it was the
12 fundamental objective of Los Esteros to serve
13 Dataport?

14 A It was one -- that was one, I think,
15 that you're picking at the definition of a word,
16 but, yes, that word is in fact in the testimony.

17 Q Don't you say in the same paragraph both
18 it's the critical project objective and
19 fundamental project objective?

20 MR. RATLIFF: That's been asked and
21 answered.

22 MR. FREEDMAN: Right, just clarifying
23 so --

24 MR. WORL: Yes.

25 MR. FREEDMAN: -- this is not a mincing

1 of words by --

2 MR. WORL: No.

3 MR. FREEDMAN: -- by me.

4 BY MR. FREEDMAN:

5 Q This is just your testimony?

6 A No, no, this is the testimony as it's
7 written, correct.

8 Q And clearly the Commission believes that
9 there are benefits, efficiency benefits and other
10 benefits associated with co-locating a power plant
11 on the same site as a server farm, correct?

12 A I think that the benefits are fairly
13 obvious if both are, in fact, developed, correct.

14 Q But the alternative that the Coalition
15 proposes was not analyzed?

16 A No.

17 MR. FREEDMAN: Okay, thank you, no
18 further questions.

19 MR. WORL: Thank you.

20 MR. GARBETT: I have a couple questions.

21 HEARING OFFICER WILLIAMS: Go ahead, Mr.
22 Garbett.

23 MR. RATLIFF: Go ahead, I didn't
24 realize. I forgot, Mr. Garbett. Go ahead.

25 //

CROSS-EXAMINATION

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BY MR. GARBETT:

Q This is a hypothetical question. If for instance the Los Esteros plant is basically virtually at the point of completion by Calpine C*Power and it became a fundamental problem with the transmission line, with the PUC, PG&E and general order 138 and perhaps the necessity for another EIR, and the applicant asked to go and have a 50 kV line that would be exempt from the PUC order, and also meet the San Jose City Code as being -- requiring no further permits, would you encourage that in order to complete this --

HEARING OFFICER WILLIAMS: Mr. Garbett, I don't think that's something that we're going to get into at this late hour. I'm going to ask you to ask another question.

BY MR. GARBETT:

Q This question says there appear to be two planned developments, the first the Dataport and the generators, which is a valid PD that was passed back in April sometime, and you have a new PD which is for the Los Esteros Power Plant -- nature.

If the second one basically fails

1 because it was not done properly by the City, you
2 anticipate the first planned development with
3 direct to the grid will be used without this power
4 plant?

5 HEARING OFFICER WILLIAMS: Mr. Garbett,
6 excuse me, I hate to cut you off again. But,
7 again, this is something that we've discussed at
8 length, and it's really outside the scope of his
9 testimony. So I'm going to have to ask you to ask
10 another question.

11 MR. GARBETT: Well, these are just
12 questions of what he would do as the project
13 manager.

14 HEARING OFFICER WILLIAMS: I don't
15 believe that they are appropriate based upon what
16 his testimony has been.

17 MR. GARBETT: That concludes my
18 questions except for later T.H.E.P.U.B.L.I.C.
19 testimony.

20 HEARING OFFICER WILLIAMS: You may
21 proceed. You have a witness, sir?

22 MR. RATLIFF: I was going to ask a
23 couple of --

24 HEARING OFFICER WILLIAMS: Oh, you have
25 some --

1 MR. RATLIFF: -- questions on redirect,
2 if I may.

3 HEARING OFFICER WILLIAMS: Sure.

4 REDIRECT EXAMINATION

5 BY MR. RATLIFF:

6 Q Mr. Worl, going back to the project
7 objectives, the project objectives stated in your
8 testimony would include providing a reliable
9 source of energy for future U.S. Dataport
10 facility, mitigating the diesel fuel reliable
11 energy center in that original proposed
12 development, that objective, as stated in your
13 testimony, did not have the year 2002 in it, did
14 it?

15 A No, it did not.

16 Q And the testimony, the project objective
17 in your testimony to add support and reliability
18 to the North San Jose Transmission Reinforcement
19 Project recently approved by the CPUC did not have
20 the year 2002 in it?

21 A No.

22 Q So those were general project
23 objectives, is that correct?

24 A Correct.

25 Q Now, one other question has to do with

1 the alternative, which TURN talks about as their
2 project alternative.

3 Do you know of any justification for
4 restricting the power plant project to the
5 construction dates of the Dataport project,
6 assuming that the project impacts of the power
7 plant project are fully mitigated?

8 A No, none.

9 Q And do you know how you determine what
10 the date you would use for the construction of
11 Dataport would be if you were to impose such a
12 restriction?

13 A I wouldn't know how you would
14 characterize the online requirement date under
15 those circumstances.

16 MR. RATLIFF: Thank you, I have no other
17 questions.

18 MR. FREEDMAN: I have some recross.

19 RE-CROSS-EXAMINATION

20 BY MR. FREEDMAN:

21 Q Just to follow up on that last one, the
22 Commission typically establishes condition of
23 licensing which require applicants to take certain
24 actions by certain dates, is that correct?

25 A Yes.

1 Q So, requiring the applicant to insure
2 the operation of its plant in tandem with there
3 being load onsite to serve, isn't that the kind of
4 condition that really fits within mitigation
5 strategies that the Commission has within its
6 authority?

7 MR. RATLIFF: Mitigation of what? I'm
8 sorry, some lack of clarity.

9 MR. FREEDMAN: Adverse impacts. I'm
10 trying to just get to there are conditions that
11 the Commission impose on the applicant which
12 requires certain actions by certain dates.

13 BY MR. FREEDMAN:

14 Q Maybe I'll just leave it at that as long
15 as you --

16 A Well, that's true, yeah.

17 Q Now, just to follow up on the question
18 with respect to the diesel, counsel asked you a
19 question about -- I guess what counsel was asking
20 you was whether the concern about diesel backup
21 had a date attached to it effectively. Whether or
22 not this was a concern that was relevant for 2002
23 or beyond.

24 MR. RATLIFF: I don't believe that was
25 within the scope of my redirect.

1 HEARING OFFICER WILLIAMS: I don't think
2 he asked any questions concerning diesel, counsel.

3 MR. FREEDMAN: I thought that was with
4 respect to the third project objective, that you
5 were asking about.

6 I'll move on to my final recross.

7 BY MR. FREEDMAN:

8 Q You had said on your cross-examination,
9 had you not, that the North San Jose Transmission
10 Reinforcement Project is unlikely to be
11 operational this year, is that correct?

12 A I think that's fair to say based on what
13 we heard today.

14 Q So bringing Los Esteros online in 2002
15 is not critical to the success of that project?

16 A To the North San Jose Project? Not
17 critical to it, no.

18 Q Okay.

19 MR. FREEDMAN: Thank you, that's all I
20 have.

21 HEARING OFFICER WILLIAMS: Do you have
22 anything further, Mr. Garbett, of this witness?

23 MR. GARBETT: Not of this witness.

24 HEARING OFFICER WILLIAMS: Thanks.

25 Okay, so, Mr. Freedman, you may proceed.

1 MR. FREEDMAN: I am happy to present
2 what I believe is the last witness in this
3 proceeding today.

4 MR. RATLIFF: It's actually tomorrow.
5 (Laughter.)

6 MS. SCHILBERG: Yeah, it's already
7 tomorrow.

8 MR. FREEDMAN: The witness of tomorrow,
9 I'm happy to present the first witness --

10 HEARING OFFICER WILLIAMS: I hope no
11 one's been relying on that clock over there.

12 (Laughter.)

13 HEARING OFFICER WILLIAMS: It's been
14 periodically stopping.

15 MR. FREEDMAN: It's actually 7:30 in the
16 morning --

17 (Parties speaking simultaneously.)

18 MR. FREEDMAN: Okay, I'd like to present
19 Gayatri Schilberg --

20 HEARING OFFICER WILLIAMS: We need to
21 swear her in.

22 MR. FREEDMAN: -- on behalf of the
23 Coalition.

24 HEARING OFFICER WILLIAMS: Let's swear
25 her, first, Mr. Court Reporter.

1 Whereupon,

2 GAYATRI MARGARET SCHILBERG

3 was called as a witness herein, and after first
4 having been duly sworn, was examined and testified
5 as follows:

6 DIRECT EXAMINATION

7 BY MR. FREEDMAN:

8 Q Ms. Schilberg, are you sponsoring
9 testimony marked direct testimony of William B.
10 Marcus?

11 A Yes.

12 Q On behalf of the Coalition of Ratepayer
13 and Environmental Groups?

14 A Right.

15 Q Were you involved in the production of
16 this testimony?

17 A Yes, I wrote this with the assistance of
18 Mr. Marcus.

19 Q And are you prepared to defend it?

20 A Yes.

21 Q Have you distributed your qualifications
22 by email to parties once the substitution became
23 known last week?

24 A Yes.

25 Q Do you have any corrections or additions

1 to the testimony that you'd like to make at this
2 time?

3 A There's one minor typo on page 3 in
4 paragraph numbered 1; it's the third line says,
5 has not told Wall Street that Los Esteros is a
6 project.

7 Q Are there any other corrections you'd
8 like to make?

9 A I'd like to rename it direct testimony
10 of Gayatri Schilberg.

11 Q And do the opinions in this testimony
12 represent your best professional judgment?

13 A Yes.

14 Q And are the facts represented here true
15 to the best of your knowledge?

16 A Yes.

17 Q And do you adopt this testimony as your
18 own?

19 A Yes.

20 Q Would you like to briefly summarize your
21 direct testimony, the most important points, for
22 the Committee?

23 A Yes. The Coalition views this not as a
24 project for supporting U.S. Dataport, but rather
25 as a merchant plant. At the moment the only plans

1 before the Commission are for combustion turbines.
2 There is no promise that they will do the combined
3 cycle. There's no promise that eventually
4 Dataport will materialize and that they will serve
5 Dataport.

6 So all we have at the moment is a
7 merchant plant. Therefore, the alternative to a
8 merchant plant is a no-project examination, no
9 merchant plant. And that is the proposal that we
10 favor, and we think that there should be a
11 condition of certification on this application
12 saying that this project should accompany U.S.
13 Dataport, that actually for this application the
14 no-project alternative should be the one that is
15 approved.

16 The benefits of this proposal, of our
17 proposal, are that there would be reduced
18 environmental impacts and increase the welfare of
19 California.

20 I talked about two different aspects in
21 the testimony. One is enumerating the various
22 environmental impacts that will exist if the
23 applicant's proposal is accepted. And these
24 environmental impacts would be reduced if our
25 proposal is accepted.

1 Some of those impacts are the visual
2 impacts. We heard earlier that if Dataport is
3 built to surround the Los Esteros then there will
4 be fewer visual impacts. They will be minimized.

5 There's also some biological impacts
6 from like noise. The emissions levels from
7 construction impacts would be lessened. And if
8 Los Esteros awaited the arrival of the load of
9 Dataport, it wouldn't need to build the temporary
10 overhead transmission line with its accompanying
11 visual impacts and temporary environmental
12 impacts.

13 So there are a number of these
14 environmental impacts that would be lessened if
15 our proposal were accepted.

16 In addition, there's the general fossil
17 fueled impacts that come from a fossil fuel plant
18 that either produces emissions or uses up offsets,
19 or both. And those impacts also would be avoided
20 if Los Esteros were delayed.

21 Now, when a project has environmental
22 impacts the Commission can approve it if there are
23 some offsetting benefits. And that is a legal
24 citation that I quoted in my testimony.

25 However, in this case there are

1 additional negative impacts from the project. So
2 not only we have the environmental impacts, but
3 then we also have additional negative impacts.
4 And I'll be talking about some of those, too.

5 I want to talk about some of the reasons
6 that have been given for rushing ahead to have
7 alleged benefits from this project, because as we
8 look more deeply the alleged benefits are not as
9 likely to materialize or to prove as a benefit.

10 Firstly, one of the project goals was to
11 provide generation for the summer in 2002. Now,
12 we have considerable doubt that the project will
13 meet its summer 2002 goal.

14 One thing we note is that Calpine has
15 not been telling its investors that it is prepared
16 to go ahead with Los Esteros. In my attachments I
17 include various presentations Calpine's made,
18 saying all of our projects are on hold. If
19 they're not already in the pipeline in
20 construction they're on hold.

21 And it has not said anything about, but
22 Los Esteros is going forward. At least nothing
23 that I've been able to uncover.

24 Also we note that its prior record is
25 not that good. There were two Calpine projects

1 that were permitted under emergency permitting
2 that took eight months. That's Gilroy III and
3 King City.

4 So we know that there's a record of
5 construction delays and development delays. And
6 this also makes us doubt that any benefits of
7 generation or any other sort of transmission
8 support would be available by summer 2002.

9 We've already heard that Calpine lacks
10 an interconnection agreement with PG&E. Hasn't
11 firmed up the costs that it will be obligated for.
12 And I think it's this very kind of interconnection
13 problems that had occurred in the other plants,
14 such as Gilroy III and King City that experienced
15 delays.

16 There could also be delays in
17 construction as any biological or cultural
18 resources are uncovered.

19 And also we've heard -- and also adding
20 to the scheduling issues is the issue that
21 Dataport could conceivably not even come online.
22 I wanted to explore a little bit more of that
23 attachment 4, which was the CEC news release about
24 the plans for reducing the demand at server farms
25 by 30 percent.

1 The very important factoid mentioned in
2 this news release is that statewide, the entire
3 server load in California is alleged to be 80
4 megawatts.

5 Now, we're talking about a project
6 that's contemplated to be 180 megawatts. And
7 during a period where we're trying to reduce
8 server farm demand by 30 percent, and in a
9 recession.

10 So when you put all these things
11 together, to think that the existing server farm
12 load is going to need to more than double in the
13 near future seems to be without a strong
14 foundation in my view.

15 So, to me the likelihood that Dataport
16 is going to come online anytime soon does not
17 comport with the facts.

18 Another scheduling issue. We've noticed
19 that the ISO, in its modeling of Dataport coming
20 online -- sorry, of Los Esteros, only modeled it
21 in the part peak. In other words there was no way
22 that the ISO's expecting Los Esteros to be on for
23 the peak of 2002. So, maximum that they're
24 thinking is the part peak.

25 In addition to that, when we take into

1 account that there will have to be this special
2 protection scheme, this SPS, that means any
3 support or any generation or voltage support
4 alleged from this project will not appear during
5 the peak times, when they have to reduce
6 generation for the SPS.

7 Those are some of the scheduling issues.
8 I also wanted to quickly go over something about
9 project efficiency. It has been alleged that this
10 is an efficient project. And yet I note, and I
11 talk about it more in the footnotes and explain
12 the calculations, that the air permit seems to be
13 permitted on the basis of a heat rate of 10,500,
14 not the 9000 or so that's alleged for this
15 project.

16 So the air permit is at 10,500. The
17 contract, the DWR contract is at 10,500. So
18 effectively in terms of the emissions, and in
19 terms of the costs, we're dealing with a plant
20 that's 10,500.

21 And all I'm saying there is this is not
22 a reason to hurry up and do this project. Because
23 the effective efficiency is not that exciting.

24 The applicant has alleged that the
25 project is economic. One of the references has

1 been struck, but there are many other references
2 in the testimony to what a good economic deal this
3 is.

4 Our evidence indicates exactly the
5 opposite. I quote the --

6 MS. LUCKHARDT: I would object to
7 specific dollar amounts dealing with the DWR
8 contract, if that's the direction she's going.

9 MS. SCHILBERG: I was starting --

10 MS. LUCKHARDT: We have struck our
11 testimony on the economic issues, and have offered
12 to strike it everywhere. And I'm not moving to
13 strike every reference to the contract, but if
14 you're going to move into contract costs and
15 things like that, I think that that's beyond the
16 scope of this hearing, and beyond the direction of
17 the Committee.

18 MR. FREEDMAN: Well, I'd just like to
19 point out that there again have been numerous
20 references to the cost effectiveness of this, as
21 compared to alternatives. We don't have a basis
22 for assessing the cost effectiveness. We think we
23 need to be able to present a case that there are
24 more cost effective alternatives as part of the
25 alternatives analysis.

1 Now, Calpine again wants to have it both
2 ways by repeatedly referencing the business plan
3 that they hold, the benefits that they seek to
4 bring to the state, the economic preference that's
5 associated with this facility. Yet wanting to
6 excise references to a particular element of the
7 economics of this unit.

8 We understand that it's not the basis
9 for the Committee's decision on whether or not to
10 permit the plant. But in assessing cost
11 effectiveness, in looking at the statutory
12 guidelines, including section 25009 that's
13 referenced in Ms. Schilberg's testimony, we think
14 that there needs to be at least some tangential
15 references that are permitted. Otherwise, we're
16 not going to be able to understand whether
17 alternatives are available for this project. It
18 cripples the alternatives analysis that the
19 Commission must perform under law.

20 MS. LUCKHARDT: I think that's
21 absolutely an incorrect assumption. In your
22 questioning of our alternatives witness just a
23 small time ago, he responded that his analysis was
24 based on the cost of installation of the project,
25 and was not based on the contract.

1 So, I don't think that that is a
2 relevant argument for introducing costs of the
3 contract here. If you want to bring up costs to
4 construct the facility, you know, to a certain
5 extent I'm fine to sit here and listen to it.

6 But, you know, the Commission is no
7 longer looking at need, and I think that that's
8 been clear and presented in numerous siting cases.
9 And this type of questioning moves heavily into
10 the direction of addressing need for a power
11 plant. And at this point that is beyond the scope
12 of what the Commission is looking at, and beyond
13 an evaluation of, as you have characterized it, a
14 merchant plant.

15 So I don't feel it's appropriate for
16 this type of information or testimony to be
17 entered or considered by the Commission.

18 HEARING OFFICER WILLIAMS: Yeah, the
19 contract is out of bounds. We've already ruled
20 that.

21 MR. FREEDMAN: I would like permission,
22 then, to file a written motion to strike on
23 numerous sections of Calpine's testimony that
24 relate to the economics of the project. I'd like
25 an opportunity to submit that in writing --

1 HEARING OFFICER WILLIAMS: You don't
2 have to file a motion. We've already offered to
3 strike them.

4 MS. LUCKHARDT: Yeah, --

5 MR. FREEDMAN: Well, I may have a more
6 extensive definition than what the applicant
7 believes is limited to the issue of economics.
8 And I'd like to be able to make a written motion
9 to that effect.

10 HEARING OFFICER WILLIAMS: You're
11 welcome to file your motion.

12 MS. SCHILBERG: So, Jane just raises my
13 next point, which is on page 6 of my testimony, if
14 you want to follow along.

15 Because I wanted to counter the argument
16 that has appeared several times in this case, that
17 the financial impacts of siting are not of concern
18 to the Commission. I extensively quote section
19 25009 of the Public Resources Code which was
20 introduced. It's the section that Jane was
21 talking about regarding the Commission no longer
22 needs to look at need.

23 However, that was predicated on a bold
24 statement that I will just quote right now. It
25 says, we don't need to look at need anymore,

1 essentially. It is necessary that California both
2 protect environmental quality and site new power
3 plants to insure electrical reliability,
4 electricity reliability and prove the
5 environmental performance of the current
6 electricity industry and reduce consumer costs.

7 Now, to me the reading then is the
8 spirit and the intent of 25009 requires that we
9 not be doing things that grossly inflate costs.
10 And when I was speaking earlier about this project
11 has environmental impacts, they are lessened if
12 Dataport is there. And the Commission can find
13 still that the project is needed, if some
14 offsetting benefit.

15 However, what we're finding is there is
16 an offsetting additional cost. So we're getting
17 environmental impacts, and we're getting very
18 heavy drain on the economy.

19 So, my conclusion is the no-merchant-
20 project alternative is the most viable one at this
21 point for the benefit of California.

22 It minimizes -- and we have presented a
23 proposed condition of certification that says that
24 the project construction should not begin until
25 U.S. Dataport owns the land, has firm contracts

1 for at least 90 megawatts of customers -- that's
2 less than half of their load -- half of their
3 generating capacity -- and has begun what, at that
4 time I thought was a 12-month process of designing
5 and building the facilities for its customers.

6 In other words, our condition of
7 certification would link Los Esteros to its
8 alleged fundamental and critical objective of
9 supporting U.S. Dataport.

10 By supporting our proposed siting
11 condition we feel that that minimizes the
12 environmental impacts because to the extent that
13 the presence of Dataport minimizes the impacts,
14 this would be one objective that is fulfilled.

15 It harmonizes with the zoning we heard
16 earlier today, which considered both Dataport and
17 Los Esteros as one. It minimizes the negative
18 consequences on Californians in terms of excessive
19 costs. And it allows a confident CEQA finding
20 that there is a project that has some
21 environmental difficulties, but it also has
22 offsetting benefits of supporting U.S. Dataport.

23 The Coalition believes that this is the
24 most viable alternative and the best for
25 California.

1 MR. FREEDMAN: Does that conclude your
2 direct testimony?

3 MS. SCHILBERG: Yes.

4 MR. FREEDMAN: The witness is available
5 for cross-examination.

6 HEARING OFFICER WILLIAMS: Thank you.
7 Applicant?

8 MS. LUCKHARDT: I don't have any cross.

9 HEARING OFFICER WILLIAMS: Staff?

10 MR. RATLIFF: No questions.

11 HEARING OFFICER WILLIAMS: Mr. Garbett?

12 MR. GARBETT: Yes.

13 CROSS-EXAMINATION

14 BY MR. GARBETT:

15 Q The only question I have is is not the
16 largest fixed state, steady state customer in San
17 Jose the actual San Jose sewage treatment plant?

18 A I don't know.

19 MR. GARBETT: That's it.

20 MR. FREEDMAN: I have a half hour of
21 redirect.

22 (Laughter.)

23 MR. WORL: A crime is about to occur.

24 (Laughter.)

25 MR. FREEDMAN: We'd like to move her

1 testimony then into evidence.

2 MS. LUCKHARDT: We would just like to
3 know, actually we would like to strike three
4 portions of the testimony that deal specifically
5 with contract costs. There are many references to
6 the contract, but the contract exists and that's
7 known to everyone.

8 What I'm looking at for everyone's
9 reference is on page 1, number 3.3. The next
10 reference, we've got that marked is page 5, under
11 it's numbered paragraph 3, starting --

12 MR. FREEDMAN: On page 5?

13 MS. LUCKHARDT: Yeah, did you get the --
14 I had one on page one.

15 MR. FREEDMAN: Yeah.

16 MS. LUCKHARDT: And then on my page 5,
17 they may print differently. I'm looking at
18 numbered paragraph 3, the project is efficient.

19 MR. FREEDMAN: Um-hum.

20 MS. LUCKHARDT: If you go down I think
21 it's two sentences, we've got, and then I would
22 move to strike that efficiency is not passed on to
23 the consumers, however. And then the sentence
24 that follows that. Those two sentences that deal
25 with costs.

1 MR. FREEDMAN: Do you want to talk about
2 these one at a time, or do you want to go through
3 the whole list and then --

4 MS. LUCKHARDT: I'll give you the whole
5 list, and then you can address it. That's
6 probably the most efficient way.

7 And then on paragraph number 4, right
8 after where, yeah, it's on page 6, at least on my
9 version, right after footnote 11, there's a
10 sentence that begins, the capacity charges for the
11 DWR contract average almost \$225 kilowatt hour
12 year, through the end of that paragraph.

13 MR. FREEDMAN: Are there additional
14 sections?

15 MS. LUCKHARDT: No. That's it.

16 MR. FREEDMAN: Let me just take the
17 second one actually first. That's acceptable?

18 HEARING OFFICER WILLIAMS: The page 5?

19 MR. FREEDMAN: Yeah. I'm not clear why
20 testimony relating to the heat rate of the unit
21 and its efficiency should be outside the scope.
22 In fact, my understanding is there was a letter
23 circulated by Calpine, which I remember receiving,
24 among many things last week, specifically stating,
25 making some sort of -- it was by staff or was it

1 by Calpine, referencing the inapplicability of the
2 contract in determining certain heat rates.

3 Seems like there's been a lot of
4 testimony on heat rates. And I think as far as a
5 point of reference it's very important for
6 understanding whether or not the unit will be
7 efficient. And I don't think it's outside the
8 scope of what the Commission's ruled at all.

9 MS. LUCKHARDT: I have no objection to
10 talking about heat rates. My objection is that
11 the testimony refers to efficiency not being
12 passed on to consumers and how the applicant may
13 or may not be paid under the DWR contract. And
14 that's what is referred to in these two sentences,
15 and that's my objection to those two sentences.

16 MR. FREEDMAN: There's a presumption
17 that efficiency is going to provide some benefits
18 to someone other than the applicant.

19 HEARING OFFICER WILLIAMS: Okay, we're
20 going to strike those references in the two
21 sentences.

22 Next?

23 MR. FREEDMAN: So that starts with, that
24 efficiency?

25 HEARING OFFICER WILLIAMS: Yes.

1 MR. FREEDMAN: And it ends with?

2 MS. LUCKHARDT: The parenthetical
3 efficient.

4 MR. FREEDMAN: 17 percent less
5 efficient?

6 MS. LUCKHARDT: Yeah.

7 MR. FREEDMAN: With respect to the issue
8 on page 1, item number 3, you can strike the
9 reference to the contract, but we do believe it's
10 important that there's an adverse effect from this
11 facility that has net drain on the economy. There
12 has been testimony presented on socioeconomic
13 impacts, economic gains associated with the
14 facility.

15 We think the general statement there is
16 a net drain on the economy from this facility is
17 relevant to this process, and we do want to take
18 out the DWR contract reference.

19 HEARING OFFICER WILLIAMS: Okay, so give
20 me a from-to that you're willing to talk about.
21 However the application before the Commission is
22 not for service of U.S. Dataport --

23 MR. FREEDMAN: I'm sorry, I'm on page 1,
24 item number 3. Are we in the same --

25 HEARING OFFICER WILLIAMS: Oh, okay. So

1 long as?

2 MR. FREEDMAN: We can strike the first
3 sentence and say this contract -- oh, I'm sorry,
4 in the second sentence, this facility, replace the
5 words adverse effect with facility. This facility
6 will result in a net drain on the economy to the
7 detriment of California ratepayers and businesses.

8 HEARING OFFICER WILLIAMS: And strike
9 the reference in the first sentence to the DWR
10 contract?

11 MR. FREEDMAN: Yeah, the whole first
12 sentence.

13 HEARING OFFICER WILLIAMS: Okay, we'll
14 do that.

15 Which one's next?

16 MR. FREEDMAN: Well, with respect to the
17 last one, hey, the truth hurts, you know. It's a
18 very expensive contract. And I know the
19 Committee's probably going to strike this section,
20 but I'm sorry, we just can't help ourselves when
21 we're getting ripped off. We feel like we got to
22 make that known.

23 So, I have no hope for you guys keeping
24 this in because I understand where you've been on
25 this, but it's done under protest.

1 HEARING OFFICER WILLIAMS: Okay, where
2 are we there? What page are you on?

3 MR. FREEDMAN: Page 6.

4 MS. LUCKHARDT: Page 6 under paragraph
5 number 4, the project is economic is the bold. If
6 you find footnote 11, over a three-year period. I
7 mean the fact that the FERC complaint exists is --
8 if that's true that exists, it's a fact.

9 Going on to -- I mean I would object to
10 that, as well, being outside of the scope, but --

11 HEARING OFFICER WILLIAMS: The sentence
12 following the footnote?

13 MS. LUCKHARDT: Following the footnote,
14 if you go into the capacity charges for the DWR
15 contract and following to the end of that
16 paragraph.

17 HEARING OFFICER WILLIAMS: Yeah, we're
18 going to strike that.

19 MR. FREEDMAN: And that's it, right?

20 HEARING OFFICER WILLIAMS: Yes.

21 MS. LUCKHARDT: Yes.

22 MR. FREEDMAN: With that I move this
23 testimony into evidence.

24 HEARING OFFICER WILLIAMS: The Committee
25 has received it subject to those changes.

1 MR. FREEDMAN: How is it marked?

2 MS. LUCKHARDT: It has a number I think.

3 HEARING OFFICER WILLIAMS: Okay, it will
4 be next in order which is 6.

5 Staff, we've already received your
6 exhibits, I believe, on these topics?

7 MR. RATLIFF: Yes.

8 HEARING OFFICER WILLIAMS: So that means
9 that the total, your staff assessment and your
10 supplement, they've been received.

11 MR. RATLIFF: Yes.

12 HEARING OFFICER WILLIAMS: Okay. And I
13 think we've got all of the applicant's exhibits
14 in.

15 MS. LUCKHARDT: I believe so, we went
16 through that.

17 HEARING OFFICER WILLIAMS: Yeah, we've
18 received them all.

19 And we have one exhibit, I believe, from
20 Mr. Garbett; number 5. Is there anything further?

21 MS. LUCKHARDT: Not here.

22 HEARING OFFICER WILLIAMS: Do you have
23 anything?

24 COMMISSIONER BOYD: Yeah, I have a
25 couple comments while we have this highly

1 motivated audience remaining here at this late
2 hour.

3 (Laughter.)

4 COMMISSIONER BOYD: That came up in the
5 last section of the testimony. One is that
6 research project on the server farms. I just need
7 to note for your information that this is
8 research, and there are no guarantees of paybacks
9 from research until you've engaged in the
10 research.

11 So while it's the goal of this research
12 project to try to achieve, and we certainly hope,
13 we want to achieve, we assume when the economy
14 comes back server farms will become more
15 fashionable.

16 So, it's a research goal and we hope it
17 works. To predicate actions in the near term on
18 it gets a little dubious. So I just wanted to
19 make that point.

20 And the other one I just want to recruit
21 you all into another issue, and that is while I
22 agree a hundred percent with the idea that, you
23 know, a megawatt not used is the cheapest
24 megawatt. You know, a megawatt saved, et cetera,
25 et cetera.

1 And therefore conservation is a very
2 good thing to do. I agree with it a hundred
3 percent. We proved last year, I mean we saved our
4 skin by good conservation programs and we intend
5 to continue that kind of effort.

6 But I see a couple things on the
7 horizon, at least one which chills me and chills
8 the subject a little bit. And that is all the
9 rhetoric about these contracts the state engaged
10 in as a ripping off the state, the public, and has
11 the public perceiving that we've got plenty of
12 power. That there's plenty of power out there, in
13 fact we're paying way too much for power because
14 there is so much power.

15 And therefore we're very fearful that
16 the public will be turned off somewhat by our
17 conservation campaigns. And so we're a little
18 concerned about what kind of return rate we're
19 going to get this year on conservation vis-a-vis
20 the legitimate belief of the public last year that
21 we had an emergency.

22 So you all have to help us with that.
23 That is a problem. All this debate about these
24 off-the-record contracts has a lot of people
25 thinking we're awash in power. And it's chilling,

1 our ability to convince people to conserve. So we
2 need to get that message out a little bit more.

3 But how I'm not quite sure.

4 So, just a couple of comments.

5 HEARING OFFICER WILLIAMS: Okay, I'd
6 like to thank everybody for their patience.

7 MR. GARBETT: Do I have some public
8 testimony --

9 HEARING OFFICER WILLIAMS: Yes, you did
10 mention that.

11 Now we're going to impose a time limit.

12 MR. GARBETT: Okay, this is public
13 comment. And the reason why it is public comment
14 is as an intervenor I've been very frustrated,
15 for instance, of the transactions that have been
16 documented, I am probably in receipt of somewhere
17 between 10 and 15 percent of the items, and the
18 rest of the items I will probably never see.

19 And I will probably never ever get to
20 see the transcripts of the hearings in order to
21 make final briefs on the project. Knowing the
22 pattern that has been repeated before.

23 With that I was not able to basically
24 provide expert witnesses here. I had a couple
25 that needed to come here. Instead I'm just going

1 to offer myself with some of the same expertise in
2 this group, not as an expert witness, but as a lay
3 witness on public comment.

4 During my military experiences I had the
5 experience of having part-time duties as a
6 firefighter, fighting various types of fires,
7 black oil fires, aircraft fires, rocket fuel fires
8 and a number of others.

9 With that, in firefighting there is a
10 particular hazard because you enter compartments
11 without any oxygen, quite frequently without any
12 oxygen breathing apparatuses, and your only source
13 of oxygen is if you have a fog nozzle. You are
14 basically getting your air from the oxygen that is
15 in the water stream.

16 In the case of using recycled water, you
17 basically have tremendous health hazards, because
18 these are going directly into your lungs. The
19 water spray, along with the oxygen that you're
20 getting that is dissolved in the water.

21 As a matter of fact I would say it's
22 almost a 50/50 chance that a firefighter, if he's
23 fighting an extensive fire, would come down with
24 some ailment after this. And just using seawater,
25 which is reasonably sterile at sea, approximately

1 that many people would have ailments after the
2 fire. Other than just plain smoke inhalation.

3 With respect to other things I have
4 worked in germ warfare. Originally the germ
5 warfare we did by taking airborne spray tanks and
6 spraying aerosols across, for instance, like the
7 entire continental U.S.

8 Later we found out we could hit the
9 major cities and basically by people moving in and
10 out of the major cities have the same almost
11 effective coverage.

12 Later on we found out even more
13 effective than aircraft was just the simple use of
14 cooling towers whose continuous usage over long
15 period of time and the prevailing winds will go
16 and spread just about as fast.

17 Unfortunately, we have people who work
18 at the San Jose sewage treatment plant that do
19 test the water. They find out it is not pathogen
20 free. It is not attenuated greatly.

21 The Great Oaks Water Company presently
22 has a suit pending in the local courts regarding
23 this same supply of recycled water that was used
24 on the Metcalf Energy Center, which will also be
25 used for Los Esteros.

1 There are some organisms, such as
2 anthrax, which is very difficult to kill, even if
3 you run it through the turbine engine, even at
4 5000 degrees you don't kill the anthrax spores.
5 Anthrax has been found in Santa Clara County, in
6 the foothills. It is a disease here, as is
7 Scrapie from sheep is found in humans as
8 Creutzfeldt-Jakob disease, commonly known as mad
9 cow disease. It is a prion and there is no known
10 way of killing these off, including water
11 treatment processes.

12 With this, other viruses are not
13 necessarily killed off or attenuated greatly by
14 the treatment process, including the AIDS virus.

15 With the use of this recycled water, you
16 are having a public health hazard in San Jose; and
17 the newspaper of general circulation, they've
18 talked about the flu epidemic that started when
19 they started using recycled water in the San Jose
20 State power plant cooling towers. All the
21 hospitals were filled, and eventually they backed
22 off on the water for awhile.

23 On the athletic fields of San Jose State
24 University there's two athletes that had major
25 infections. One of them had an amputation from

1 it. And this is basically resulting in contact
2 sports.

3 Basically recycled water is safe when
4 it's used for flooding, when it is sprayed or made
5 airborne by sprinkling systems it can become a
6 hazard. Just flooding fields for agriculture is a
7 safe use.

8 In Los Esteros project you have
9 sufficient groundwater to be used for the single
10 cycle plant.

11 You have closed down three wells.
12 There's still two available for the construction
13 process.

14 Plus they have drilled five additional
15 environmental wells, which could also be used for
16 water for the power plant.

17 I would encourage you to go and consider
18 amending the application to only require fresh
19 water for this power plant.

20 And at the time it is converted to a
21 combined cycle plant, require dry cooling, which
22 minimizes any water usage at all.

23 This is what has been requested by the
24 community, for instance on the Metcalf Energy
25 Center, with a considerable and substantial

1 litigation. This has been present and ongoing on
2 this plant.

3 And in order to expedite this plant, and
4 there is a need for it, if nothing else, San Jose
5 sewage plant is the largest continuous fixed usage
6 of power in the City of San Jose. And this plant
7 will be adjacent to that. It does have a built-in
8 market whether or not Dataport is there or not.

9 For this reason I'm going to ask the
10 Commission to go and consider entertaining the
11 applicant to put an amendment on this application
12 to allow the immediate conversion to combined
13 cycle and bring their power plant online with the
14 highest efficiency, with the greatest
15 profitability for them, and the greatest benefit
16 for the consumer.

17 Thank you.

18 HEARING OFFICER WILLIAMS: Thank you,
19 Mr. Garbett.

20 So, I think with that we stand
21 adjourned.

22 (Whereupon, at 1:15 a.m., Tuesday, March
23 12, 2002, the hearing was concluded.)

24 --o0o--

25

CERTIFICATE OF REPORTER

I, DUNCAN FANKBONER, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Hearing, Volume I; 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 17th day of March, 2002.

DUNCAN FANKBONER

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