

EVIDENTIARY 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)
_____)

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

MONDAY, MAY 20, 2002
9:15 a.m.

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

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

William J. Keese, Presiding Member

James D. Boyd, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Major Williams, Hearing Officer

Michael Smith, Advisor

Susan Bakker, Advisor

STAFF AND CONSULTANTS PRESENT

Robert Worl, Project Manager

Dick Ratliff, Staff Attorney

Gabriel Behymer

Alvin Greenberg

Brewster Birdsall

Natasha Nelson

Joe Crea

Michael Clayton
Aspen Environmental Group

PUBLIC ADVISER

Roberta Mendonca

APPLICANT

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representing Calpine Corporation

Gary S. Rubenstein
Sierra Research

APPLICANT

Jerry P. Salamy, Air Quality Engineer
Valerie J. Young, Vice President
EJ Koford, Project Manager
Thomas Priestley, Senior Environmental Planner
CH2MHILL

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

Mark Bastasch

Amanali "Ali" Amirali

John Reese

INTERVENORS

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

Joseph J. Brecher, Attorney
City of Milpitas

ALSO PRESENT

Rob Eastwood, Planner II
Elena Lee
City of San Jose

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P R O C E E D I N G S

9:15 a.m.

PRESIDING MEMBER KEESE: We are here this morning to hold evidentiary hearings on the application for certification for the Los Esteros Critical Energy Facility, docket number 1-AFC-12.

I'm Bill Keese, chairing the Committee, Chairman of the Commission. Commissioner Jim Boyd, Second on this Committee, joins us, along with his Advisor, Susan Bakker. Mike Smith, my Advisor, will be joining us in one moment. Major Williams is our Hearing Officer for this case.

I'd like the parties at the beginning here to identify themselves for the record. Applicant, Ms. Luckhardt.

MS. LUCKHARDT: Jane Luckhardt from Downey, Brand, Seymour and Rohwer, representing Los Esteros Critical Energy Facility. To my right is Kim MacFarlin, also from my office.

PRESIDING MEMBER KEESE: Thank you. Staff. Mr. Worl.

MR. RATLIFF: Dick Ratliff and Robert Worl. Dick Ratliff, Staff Counsel; Robert Worl, Project Manager from staff.

PRESIDING MEMBER KEESE: Thank you. The

1 City of Milpitas.

2 MR. BRECHER: Joseph J. Brecher for the
3 City of Milpitas.

4 PRESIDING MEMBER KEESE: The Coalition
5 of Ratepayer and Environmental Groups.

6 MR. FREEDMAN: Matt Freedman with The
7 Utility Reform Network, representing the
8 Coalition.

9 MS. SCHILBERG: And Gayatri Schilberg
10 with JBS Energy, also representing the Coalition.

11 PRESIDING MEMBER KEESE: Thank you. Is
12 Mr. Garbett here, or on the line?

13 I understand we have somebody on the
14 phone from the City of San Jose.

15 MR. EASTWOOD: Yes, Rob Eastwood, City
16 of San Jose.

17 PRESIDING MEMBER KEESE: Thank you. Do
18 we have anyone from the Bay Area Air Quality
19 Management District? Are there any other
20 governmental entities who would like to identify
21 themselves for the record?

22 Seeing none, Ms. Mendonca, are you here?
23 Ms. Mendonca is our Public Adviser and available
24 to the public.

25 MS. MENDONCA: Yes. Roberta Mendonca,

1 Public Adviser, thank you very much.

2 PRESIDING MEMBER KEESE: Thank you. Are
3 there any members of the public who would like to
4 identify themselves for the record at this time.
5 Failure to do so will not preclude you from
6 commenting later, but if you'd like to identify
7 yourself for the record this is the appropriate
8 time.

9 On April 25, 2002, this Committee issued
10 a notice setting today's hearing. During the
11 course of today's hearing the Committee will take
12 occasional short recesses as needed. Our
13 expectation is that we'll complete all hearings in
14 this matter today, and the record will again be
15 closed.

16 We have some housekeeping matters. Mr.
17 Williams will take them up.

18 HEARING OFFICER WILLIAMS: Okay, thank
19 you, Mr. Chairman. Before we get into our agenda
20 I think there has come to the Committee's
21 attention some matters that we should probably
22 talk about now before we get into the agenda.

23 We understand that there's a pending
24 settlement agreement between the applicant and the
25 City of Milpitas on the issue of visual resources.

1 If we could have some discussion of that for the
2 record?

3 MS. LUCKHARDT: I actually think that
4 would make good sense because it has just come to
5 my attention this morning that despite significant
6 efforts per your direction on behalf of the Los
7 Esteros Critical Energy Facility that the City of
8 Milpitas intends to continue to participate on the
9 same basis it has done previously.

10 And this comes at a considerable
11 surprise to us this morning. Not that we're
12 unprepared, but simply that I believe that this
13 flies in the face of the good faith efforts that
14 have been put forward by the project to this point
15 as recorded in the letters and documents that have
16 been passed back and forth between the parties and
17 filed with this Commission on Friday.

18 And I wonder whether -- this puts into
19 question whether that agreement and effort and
20 real extension on behalf of the project in this
21 instance is worthwhile, given Milpitas'
22 continuance to object to the project, and
23 continued efforts to block the project despite the
24 considerable efforts made by Calpine in this
25 instance.

1 And it puts into question as to whether
2 if that is the direction that Milpitas intends to
3 go today, as to whether this agreement will truly
4 hold.

5 HEARING OFFICER WILLIAMS: Mr. Brecher.

6 MR. BRECHER: Yeah, Mr. Chairman, I'm
7 surprised to hear this from the applicant. As far
8 as I know the staff of the City of Milpitas is
9 going to recommend to the City Council that the
10 settlement agreement be ratified.

11 However, until that's done, and until
12 that happens, we don't think it's prudent for us
13 to simply walk away from these proceedings.

14 I'm likely to not make a great deal of
15 noise here today because I don't want to prejudice
16 those ongoing negotiations.

17 As I understand, the parties have
18 reached an agreement. Until it's ratified by the
19 City we don't think it's prudent to simply stop
20 our participation.

21 MS. LUCKHARDT: I guess I'm unclear as
22 to the level of the participation that Milpitas
23 intends to perform today.

24 PRESIDING MEMBER KEESE: That would
25 help. We don't want anybody sandbagged here.

1 When is the City Council slated to deal with this
2 issue?

3 MR. BRECHER: I'm going to be meeting
4 with them Tuesday night. I don't believe the
5 settlement is on the agenda, so it will probably
6 be another month until it can be ratified. As the
7 Chairman knows, these things go slowly in
8 municipal law.

9 But I have been assured by the staff
10 that the staff intends to recommend the settlement
11 be approved.

12 PRESIDING MEMBER KEESE: Thank you.

13 HEARING OFFICER WILLIAMS: Well,
14 counsel, I think you recognize that he has to be
15 here to fulfill his obligations to, you know, his
16 fiduciary obligations to the City.

17 MS. LUCKHARDT: Well, he does have those
18 obligations, but we are also under the direction
19 and express jurisdiction of this Committee and
20 this Commission. And you specifically directed
21 that we conduct these types of negotiations with
22 the City of Milpitas. And we feel that we have
23 gone the extra mile in this instance.

24 And you directed that we complete, or
25 come forward to you on this day with an agreement.

1 And we have made every effort to reach that. I'm
2 not saying that Milpitas has not, but if they are
3 going to continue to object to this proceeding and
4 to this project --

5 PRESIDING MEMBER KEESE: Well, let's
6 see. I heard a suggestion that they're not going
7 to have too many comments. So, let's see.

8 MS. LUCKHARDT: If that's the case --

9 PRESIDING MEMBER KEESE: We will then --

10 MS. LUCKHARDT: -- then that would be --

11 PRESIDING MEMBER KEESE: There's going
12 to be no surprise here.

13 MS. LUCKHARDT: Yeah, that would be
14 consistent with our understanding.

15 PRESIDING MEMBER KEESE: There's going
16 to be no surprise here.

17 MS. LUCKHARDT: Yes.

18 PRESIDING MEMBER KEESE: Okay.

19 MR. BRECHER: Let me just say one more
20 thing. We've submitted our position in writing.
21 If the City Council ratifies the agreement, we
22 will ask you to shove all that stuff down in every
23 hole and we will be enthusiastic supporters of
24 this.

25 However, until the City Council ratifies

1 this --

2 PRESIDING MEMBER KEESE: I understand.

3 MR. BRECHER: -- it would be remiss to
4 just stand aside. And that's what we're going
5 to --

6 PRESIDING MEMBER KEESE: Okay, I think
7 hopefully that will clarify it enough. And, Ms.
8 Luckhardt, you will not be precluded from
9 presenting everything on this issue --

10 MS. LUCKHARDT: Yes, we --

11 PRESIDING MEMBER KEESE: -- necessary to
12 satisfy the Committee. And the Committee intends
13 for this to be the last hearing. We intend to be
14 satisfied before we leave here today.

15 COMMISSIONER BOYD: No matter how many
16 hours it takes.

17 PRESIDING MEMBER KEESE: No matter how
18 many hours it takes.

19 MS. LUCKHARDT: No, we appreciate that;
20 we just --

21 PRESIDING MEMBER KEESE: Okay, I
22 understand your point. Major, are there --

23 HEARING OFFICER WILLIAMS: Yes, there
24 are --

25 PRESIDING MEMBER KEESE: -- any other

1 easy issues?

2 HEARING OFFICER WILLIAMS: The Committee
3 has --

4 PRESIDING MEMBER KEESE: Housekeeping?

5 HEARING OFFICER WILLIAMS: The
6 Committee, I don't believe, has a copy of the
7 settlement agreement. Is there any plan to put
8 that in the record? Or should we --

9 MS. LUCKHARDT: Yes, it was entered into
10 the record and filed; and also served
11 electronically on Friday. But we have other
12 copies that we can --

13 HEARING OFFICER WILLIAMS: Okay.

14 MS. LUCKHARDT: -- bring to the front.

15 HEARING OFFICER WILLIAMS: Okay, thank
16 you. You can just drop that off here sometime
17 later. We can move on.

18 MS. LUCKHARDT: Okay.

19 HEARING OFFICER WILLIAMS: Thank you.

20 The second housekeeping matter refers to
21 the settlement agreement of the jurisdictional
22 dispute between U.S. Dataport and the Energy
23 Commission.

24 I believe all the parties have seen that
25 settlement agreement of the jurisdictional

1 dispute. I propose that it be attached to
2 applicant's petition for review as exhibit 2 to
3 your petition. And that it come in the record in
4 that manner. Do you have any objection to that?

5 MS. LUCKHARDT: No, that's fine with us.

6 HEARING OFFICER WILLIAMS: Okay, so we
7 will attach the jurisdictional settlement
8 agreement between U.S. Dataport and the California
9 Energy Commission to applicant's petition for
10 review as exhibit 2.

11 Are there any other matters that we
12 should take up at this time as housekeeping before
13 we move on to the presentation on the motion?

14 Okay. Let me just give a quick summary.
15 On May 3rd, applicant filed a petition for review
16 of the Committee's ruling on removing the AFC from
17 the four-month process set forth in Public
18 Resources Code section 25552 to the 12-month
19 process set forth in Public Resources Code
20 25540.6.

21 We will take up that matter, as well as
22 staff's motion for consideration on our removal
23 order. And staff's presentation will follow that
24 of the applicant's.

25 Before we do that, just let me announce

1 that evidentiary hearings are formal in nature,
2 similar to court proceedings. The purpose of the
3 hearings is to receive evidence including
4 testimony and to establish a factual record
5 necessary to reach a decision in this case.

6 Applicant has the burden of presenting
7 sufficient substantial evidence to support the
8 findings and conclusions required for
9 certification of the proposed facility.

10 Now, on the motions, of course, the
11 parties bear the burden of proof on their motions,
12 as well, which we will take up now.

13 The Committee has set out the order of
14 presentation on the motions in our order of May
15 8th as follows: applicant, staff, City of
16 Milpitas, Coalition and Mr. Garbett, I guess who
17 is not here will not be participating, unless, of
18 course, he shows up.

19 I passed out a revised exhibit list for
20 purposes of the evidentiary proceedings. If you
21 didn't get a copy let me know and we'll make sure
22 that you get one. It might help to guide our
23 discussions during the evidentiary phase.

24 So, with that, we'll move on to the
25 motion. Applicant.

1 MS. LUCKHARDT: I've put the code
2 section up here because I think that that's
3 important. Check my watch here; you guys gave me
4 ten minutes.

5 In determining under which section of
6 the code this project should be evaluated really
7 requires a detailed and specific review of section
8 25552, which is the four-month process.

9 And there has been a lot of back-and-
10 forth between different parties about what the
11 section means. If you look at subsection (a) of
12 25522 which is divided in approximately six
13 sections, you'll note that subsection (a) talks
14 about the procedure that the Commission is to
15 establish.

16 And the Commission is to establish a
17 procedure that for expedited processing of simple
18 cycle power plants, and the intent of the statute
19 was to have simple cycle power plants that could
20 be installed quickly so that new generation could
21 be online to support California.

22 The intent of 25522 was clearly to get
23 power online quickly. And there was a recognition
24 that a simple cycle power plant could come online
25 faster than a combined cycle or cogeneration

1 facility.

2 As we move through the statute you get
3 to subsection (b). Subsection (b) further
4 describes the procedure that the Commission was to
5 implement of a four-month process. It has a
6 shortened time period for data adequacy of 15
7 days, as opposed to the standard 30 days.

8 And in addition it has a requirement for
9 a determination, that this Committee made back
10 last year, that the project met the requirements
11 of the four-month process.

12 As we move on to subsection (c) this is
13 really where the statute talks about the four-
14 month deadline. It sets out a four-month process,
15 and it allows for extensions of time, if those
16 extensions of time are mutually agreed upon by the
17 Commission and the applicant.

18 And it puts a provision in there because
19 they didn't want this process to potentially flow
20 out over years, as is claimed by the Coalition in
21 their reply, that this could continue on into year
22 after year after year. And that's inaccurate. It
23 flies in the face of the statute.

24 The statute clearly indicated that its
25 point and its purpose was to get projects online

1 quickly and to go through the certification
2 process in an expedited manner. Or as quickly as
3 one could get through it in the hopes of getting
4 all projects on by the end of this year.

5 As you move on through subsection (d),
6 subsection (d) further describes what needs to be
7 in the decision, the decision that you must make
8 and the Commission must adopt on a four-month
9 process. The pertinent portions of that
10 subsection (c) is that it not be a major
11 stationary source. There's no dispute about that.
12 That it not have a significant adverse impact on
13 the environment.

14 And, frankly, it's very difficult to
15 contemplate that an LM6000 facility, with a stack
16 height of 90 feet, could be considered to have a
17 significant impact on the environment in which
18 this project is sitting, given that this
19 Commission typically certifies and finds no
20 significant visual impacts for projects that dwarf
21 this project.

22 A project with HRSG, the HRSGs, heat
23 recovery steam generators are approximately 90
24 feet; stack heights of 145 feet plus. This
25 project is dwarfed by those other projects. And

1 those other projects have similar or equivalent
2 landscaping that was originally proposed.

3 Nonetheless, we will be presenting
4 today, and have filed in our testimony, additional
5 landscaping that includes berms and other features
6 to further improve the visual impact of this
7 project.

8 The last section of this requires that
9 we have sufficient labor supply. This project has
10 a participating labor agreement; that's not been
11 an issue at all.

12 When you move to subsection (e),
13 subsection (e) talks about the requirements to
14 qualify for this procedure. And to qualify for
15 this procedure the project goes through -- I'm
16 sorry, I'm trying to read this -- there are
17 certain specific things that the project must
18 show.

19 One of those showings is listed in
20 subsection 4 at the bottom, which is the
21 reasonable demonstration that a thermal power
22 plant and related facilities, if licensed on the
23 expedited schedule, will be in service before
24 December 31, 2002.

25 Now this is not an accident. The words

1 in this section are not an accident. If licensed
2 on the expedited schedule provided in this
3 section.

4 Various members of the power community
5 worked on this. I know specifically Chris Ellison
6 worked on this. He's very familiar with the
7 Energy Commission and its process. And it was
8 clear that he understood that delays could happen,
9 and that those delays should not be held against
10 the applicant.

11 If you go back here to subsection (c)
12 and you look at the timelines and the ability to
13 extend the timeline of the project, you will note
14 that it requires those timelines to be at the
15 mutual agreement of the Commission and the
16 applicant.

17 In this instance the applicant agreed to
18 perhaps a two-month extension last year.
19 Obviously we have exceeded that timeframe. No one
20 has the right to pick and choose between which
21 portions of a subsection of a statute that they
22 wish to implement. This statute requires an
23 agreement by the applicant for further extensions
24 of time. That agreement has not been granted.

25 And actually, as you well know, we have

1 made desperate efforts to try and get this process
2 expedited.

3 Nonetheless, this Committee is holding
4 this applicant to the final section of this
5 subsection that the project must be in service on
6 or before December 31, 2002.

7 Now, you don't get to choose between one
8 or the other. This applicant has not agreed to a
9 continuation to this extent, and therefore it
10 should not be held to an unreasonable standard
11 which is not clearly defined.

12 Nowhere in the statute do you find does
13 the Commission need to make a finding that this
14 project can be online on December 31, 2002, except
15 in the initial determination of whether the
16 project can be online based upon the original
17 schedule.

18 On the original schedule there's no
19 question this project can be online. Nonetheless,
20 the applicant's project has put forth a very
21 aggressive construction schedule and intends to
22 get this project, and has a very reasonable
23 chance, of getting this project online by the end
24 of this year.

25 So there is nothing in this statute that

1 precludes this project from being heard under the
2 four-month process. There's nothing in the
3 statute that requires a finding by the Commission
4 under the subsection (d) which requires the
5 finding, the specific findings that have to be
6 found in order for this Commission to grant a
7 four-month process. Nowhere in there does it say
8 that you have to find that this project is online
9 at the end of this year.

10 If this project is moved into the 12-
11 month process it raises issues. Mr. Freedman, Mr.
12 Brecher are fine attorneys. They aren't going to
13 miss them. There's a potential problem with CEQA;
14 potential problem with bifurcating the review of
15 the project.

16 Unlike CEQA, this statute specifically
17 allows for review of these projects in stages.

18 HEARING OFFICER WILLIAMS: Where does it
19 say that?

20 MS. LUCKHARDT: If you look at
21 subsection (e) (5) (b) where it lists the
22 requirements of a project, in order for this
23 project to be accepted in the four-month process,
24 it had to provide a binding and enforceable
25 agreement with the Commission. And part of that

1 includes that either the project ceases to operate
2 in three years, or it will be recertified,
3 modified, replaced, removed within three years.

4 It is directly contemplated in this
5 statute that you either remove the project in
6 three years, or you come back in and go through a
7 re-review. Either through an amendment or in a
8 project of this size, a modified amendment or
9 recertification of the project when it moves to a
10 combined cycle process.

11 So, it's specifically contemplated
12 within this statute that there are two levels of
13 review for projects that are to convert to a
14 combined cycle facility, and aren't going to be
15 removed within three years, as this project has
16 been proposed from the beginning. And staff has
17 included in its proposed conditions of
18 certification just such an action by the
19 Commission.

20 HEARING OFFICER WILLIAMS: But even
21 without the statute wouldn't there have been two
22 levels of review?

23 MS. LUCKHARDT: Even without the
24 statute?

25 HEARING OFFICER WILLIAMS: Yeah.

1 MS. LUCKHARDT: Only if -- the
2 Commission would be remiss not to review the
3 combined cycle portion of it when they did the
4 simple cycle. Because that would be the whole of
5 the project.

6 If Calpine, as they have indicated in
7 this application, fully intends to convert this
8 project to a combined cycle project --

9 HEARING OFFICER WILLIAMS: Well, under
10 the emergency legislation if the intent was to get
11 the project online quickly there would not
12 necessarily be a requirement that even without the
13 statute that we consider the project as a whole,
14 if the intent is to get emergency generation
15 online right away.

16 MS. LUCKHARDT: If it is under 25552,
17 and under the emergency legislation.

18 HEARING OFFICER WILLIAMS: No, no, we're
19 not talking about 25552. Just assuming --

20 MS. LUCKHARDT: The emergency powers
21 that were granted to the Governor have now ended.
22 Most of the executive orders expired by their own
23 terms at the end of last year. And I believe that
24 the emergency -- they've also closed the second
25 Special Session, but I don't know if they

1 completely closed the Governor's declaration on
2 the emergency at this point. But there are no
3 more executive orders outstanding that we can rely
4 on to process this project in another way.

5 HEARING OFFICER WILLIAMS: Okay.
6 Counsel, your time is up. You will have five
7 minutes on reply.

8 Staff.

9 MR. RATLIFF: Dick Ratliff for the
10 staff. I'll try to be brief. Although we agree
11 that there is no express requirement for findings
12 regarding the online date of the power plant, we
13 think that the most important aspect of that is
14 that should the Committee decide on such a
15 finding, that it should desire to make such a
16 finding, that it has the evidence to do so.

17 You have that evidence in the testimony
18 of the staff and the applicant in the prior
19 proceeding. And the staff has, to date, filed
20 additional testimony supporting that finding based
21 upon the staff's experience with prior simple
22 cycle cases.

23 So, I think that the most important
24 aspect is not to get too caught up with the
25 statute to realize that you simply have a record

1 that supports any finding you wish to make in that
2 regard. And that would be what we would emphasize
3 to you today.

4 I would like to reserve some amount of
5 time to respond to any further arguments that we
6 may hear.

7 HEARING OFFICER WILLIAMS: I think, Mr.
8 Brecher --

9 MR. BRECHER: Yes. The City of Milpitas
10 has stated its views concerning the applicability
11 of CEQA in its opposition to the petition for
12 review by the Commission. And I don't think
13 there's any purpose in restating that at this
14 point.

15 HEARING OFFICER WILLIAMS: Thank you,
16 sir.

17 Mr. Freedman.

18 MR. FREEDMAN: Well, I'd like to focus
19 on the statutory section. I do not have a
20 PowerPoint presentation, but I think everyone's
21 familiar with the text.

22 We think that under section 25552 it's
23 pretty clearly stated that this type of review
24 process is limited to facilities that will be
25 online by the end of 2002, period.

1 Both applicant and staff appear to be
2 trying to transform these statutory references
3 into the category of legislative intent. We think
4 that that is a mistake, and it's not consistent
5 with the plain reading of the text.

6 The applicant effectively argues that
7 the statutory dates are irrelevant except for the
8 purposes of the original application; and are
9 particularly irrelevant if the Committee, itself,
10 has not adhered to its view of the four-month
11 process.

12 Now, counsel for the applicant said no
13 one has the ability to decide which subsections of
14 the statute can or cannot be implemented, yet I
15 think the applicant's seeking to do just that. To
16 ignore the statutory references to the date, and
17 instead argue that the Commission has somehow
18 violated its obligation to conduct a fair and
19 reasonable process.

20 To the extent the applicant wishes to
21 make that argument, I think it's a separate
22 argument from whether the statutory date is
23 binding.

24 There are three separate references in
25 this section of the code to December 31, 2002. I

1 don't think it's an accident that those dates
2 appear repeatedly.

3 Most notably, in subsection (c) it says
4 that the Commission must -- well, let me take a
5 look -- counsel for Calpine focused on the
6 mutually agreeable schedule provisions, but the
7 last sentence, of course, says provided that the
8 thermal power plant and related facilities remain
9 likely to be in service on or before December 31,
10 2002.

11 PRESIDING MEMBER KEESE: And, Mr.
12 Freedman, you're questioning that? The applicant
13 indicated their intent to be online by December
14 31, 2002. Are you --

15 MR. FREEDMAN: Well, Commissioner, I
16 believe there are two separate issues here. One
17 is what the statute requires. The second is
18 whether or not the applicant has met the statutory
19 test. And I believe that we're arguing both
20 points separately here today, if that's fair.

21 PRESIDING MEMBER KEESE: Okay.

22 MR. FREEDMAN: Because applicant has
23 been arguing, as has been staff, that there is, in
24 fact, no explicit statutory requirement at this
25 date that this facility be online by the end of

1 2002. And I think it's just a misreading of the
2 statute.

3 And the applicant has, in fact,
4 criticized our filings. We said in our filings,
5 well, under their test, in fact a facility could
6 come online in 2004. And they said, oh, that's
7 crazy. But I'm listening to the arguments that
8 are made today. And what I'm hearing is that the
9 statutory date listed three times in the section
10 of the law is effectively irrelevant at this point
11 in the process. So long as the applicant receives
12 its license before the end of 2002.

13 Now, here's one scenario in which this
14 plays out. The applicant receives a license
15 sometime this year. The applicant, for whatever
16 reasons, decides that it cannot or does not want
17 to pursue construction on an expedited basis. And
18 it sits on the license.

19 How long can it sit on the license? Can
20 it come back in 2003 or 2004 and then build the
21 plant? I don't hear any limitations built into
22 the arguments that are put forth by both applicant
23 and staff. How long can they wait? I hear it as
24 being forever. So I'd like to hear what it's
25 bounded by.

1 Now, it seems to be bounded by a
2 reasonable expectation in the original AFC, that
3 it would be online by 2002. I don't see that as
4 much assurance. This statute was put in place to
5 get facilities online by the end of 2002. If the
6 facility can't be it's not the end of the
7 project's viability, it just means it gets
8 considered under the 12-month process.

9 PRESIDING MEMBER KEESE: So then it
10 would be very reasonable if this Committee were to
11 return this project to the four-month process,
12 that the Committee institute a condition such as
13 you're talking about, so that this plant could not
14 be delayed until 2004?

15 MR. FREEDMAN: I think it is the
16 Committee's obligation to require that if the
17 facility receives a license under the four-month
18 process that it be online by the end of this year.
19 I think that's what the statute requires.

20 So, is it within the Committee's --

21 PRESIDING MEMBER KEESE: There's the
22 word reasonable in there, as I recall. You're
23 dispensing with the use of that word reasonable.

24 MR. FREEDMAN: Well, in subsection (c)
25 it says provided that the facilities remain likely

1 to be in service.

2 PRESIDING MEMBER KEESE: Likely. Okay.

3 MR. FREEDMAN: Yes.

4 PRESIDING MEMBER KEESE: Okay.

5 MR. FREEDMAN: Remain likely --

6 PRESIDING MEMBER KEESE: I think --

7 fine.

8 MR. FREEDMAN: Now, as to whether the
9 facility will be online by the end of this year,
10 that's an issue that is being litigated. There's
11 new testimony presented that addresses several of
12 the topics here today. We plan on cross-examining
13 these witnesses. And we would like an additional
14 opportunity to brief the issue based on how the
15 Commission rules on the matters of law that are
16 before it.

17 Finally, there is also another section
18 of the code that we're going to be dealing with
19 today, which is the significant adverse impacts
20 from the facility. And applicant argues that the
21 operation of this facility really won't pose
22 significant adverse environmental impacts.

23 But the applicant didn't mention the
24 fact that the statute also requires this Committee
25 to look at construction impacts; it's in the

1 statute. Now why would the Legislature put that
2 word in there if it was simply interested in
3 looking at whether or not ongoing air emissions
4 were significant.

5 Well, in subsection (d)(2) and (e)(1) it
6 mentions construction impacts. And we know that
7 that's an issue that's going to be discussed
8 today. There will be testimony presented. And if
9 the Commission finds that there will be
10 significant construction impacts, then we believe
11 it cannot be permitted under the four-month
12 process.

13 There's no tragedy in returning this to
14 the 12-month process here. We know that --

15 HEARING OFFICER WILLIAMS: Returning it
16 to the four-month process.

17 MR. FREEDMAN: No, the 12-month process,
18 which is what the Committee wishes to uphold what
19 the Committee's already ruled.

20 PRESIDING MEMBER KEESE: You mean that
21 if we leave it in the 12-month process Calpine
22 will still be able to have it operating by
23 December 31st?

24 MR. FREEDMAN: I don't believe under the
25 12-month process that's required. This is a four-

1 month process issue, unless I'm mistaken.

2 PRESIDING MEMBER KEESE: But the
3 rationale for the statute that creates the
4 expedited process has a rationale of getting power
5 plants online as soon as possible to handle what
6 we all recognized was a situation in California
7 where we didn't have enough generation.

8 Calpine has indicated their intent to be
9 online by the end of the year for that purpose.
10 And to meet obligations, statutory obligations.

11 Are you suggesting that if we go to the
12 12-month process that will not slow down their
13 effort to be online by December 31st?

14 MR. FREEDMAN: I'm not sure if it will
15 or it will not. With respect to --

16 PRESIDING MEMBER KEESE: Well, okay,
17 include that in your comment, then, here.

18 MR. FREEDMAN: Sure. With respect to
19 whether they will be online, I think the applicant
20 simply declaring that they intend to be online is
21 an insufficient basis for the Committee to reach a
22 finding of fact in this case.

23 The Committee has to reach an
24 independent determination based on the evidence
25 presented. So I can't endorse the concept of the

1 Committee simply takes the applicant's word for
2 it.

3 COMMISSIONER BOYD: Chairman Keese, I
4 think we're straying way over the line that I
5 think Mr. Freedman properly pointed out in his
6 testimony, that there are different issues on the
7 table today. This is an issue of the operation
8 and applicability of the law. Later today we will
9 debate whether or not a case has been made that
10 the project can be done by the end of this year.

11 Mr. Freedman, a point that Mr. Major
12 made, just so you don't perhaps repeat it, is at
13 the moment the project is in the 12-month process
14 by order of this Committee. The debate on the
15 table today is whether there's any legitimate
16 grounds to return it to the four-month process.
17 So he tripped you up there on a question. So,
18 just to set the record straight.

19 MR. FREEDMAN: Yes, I'm defending the
20 Committee's decision here. Opposing the
21 applicant's petition.

22 HEARING OFFICER WILLIAMS: You need to
23 wrap it up, too, Mr. Freedman.

24 MR. FREEDMAN: Sure. Well, as far as
25 the 12-month process goes, we think that it's

1 warranted. We don't think it's going to cause
2 irreparable harm to this project. The project
3 will come online if it's meant to come online. It
4 will give us an opportunity to look at, for
5 example, whether it should be built a single cycle
6 or combined cycle.

7 And we don't think that there's any
8 relationship between this process and the concern
9 over U.S. Dataport. U.S. Dataport, which is not a
10 party to this proceeding, which has not presented
11 testimony, and which, based on public comments
12 given by its executive officer, appears to be, in
13 terms of its viability, shaky at best. Perhaps
14 coming online with a single tenant in 2004,
15 perhaps not.

16 So it's not at all clear to us that
17 whether this project goes forward on the four- or
18 12-month process is going to have any impact on
19 U.S. Dataport and its ability to come online. I'm
20 not sure that's the Commission's concern here,
21 except to the extent that the settlement agreement
22 is relevant. And the settlement agreement simply
23 says the Commission has to work in good faith
24 under its emergency powers or otherwise.

25 The settlement doesn't even require the

1 Committee to use the four-month process.

2 So I'll stop there and I know I'm sure
3 there will be comments in response.

4 HEARING OFFICER WILLIAMS: Thank you,
5 sir. Applicant.

6 COMMISSIONER BOYD: Could I ask a
7 question, Mr. Major, before we go forward --

8 HEARING OFFICER WILLIAMS: Sure.

9 COMMISSIONER BOYD: Mr. Williams.

10 (Laughter.)

11 COMMISSIONER BOYD: A question, I think
12 of staff, although it may be relevant to Mr.
13 Freedman, as well.

14 It's my understanding under a 12-month
15 process that the applicant does not have to change
16 the simple cycle project into a complex project.
17 That's only a requirement of the four-month
18 process, is that correct, Mr. Ratliff?

19 MR. RATLIFF: That's correct.

20 COMMISSIONER BOYD: I just wanted that
21 on the record.

22 HEARING OFFICER WILLIAMS: Ms.
23 Luckhardt.

24 PRESIDING MEMBER KEESE: Well, excuse
25 me. I've heard a couple of clicks on the phone.

1 Do we have any additional participants by phone?

2 HEARING OFFICER WILLIAMS: Is anybody
3 there?

4 PRESIDING MEMBER KEESE: Is Mr. Garbett
5 there? Thank you.

6 HEARING OFFICER WILLIAMS: Okay.

7 COMMISSIONER BOYD: Did we lose the City
8 of San Jose?

9 HEARING OFFICER WILLIAMS: Mr. Eastwood,
10 are you there?

11 MR. EASTWOOD: I am, I'm still here.

12 PRESIDING MEMBER KEESE: Thank you.

13 MS. LUCKHARDT: Okay, I'd like to
14 address just a couple of comments made by Mr.
15 Freedman.

16 The first one has to do with the fact
17 that his claim that this project could be
18 constructed out into the future. And that really
19 flies in the face of the requirement that I
20 mentioned last, which is that this project either
21 be removed or recertified within three years.

22 So, such a delay either nullifies this
23 license, or gives this Commission another
24 opportunity to review this project.

25 Not only that, the applicant in this

1 case has made every effort to get this project
2 moving and online as quickly as possible.
3 Engineering is 99 percent complete. A lot of the
4 conditions specified by staff that we expect to be
5 adopted by this Commission have already been
6 satisfied for preconstruction activities.

7 And I would also like to note to this
8 Commission that to my understanding this is the
9 only project remaining, or potentially could be
10 put back into the four-month process. Everything
11 else is over. And this statute ends at the end of
12 the year.

13 So it's not like a decision made here
14 will have profound impacts on future projects.
15 Because this statute isn't going to be here
16 anymore. So that's really not an issue.

17 In regards to Mr. Freedman's request for
18 additional briefs, I'll leave that to your
19 discretion, but I kind of feel like this has been,
20 you know, more of an hours-for-lawyers briefing
21 exercise in this project, and if you feel it's
22 necessary we will, of course, submit additional
23 briefs.

24 He referred to U.S. Dataport. I think
25 the key with U.S. Dataport in the settlement

1 agreement is really honoring the intent of
2 entering that settlement agreement. And honoring
3 the intent of the Commission in reaching that
4 agreement with an entity and showing a good faith
5 effort on all parties to get projects online
6 quickly, and to honor the agreements that are
7 reached.

8 I think if this Commission fails to
9 honor its agreements it will, of course, be more
10 difficult to enter into additional agreements in
11 the future.

12 And that's all I have at this point.

13 HEARING OFFICER WILLIAMS: Staff, you
14 had indicated you might have some additional
15 comments?

16 MR. RATLIFF: Yes. We spent, I think,
17 an inordinate amount of time discussing the
18 statute. What I would suggest is that let's just
19 assume, for the sake of argument, that a finding
20 is required.

21 The order says, the order converting
22 this process from a four-month proceeding to a 12-
23 month proceeding says it is not convinced by the
24 evidentiary record that the project could be in
25 service by the end of the year.

1 Staff believes that that is a finding
2 that is difficult to understand, because the
3 testimony and the evidence, which is
4 uncontradicted in this case, is that it will be.

5 We would prefer to go ahead and go
6 forward today with the staff testimony, which is
7 supportive and reiterative of our prior testimony,
8 that the project can be in effect at the end of
9 the year. If the Committee needs to make that
10 finding, it can.

11 And so what we would propose to do is go
12 ahead with the staff testimony to that effect.
13 And assure the Committee, based on all of the
14 evidence, which I think there is none in
15 contradiction, that is, in fact, a reasonable
16 possibility and that the finding would be one that
17 it could make.

18 HEARING OFFICER WILLIAMS: Okay, thank
19 you. And thank you, all.

20 I think then we're ready to move into
21 the evidentiary phase. Applicant, if you would
22 call your first witness on air quality, we can
23 proceed.

24 MS. LUCKHARDT: Are you planning on
25 doing air quality and public health together?

1 HEARING OFFICER WILLIAMS: Yes.

2 MS. LUCKHARDT: Okay, then we would call
3 Gary Rubenstein and Jerry Salamy. And they both
4 need to be sworn once they get themselves settled.

5 (Pause.)

6 HEARING OFFICER WILLIAMS: Mr. Court
7 Reporter, if you could swear the witnesses, thank
8 you.

9 Whereupon,

10 GARY RUBENSTEIN and JERRY SALAMY
11 were called as witnesses herein, and after first
12 having been duly sworn, were examined and
13 testified as follows:

14 DIRECT EXAMINATION

15 BY MS. LUCKHARDT:

16 Q Mr. Rubenstein, if you could state your
17 name and spell your name for the record.

18 MR. RUBENSTEIN: Yes, my name is Gary
19 Rubenstein, that's G-a-r-y R-u-b-e-n-s-t-e-i-n.

20 MS. LUCKHARDT: And, Mr. Salamy, if you
21 could do the same?

22 MR. SALAMY: Jerry Salamy, J-e-r-r-y
23 S-a-l-a-m-y.

24 MS. LUCKHARDT: And since -- I guess we
25 have two different testimonies, okay.

1 Mr. Salamy, I'll start with you. Do you
2 have a copy, applicant's exhibit, and it's noted
3 on the exhibit list as 4C1, applicant's
4 supplemental testimony on public health?

5 MR. SALAMY: Yes, I do.

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

8 MR. SALAMY: It was.

9 MS. LUCKHARDT: And does this testimony
10 include or did your prior testimony include a
11 description of your qualifications?

12 MR. SALAMY: Yes, it did.

13 MS. LUCKHARDT: And do you have any
14 corrections or clarifications you'd like to make
15 to your testimony?

16 MR. SALAMY: I do not.

17 MS. LUCKHARDT: And are the facts
18 contained in that testimony true to the best of
19 your knowledge?

20 MR. SALAMY: Yes, they are.

21 MS. LUCKHARDT: And do the opinions
22 contained therein represent your best professional
23 judgment?

24 MR. SALAMY: Yes, they do.

25 MS. LUCKHARDT: And do you adopt this

1 testimony on public health as your testimony in
2 this proceeding?

3 MR. SALAMY: Yes, I do.

4 MS. LUCKHARDT: And, Mr. Rubenstein, do
5 you have a copy of applicant's supplemental
6 testimony on air quality, listed as exhibit 4B1?

7 MR. RUBENSTEIN: Yes, I do.

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

10 MR. RUBENSTEIN: Yes, it was.

11 MS. LUCKHARDT: And does this testimony
12 or does your prior testimony include a description
13 of your qualifications?

14 MR. RUBENSTEIN: Yes, it does.

15 MS. LUCKHARDT: And do you have any
16 corrections or clarifications you would like to
17 make to your testimony?

18 MR. RUBENSTEIN: No, I don't.

19 MS. LUCKHARDT: And do the opinions
20 contained therein represent your best professional
21 judgment?

22 MR. RUBENSTEIN: Yes, they do.

23 MS. LUCKHARDT: And do you adopt this as
24 your testimony in this proceeding?

25 MR. RUBENSTEIN: Yes, I do.

1 MS. LUCKHARDT: Mr. Salamy, did you
2 evaluate the potential public health impacts of
3 accelerated construction?

4 MR. SALAMY: Yes, I did.

5 MS. LUCKHARDT: And in your professional
6 opinion do those impacts create a significant
7 adverse impact to public health?

8 MR. SALAMY: No, they do not.

9 MS. LUCKHARDT: And could you explain
10 why?

11 MR. SALAMY: We received the modeling
12 results from Mr. Rubenstein and for diesel
13 particular emissions we compared those to the
14 reference exposure level. We predicted a cancer
15 impact from the project of .8 in a million, which
16 is below the traditional level considered to be
17 significant.

18 So we do not expect any health risks as
19 a result.

20 MS. LUCKHARDT: Thank you. And, Mr.
21 Rubenstein, referring to your testimony on the
22 accelerated construction schedule, how do the NO2
23 construction impacts compare to the standard
24 construction schedule impacts?

25 MR. RUBENSTEIN: The worst case hourly

1 NO2 impacts increased by less than 1 mcg/cubic
2 meter, or less than .3 of a percent, as compared
3 with the comparable number that we had estimated
4 for the original construction schedule.

5 MS. LUCKHARDT: And would you consider
6 that increase of 0.3 percent to be either
7 substantive or significant?

8 MR. RUBENSTEIN: No, not by any measure.

9 MS. LUCKHARDT: And could you please
10 describe the Commission Staff's original
11 conclusion regarding construction emissions for
12 NO2?

13 MR. RUBENSTEIN: The Commission Staff
14 had originally concluded that the construction
15 activities would create a potential significant
16 impact with respect to NO2. And the Commission
17 Staff further concluded that with the
18 implementation of their additional mitigation
19 measures, which were conditions AQSC1, SC2 and
20 SC3, that those impacts would be reduced to a
21 level of less than significant.

22 MS. LUCKHARDT: And do you agree with
23 their conclusion?

24 MR. RUBENSTEIN: Yes, I do. Well, let
25 me restate that. I answered a little too quickly.

1 No, I don't agree with their initial conclusion
2 that the impacts were significant. I believe they
3 were not significant as proposed.

4 However, I do agree with their
5 subsequent conclusion which is that with the
6 implementation of those mitigation measures the
7 impacts are not significant.

8 MS. LUCKHARDT: And would that
9 conclusion be different for the accelerated
10 construction schedule?

11 MR. RUBENSTEIN: No. The increase in
12 NO2 concentrations are predicted to increase by
13 such a small amount that I don't see it would have
14 any bearing on the conclusions at all. The
15 conclusions with respect to NO2 would be exactly
16 the same.

17 MS. LUCKHARDT: Okay, turning to PM10,
18 what were your conclusions regarding construction
19 emissions of PM10 from the standard construction
20 schedule?

21 MR. RUBENSTEIN: In my original
22 testimony I had estimated that on a qualitative
23 basis the 24-hour average PM10 impacts might
24 increase by a factor of three with an accelerated
25 construction schedule.

1 In my supplemental testimony where we
2 actually analyzed the air quality impacts
3 associated with an accelerated construction
4 schedule, the increase turned out to be slightly
5 less than a factor of 3 for the 24-hour average
6 PM10.

7 MS. LUCKHARDT: In regards to the
8 original construction schedule, what did
9 Commission Staff conclude regarding PM10?

10 MR. RUBENSTEIN: As they did with
11 respect to NO2, the Commission Staff concluded
12 that the construction impacts had the potential to
13 be significant, but that with the implementation
14 of the recommended additional mitigation measures,
15 again conditions AQSC1, SC2 and SC3, that those
16 impacts would be reduced to a level that was not
17 significant.

18 MS. LUCKHARDT: And when we talk about
19 PM10 impacts, is that primarily -- is that dust,
20 or could you explain what that involves?

21 MR. RUBENSTEIN: Yes. Although we
22 analyzed both combustion exhaust and fugitive dust
23 associated with the construction, when we're
24 talking about PM10, the bulk of the concentrations
25 that we're talking about are attributable to dust.

1 MS. LUCKHARDT: And how does the
2 analysis, you explained that the analysis of the
3 accelerated construction schedule increases the
4 impacts. What is your conclusion regarding the
5 accelerated construction schedule PM10 impacts?

6 MR. RUBENSTEIN: My conclusion is the
7 same as the conclusion for the original schedule,
8 which is that the dust impacts do have a potential
9 to contribute significantly to existing violations
10 of state and federal air quality standards. But
11 that with the implementation of the proposed
12 mitigation measures, those impacts are reduced to
13 a level that is not significant.

14 So my conclusion, in the end, is exactly
15 the same for the accelerated construction schedule
16 as it was for the original schedule.

17 MS. LUCKHARDT: And how do you determine
18 whether a short-term impact from something like
19 construction is significant? How do you make your
20 determination?

21 MR. RUBENSTEIN: My determination is
22 made in a way that's actually quite different from
23 that of the Commission Staff.

24 When dealing with construction impacts
25 in particular, which are short in duration and

1 where the impacts are, in fact, reversible, which
2 is to say when construction activity stops the
3 impacts stop, the approach that I use is one
4 that's consistent with many air districts in
5 California, which is a qualitative and not a
6 quantitative assessment.

7 Many air districts in California use a
8 qualitative assessment of significance for
9 construction impacts, particularly those related
10 to dust. And have a prescribed set of mitigation
11 measures which, if a project developer follows,
12 the impacts are concluded to be less than
13 significant.

14 The reason why most air agencies use
15 this approach is because the estimation of dust
16 emissions from construction activities is very
17 difficult. It relies on a number of assumptions
18 and empirical formulas. And, in addition, the
19 available air quality dispersion models tend to
20 significantly overstate impacts from relatively
21 low level cold plume sources, which is what we're
22 talking about when we're talking about a dust
23 source.

24 So for that reason, as I said, most air
25 agencies rely on a qualitative or mitigation-based

1 approach to evaluating significance. In my
2 professional opinion, that is the appropriate
3 technique to use.

4 MS. LUCKHARDT: And could you please
5 just state it clearly so that I make sure that
6 we've got it, is do the air districts -- how do
7 the air districts determine whether an impact is
8 significant?

9 MR. RUBENSTEIN: Are you referring
10 specifically to construction impacts, or to
11 impacts in general?

12 MS. LUCKHARDT: To construction impacts.

13 MR. RUBENSTEIN: As I say, different air
14 districts do it in different ways. But in the
15 case of, for example, the El Dorado County CEQA
16 guidelines and I bring those up because those are
17 guidelines that we developed for the County and
18 which were adopted by the board of supervisors
19 earlier this year, with similar approaches taken
20 in the Bay Area Air Quality Management District,
21 if construction activities are carried out using a
22 prescribed set of mitigation measures, then the
23 CEQA guidelines explicitly provide that those
24 impacts are considered not significant.

25 And those list of construction

1 mitigation measures are comparable to the measures
2 that are required under condition AQSC1.

3 MS. LUCKHARDT: And has your firm ever
4 completed a survey of PM10 control areas?

5 MR. RUBENSTEIN: Yes, I believe what
6 you're asking is -- yes, we have. We have taken a
7 look at, in particular, fugitive dust control
8 measures throughout the western United States
9 under a contract where we were performing work for
10 the Maricopa Association of Governments.

11 That work was related to identifying
12 what are referred to as most stringent measures,
13 just to toss another acronym into the till here.
14 And most stringent measures are a term of art
15 related to PM10 nonattainment areas; and air
16 quality plans in a series of PM10 nonattainment
17 areas are required to include a listing of most
18 stringent measures. And we did a survey for
19 Maricopa Association of Governments to identify
20 those for their plan.

21 MS. LUCKHARDT: And what did you find?

22 MR. RUBENSTEIN: We identified a number
23 of control measures throughout the western U.S.,
24 but among the most comprehensive in terms of its
25 both scope and level of detail were South Coast

1 District rule 403.

2 And that rule provided a basis for a
3 number of our recommendations to Maricopa County.

4 MS. LUCKHARDT: And could you please
5 describe South Coast fugitive dust rule, I think
6 you referred to that as 403?

7 MR. RUBENSTEIN: Yes. That rule
8 requires all construction activities to have
9 prepared for them dust mitigation plans. And
10 those dust mitigation plans have to include a
11 number of prescribed activities. And the rule
12 also includes mechanisms for enforcement.

13 I believe at the Commission Staff's
14 recommended condition AQSC1, originally was, in
15 fact, derived from the recommended dust mitigation
16 measures contained in South Coast District's rule
17 403.

18 MS. LUCKHARDT: And so based on your
19 last statement does that mean that the type of
20 provisions that are described in AQSC1 are similar
21 to rule 403?

22 MR. RUBENSTEIN: Yes. AQSC1 requires
23 the preparation of a dust mitigation plan that
24 must include certain features. AQSC1 is not as
25 precise as South Coast District rule 403 in

1 spelling out exactly what the measures are, but
2 all the elements of the plans are pretty much the
3 same between AQSC1 and rule 403.

4 MS. LUCKHARDT: And what types of
5 provisions are included to control construction
6 emissions?

7 MR. RUBENSTEIN: Rule 403 requires
8 activities such as earth-moving activities to be
9 controlled through the use of watering at an
10 adequate level to insure that no significant
11 amount of dust is generated.

12 Requires the application of chemical
13 stabilizers to areas depending on how long those
14 surfaces would be potentially generating dust.
15 And it also includes specific recommendations for
16 dealing with open storage piles, travel on unpaved
17 roads and similar activities that you expect to
18 find at a construction site.

19 MS. LUCKHARDT: And does it include a
20 provision regarding visible dust?

21 MR. RUBENSTEIN: Yes. There's a
22 requirement that every dust mitigation plan must
23 insure that there is no visible dust that remains
24 in the atmosphere at the fenceline of a project
25 site.

1 MS. LUCKHARDT: And why does the South
2 Coast use the standard of no visible dust instead
3 of an upwind/downwind monitoring as suggested by
4 Commission Staff?

5 MR. RUBENSTEIN: Well, actually rule 403
6 does include an upwind/downwind monitoring
7 requirement in it, however, that upwind/downwind
8 requirement is only present if a project developer
9 decides that they do not want to implement all of
10 the recommended dust mitigation measures, which is
11 to say it is in the alternative.

12 If a particular developer believes that
13 one or more of the measures are inappropriate,
14 South Coast District requires upwind/downwind
15 monitoring.

16 However, if the recommended measures are
17 carried out, the District requires that
18 enforcement of those measures be carried out
19 simply by insuring that there is no visible dust
20 that crosses the property line.

21 I believe why that requirement is there
22 is because that's actually a fairly simple
23 standard for either workers on a construction
24 site, a construction mitigation manager, a member
25 of the public, a District inspector, any of them

1 can enforce a measure like that very simply.

2 And it's very obvious when you have a
3 dust cloud that's crossing a property line. It
4 doesn't require any monitoring. And it's a
5 requirement that applies around the entire
6 perimeter of a construction site, and not in a
7 specific location where a monitor is located.

8 And that's why I believe that the
9 District relies on that enforcement mechanism in
10 combination with specific recommended mitigation
11 measures as really the backbone for this rule,
12 provision.

13 MS. LUCKHARDT: And so you have reviewed
14 Commission Staff's proposed condition of
15 certification AQSC5, I gather?

16 MR. RUBENSTEIN: Yes, I have.

17 MS. LUCKHARDT: And does that condition
18 contain the same type of upwind/downwind
19 monitoring that South Coast would require as you
20 have explained?

21 MR. RUBENSTEIN: Yes and no. It does
22 require upwind/downwind monitoring consistent with
23 the requirements of rule 403 for sources who don't
24 do all the recommended mitigation measures.

25 However, condition AQSC5 has a different

1 numeric level for triggering action. AQSC5 would
2 trigger action based on a measured concentration
3 of increase of 5 mcg/cubic meter over a 30-minute
4 average period; in contrast to rule 403 triggers
5 action based on 50 mcg/cubic meter increase over
6 24-hour average, which is essentially the state
7 air quality standard for PM10.

8 So I'm not sure where the staff's
9 numbers came from, because this is the first time
10 I've seen a condition like this proposed by the
11 Commission Staff, but even if you were to go to
12 upwind/downwind monitoring, the criteria that are
13 proposed are not the same as rule 403.

14 MS. LUCKHARDT: And have you had
15 experience with upwind/downwind monitoring?

16 MR. RUBENSTEIN: Yes, I have.

17 MS. LUCKHARDT: And, in general, what
18 types of projects typically use upwind/downwind
19 monitoring?

20 MR. RUBENSTEIN: The cases that we've
21 applied upwind/downwind monitoring to have
22 generally been to projects where there have been
23 concerns about one or more different types of
24 toxic or hazardous air pollutants.

25 And the programs that we've developed

1 have been carefully set up, generally dealing with
2 a long-term operation of say an asbestos landfill,
3 where you'll be collecting data on a permanent
4 basis for the life of the project. And
5 occasionally for a short-term type of operation.

6 We've never had to prepare or been asked
7 to prepare an upwind/downwind monitoring program
8 for a construction site such as this. And where
9 the focus has been principally on PM10 as opposed
10 to a hazardous air pollutant.

11 MS. LUCKHARDT: And what would be the
12 problem with just doing upwind/downwind
13 monitoring, just doing it anyway?

14 MR. RUBENSTEIN: The problem is that the
15 typical location that you would sort of
16 instinctively think of to put in a monitor would
17 be at a location that is on either side of the
18 project site, matching its predominant wind flows.

19 And the reason why I say that is because
20 the whole purpose of upwind/downwind monitoring is
21 that you take the difference between the readings
22 of the two monitors at the same time. And by
23 inference you assume that any difference between
24 those two readings is attributable to the
25 activities of that particular site.

1 So, assuming hypothetically if the wind
2 was blowing either from the north to the south, or
3 from the south to the north, you'd have a monitor
4 at the northern boundary of the site, a monitor at
5 the southern boundary of the site.

6 When the wind was blowing from the north
7 to the south, then you would presume that the
8 reading of the south monitor would be higher,
9 because it includes the PM10 impacts for
10 construction activities.

11 And you subtract from that higher number
12 the concentration measured at the northern
13 monitor, and the delta is what you presume is the
14 contribution of the particular site that you're
15 trying to evaluate.

16 However, that only works, that math only
17 works if there are no significant activities that
18 generate emissions immediately north of the north
19 monitor. It also only works if the wind's blowing
20 precisely in the right direction so that the two
21 monitors are aligned, or even if you're off a
22 little bit, but within the same general quadrant.

23 So consequently you have monitors that
24 will only give you meaningful data when the wind
25 is blowing in the right direction, and only if

1 certain other circumstances are true, which is why
2 I prefer, and I think most agencies prefer, the no
3 visible dust standard, because that's easily
4 enforceable. You can tell which way the dust is
5 coming from, whether it's project site or some
6 other site. And you can tell if it's visible when
7 it crosses the property line.

8 MS. LUCKHARDT: And what are the
9 predominant wind directions at the site?

10 MR. RUBENSTEIN: Predominant wind
11 directions at this particular site are shown in
12 the windrows that's included in the AFC. That was
13 included as table 8.1-5A. And that windrow shows
14 on an annual average basis. And it's pretty
15 consistent throughout the year. The predominant
16 wind directions are between the northwest and
17 southeast.

18 MS. LUCKHARDT: And where are the peak
19 24-hour PM10 impacts? And these would, I gather,
20 be from the construction impacts?

21 MR. RUBENSTEIN: That's right. If I
22 could use that board that we have over here; I'm
23 not sure if we can move it someplace so everyone
24 can see it, I could show --

25 MS. LUCKHARDT: You'll need to get some

1 kind of a microphone, Gary.

2 MR. RUBENSTEIN: Apologies to people who
3 are sitting behind the board.

4 (Laughter.)

5 MR. RUBENSTEIN: The peak 24-hour PM10
6 impacts associated with construction activities
7 are generally located on the left-hand or western
8 fenceline boundary of the project site.

9 MS. LUCKHARDT: Okay, and --

10 HEARING OFFICER WILLIAMS: Excuse me,
11 that area to the left of where you just pointed
12 to, is that the sludge ponds, is that where the
13 sludge ponds are located, the water pollution
14 control?

15 MR. SALAMY: No, that's the City buffer
16 lands.

17 MS. LUCKHARDT: Thank you, Jerry.

18 And then couldn't you just place the
19 monitors then where you expect the PM10 impacts?
20 Or in the direction of where you expect the
21 maximum impacts?

22 MR. RUBENSTEIN: Well, in theory you
23 could. You could put one monitor that was located
24 along the roughly western boundary, and I do mean
25 literally at the fenceline is where the peak

1 impacts occur. You could put it right at the
2 fenceline on the western boundary of the property,
3 at which point, though, the second monitor would
4 have to be on the eastern boundary of the
5 property, because remember this is an upwind/
6 downwind monitoring.

7 And if you were to take a look at the
8 windrows that is present in the AFC, again at
9 figure 8.1-5A, the wind hardly ever blows in that
10 east/west direction.

11 And so most of the time, well over 90
12 percent of the time those two monitors would not
13 be reading upwind/downwind measurements from the
14 project site.

15 For example, if the wind was blowing
16 from the northwest, then the western boundary
17 monitor would be picking up anything that came in
18 over the City's buffer land.

19 And the eastern boundary monitor would
20 generally be picking up impacts from the parcel
21 that's to the north of the project site.

22 And so for over 90 percent of the time
23 if you located the monitors to detect that key
24 concentration, the impacts that you get would have
25 absolutely nothing to do with the construction

1 activities on the site.

2 However, the numbers could easily create
3 the impression that the impacts were significant
4 or not significant because who knows what's going
5 on at either of those two other parcels on any
6 other particular day. And if you've got a
7 protocol that simply says take a look at those
8 numbers and compare them, one is always going to
9 be larger than the other by definition. But
10 again, the difference between those two numbers
11 would have absolutely nothing to do with the
12 project's impacts.

13 MS. LUCKHARDT: And in your opinion what
14 is the goal of AQSC5?

15 MR. RUBENSTEIN: In my opinion the goal
16 of AQSC5 is simply to insure that the dust
17 mitigation measures required under AQSC1 are
18 properly carried out and are sufficient to insure
19 that there are no significant dust-related impacts
20 associated with construction activities.

21 MS. LUCKHARDT: And based upon your
22 experience and the description that you've
23 provided and your knowledge of air district
24 practice, what do you think would be a more
25 effective way of insuring dust mitigation measures

1 are performed properly?

2 MR. RUBENSTEIN: I think that adding a
3 sentence to AQSC1 that requires that the dust
4 mitigation plan specifically be designed to insure
5 that there is no visible dust that remains in the
6 atmosphere at the fenceline during construction
7 activities with a corresponding addition to the
8 verification section that says that in fact no
9 visible dust shall remain in the atmosphere at the
10 fenceline is a far more effective way to insure
11 that the dust mitigation measures are being
12 properly carried out during construction
13 activities.

14 MS. LUCKHARDT: And just to be clear how
15 effective are the mitigation measures that staff
16 has proposed?

17 MR. RUBENSTEIN: Again, those dust
18 mitigation measures are in the same kinds of
19 categories as are required under rule 403; the
20 kinds of dust suppression levels that you get
21 range anywhere from 60 to over 90 percent control.

22 In my opinion it is not very difficult
23 to manage mitigation at a construction site to
24 insure that you have no visible dust crossing the
25 property line. And if that's the case, I believe,

1 in fact, that you have no significant PM10 impact
2 associated with construction activities.

3 MS. LUCKHARDT: And with these
4 mitigation measures in place, and it is as you
5 just stated, your professional opinion that the
6 accelerated construction schedule, will that
7 create a significant adverse air quality impact?

8 MR. RUBENSTEIN: No, it will not.

9 MS. LUCKHARDT: Thank you. I have no
10 further questions. I would like to -- I guess
11 I'll wait till after cross to offer the exhibits.

12 HEARING OFFICER WILLIAMS: Yeah, I take
13 it that attached to the actual testimony will be
14 your -- it's about 21 pages that you faxed to --

15 MS. LUCKHARDT: It's rule 403.

16 HEARING OFFICER WILLIAMS: Rule 403; and
17 it also on --

18 MS. LUCKHARDT: And the modified
19 condition.

20 HEARING OFFICER WILLIAMS: And the
21 modified condition. So that will be included in
22 the testimony.

23 MS. LUCKHARDT: So that will be a part
24 of exhibit 4B1 then?

25 HEARING OFFICER WILLIAMS: Right.

1 MS. LUCKHARDT: Okay.

2 HEARING OFFICER WILLIAMS: Okay, staff
3 do you have any questions?

4 MR. RATLIFF: Yes.

5 CROSS-EXAMINATION

6 BY MR. RATLIFF:

7 Q Good morning, Mr. Rubenstein. Could you
8 explain to us what exactly we're dealing with here
9 in terms of the emission we're trying to control?
10 To be more specific it's PM10, is that correct?

11 MR. RUBENSTEIN: That's right, and in
12 particular it's fugitive dust PM10.

13 MR. RATLIFF: And what proportion of the
14 emission from the site do you think would be dust
15 as opposed to combustion emissions?

16 MR. RUBENSTEIN: Looking again
17 specifically at PM10?

18 MR. RATLIFF: Yes.

19 MR. RUBENSTEIN: I can't find those
20 numbers readily but I believe it's well over 90
21 percent.

22 HEARING OFFICER WILLIAMS: How much,
23 excuse me?

24 MR. RUBENSTEIN: Ninety, 9-0 percent.

25 MR. RATLIFF: The dust that you see in

1 the air is not all PM10, is that correct?

2 MR. RUBENSTEIN: That's correct.

3 MR. RATLIFF: And the dust we're
4 concerned with that is PM10 is the finer dust, is
5 that correct?

6 MR. RUBENSTEIN: That's correct.

7 MR. RATLIFF: Can you see dust as
8 visible when it's PM10 dust?

9 MR. RUBENSTEIN: It can be. For
10 example, one of the most significant types of
11 particles in terms of visibility impacts is diesel
12 exhaust particulate, all of which is less than 10
13 microns in size.

14 So there's no -- although --

15 PRESIDING MEMBER KEESE: Can I ask
16 counsel, both of you, this is the recording mike,
17 and I'm having a little difficulty following this.
18 Could you get these two mikes a little closer to
19 each of you?

20 MR. RUBENSTEIN: My only point was that
21 the size of the particle is only one element of
22 indicating whether it's visible or not. And its
23 refractory characteristics are second.

24 And so if your question was can you see
25 dust that was only PM10, my answer would be that

1 would probably depend on the concentration. If
2 the concentration was sufficiently high you could.
3 I don't know what that number would be. If the
4 concentration was sufficiently low you could not.

5 MR. RATLIFF: I notice that what you
6 have proposed is a visibility standard at the
7 fenceline of the project, is that correct?

8 MR. RUBENSTEIN: That's correct.

9 MR. RATLIFF: How would that be
10 enforced?

11 MR. RUBENSTEIN: The way that I believe
12 it could be enforced is by requiring the
13 construction mitigation manager at the site to
14 perform regular inspections when dust-moving
15 activities are occurring to insure that the
16 standard is not exceeded.

17 MR. RATLIFF: So he's just supposed to
18 look over there from time to time and determine
19 whether or not he can see dust?

20 MR. RUBENSTEIN: That's correct.

21 MR. RATLIFF: And here we're dealing
22 with a construction schedule which will be at
23 least 20 hours a day, is that correct?

24 MR. RUBENSTEIN: Yes.

25 MR. RATLIFF: How would he do that at

1 night?

2 MR. RUBENSTEIN: Actually with a
3 flashlight; it would probably be easier than
4 during the day to see whether or not there's any
5 dust that's crossing the property line.

6 MR. RATLIFF: Would this require him to
7 go to the fenceline physically each time, though,
8 to inspect?

9 MR. RUBENSTEIN: Yes.

10 MR. RATLIFF: In your experience do most
11 air districts or local governments require dust
12 suppression as part of the mitigation for
13 construction projects?

14 MR. RUBENSTEIN: In my experience most
15 air districts don't directly regulate construction
16 activities. They may comment as a responsible
17 agency. There are CEQA guidelines such as those
18 that I've described earlier, but the air
19 districts, themselves, do not regulate
20 construction activities. And so they don't
21 require anything.

22 MR. RATLIFF: But the lead agencies
23 typically rely on those guidelines to require dust
24 mitigation measures for construction projects, is
25 that correct?

1 MR. RUBENSTEIN: I believe that's true,
2 yes.

3 MR. RATLIFF: So if, for instance, the
4 City of Sacramento were to be granting
5 entitlements for a construction project, they
6 would probably rely on the air district's dust
7 suppression measures for their CEQA document, is
8 that correct, their mitigation monitoring plan?

9 MR. RUBENSTEIN: In general, yes. Not
10 necessarily the district's regulations for
11 regulated activity --

12 MR. RATLIFF: I understand. But on the
13 CEQA document guidelines that the district
14 provides?

15 MR. RUBENSTEIN: Right.

16 MR. RATLIFF: Have you seen projects
17 that seem to be emitting a significant amount of
18 visible dust in your experience, have you seen
19 construction projects?

20 MR. RUBENSTEIN: I've found that to be
21 quite variable. Sometimes yes, sometimes no.

22 MR. RATLIFF: When you see it do you
23 think it's because the measures are not being
24 implemented correctly? Or do you think it's just
25 because the measures aren't effective?

1 MR. RUBENSTEIN: Oh, when I see it I'm
2 usually quite certain it's because the measures
3 aren't being implemented quite correctly.

4 MR. RATLIFF: So you'd agree that the
5 effectiveness of the mitigation really does turn
6 on the conscientiousness, the rigorousness with
7 which those measures are applied?

8 MR. RUBENSTEIN: For construction dust,
9 absolutely.

10 MR. RATLIFF: Okay. I have no further
11 questions, thank you.

12 COMMISSIONER BOYD: Mr. Rubenstein, is
13 it fairly traditional for air districts to use the
14 public and public nuisance ordinances, laws, rules
15 and regulations to enforce dust rules?

16 MR. RUBENSTEIN: That's one measure.
17 And then having inspectors come on site
18 periodically would be another. But, yeah, I think
19 it's a combination of the two that they rely upon.

20 HEARING OFFICER WILLIAMS: Mr. Freedman.

21 MR. FREEDMAN: Thank you.

22 HEARING OFFICER WILLIAMS: Well, wait a
23 second, I think Milpitas was in order.

24 MR. BRECHER: No questions.

25 HEARING OFFICER WILLIAMS: No questions?

1 Okay.

2 MR. FREEDMAN: Thank you.

3 CROSS-EXAMINATION

4 BY MR. FREEDMAN:

5 Q I'd like to follow on that line of
6 questioning. So, under your proposal there would
7 be onsite personnel responsible for doing regular
8 monitoring of visible dust at the fenceline, is
9 that correct?

10 MR. RUBENSTEIN: That's correct,
11 consistent with their other responsibilities under
12 AQSC1.

13 MR. FREEDMAN: So how frequently would
14 they do such checks?

15 MR. RUBENSTEIN: I would imagine that
16 the frequency would be dictated by the nature of
17 the construction activities that are ongoing at a
18 particular time, the weather conditions at the
19 particular time, and the proximity of those
20 construction activities to the fenceline.

21 For example, if there were some grading
22 activity that was going on 300 or 400 feet away
23 from the fenceline and the construction mitigation
24 manager could tell from wherever they were
25 standing that there was no dust being generated at

1 all, if there is dust it was only visible for 10
2 or 20 feet away, I would think that confirming
3 that observation once every hour or two would be
4 sufficient.

5 On the other hand, or at the other
6 extreme if there was construction activity that
7 was going on immediately adjacent to the fenceline
8 and there was some question about whether a dust
9 plume was crossing the fenceline, the conditions
10 were very dry and windy, and the wind was blowing
11 from the construction activity to the fenceline I
12 would think that more frequent visible
13 observations would be appropriate.

14 MR. FREEDMAN: And this individual would
15 be an employee of the contractor working on the
16 site, is that correct?

17 MR. RUBENSTEIN: The construction
18 mitigation manager required by AQSC1 I believe is
19 required to be an employee of the contractor.

20 MR. FREEDMAN: So an employee of a
21 contractor that is also in this case under
22 significant pressure to construct the plant in an
23 expedited fashion, isn't that fair to say?

24 MR. RUBENSTEIN: I'm sorry, you're
25 saying the construction mitigation manager is

1 under pressure?

2 MR. FREEDMAN: The contractor that is
3 engaging in the construction of the facility, this
4 is a highly expedited schedule, is it not?

5 MR. RUBENSTEIN: I'm not an expert in
6 that area; I wouldn't really be able to answer
7 that question.

8 And frankly I don't think that level of
9 activity that's involved in the mitigation
10 measures we're talking about are equally
11 applicable regardless of the construction
12 schedule. I'd make the same recommendation if we
13 had an eight-hour-a-day construction schedule.

14 MR. FREEDMAN: In the event that the
15 construction mitigation measure finds dust at the
16 boundary of the site, what would that individual
17 then do?

18 MR. RUBENSTEIN: That individual would
19 then be required to direct that additional dust
20 mitigation be implemented to insure that the plume
21 disappeared.

22 MR. FREEDMAN: Could that involve
23 stopping construction activities?

24 MR. RUBENSTEIN: At an extreme, but I
25 don't know why that would be necessary. Typically

1 the way that you deal with dust is by increasing
2 your watering frequency and that would be the
3 first recommended measure.

4 MR. FREEDMAN: Let me ask you to go back
5 to page 2 of your testimony, your supplemental
6 testimony. You cite some testimony that you gave
7 during the evidentiary hearing in which you talk
8 about the fact that state ambient air quality
9 standards for PM10 are violated regularly in every
10 county in California except Lake County. Do you
11 see that section?

12 MR. RUBENSTEIN: Yes, I do.

13 MR. FREEDMAN: So what would then, in
14 this case where the ambient air quality standard
15 is violated on a regular basis, what constitutes a
16 significant impact?

17 MR. RUBENSTEIN: With respect to
18 construction dust, which is what we're talking
19 about here, my conclusion is that the construction
20 of a facility without using all of the recommended
21 dust mitigation measures sufficient to insure that
22 there's no visible dust crossing the property line
23 would constitute significant impact.

24 MR. FREEDMAN: I guess I'm asking you in
25 a more general sense, apart from the specifics of

1 the construction activities, what constitutes a
2 significant impact when you're dealing with
3 ambient PM10 concentrations in an area that is
4 already in violation?

5 MS. LUCKHARDT: I would like to clarify,
6 or just request, is this a -- we're dealing with
7 construction impacts here. I'm assuming your
8 question is in regard to construction impacts.

9 MR. FREEDMAN: Well, the witness has
10 sponsored testimony on state and federal ambient
11 air quality standards, looking at the contribution
12 of certain construction activities in combination
13 with background levels, comparing that to the
14 standards. And I'm trying to get a sense of the
15 relevance of these standards in a situation where
16 there's already high background concentrations.

17 MS. LUCKHARDT: And I would assume that
18 from his testimony you would be referring to
19 construction.

20 MR. FREEDMAN: Fair enough.

21 MR. RUBENSTEIN: I don't think there's
22 any relevance at all. And the only reason why I
23 presented the modeling numbers this way is because
24 the Commission Staff requires it.

25 If I were left to my own devices in

1 terms of analyzing the air quality impacts of
2 construction I might have quantified the
3 emissions, but in all likelihood I would have not.
4 And I certainly would not have performed a
5 dispersion modeling analysis, because I don't
6 believe the results are meaningful.

7 Instead I would have focused on the
8 kinds of activities that generate dust; the
9 mitigation measures that are necessary to insure
10 that those dust levels don't result in any visible
11 dust plumes crossing the property line.

12 MR. FREEDMAN: So regardless of the
13 quantity of impacts that could be modeled, you
14 think it's irrelevant so long as there are
15 standard mitigation measures in place?

16 MR. RUBENSTEIN: Talking specifically
17 about construction dust, yes. And that conclusion
18 is consistent with a number of CEQA guidelines
19 prepared by air districts throughout the state.

20 MR. FREEDMAN: Is it your testimony then
21 that with the mitigation measures that are
22 proposed that the net contribution of the
23 construction activities will be zero?

24 MR. RUBENSTEIN: Net contribution to
25 what?

1 MR. FREEDMAN: To ambient air quality
2 concentrations, ambient concentrations of PM10
3 outside the site boundary area. Are you saying
4 the addition would be zero?

5 MR. RUBENSTEIN: No.

6 MR. FREEDMAN: What would it be, then?

7 MR. RUBENSTEIN: We had estimated in our
8 analysis that using very conservative assumptions
9 the worst case contribution for 24-hour average
10 PM10 would be 37 mcg/cubic meter. That's on table
11 8.1D-3 on page 3 of my supplemental testimony.

12 MR. FREEDMAN: I thought you just said
13 that those numbers were irrelevant?

14 MR. RUBENSTEIN: I did. You asked me
15 did we estimate them, and what are the numbers,
16 and I answered your question. Maybe I
17 misunderstood.

18 MR. FREEDMAN: Post mitigation, I'm
19 asking once with the mitigation measures what is
20 the net contribution. Are you saying that it's
21 zero?

22 MR. RUBENSTEIN: No.

23 MR. FREEDMAN: What would it be then?

24 MR. RUBENSTEIN: I don't know.

25 MR. FREEDMAN: So it's not clear whether

1 or not, even with mitigation, there will be an
2 offsite increase in PM10 concentrations throughout
3 the duration of construction?

4 MR. RUBENSTEIN: I think that's correct.

5 MR. FREEDMAN: So, let's assume a
6 situation where you have a state standard of 50,
7 which is what you've listed in here, the 24-hour
8 standard on that same chart, 8.1D-3.

9 And let's say the background levels were
10 40 at a particular site, and you had construction
11 impacts that were modeled prior to mitigation of
12 these same numbers, 37, that you've put down here,
13 the revised accelerated schedule unmitigated
14 impacts.

15 You're saying that with mitigation there
16 very well could be offsite impacts greater than
17 zero, is that correct?

18 MR. RUBENSTEIN: Yes.

19 MR. FREEDMAN: Is it possible then in
20 such a situation that even with mitigation the
21 construction activities could result in the area
22 exceeding the state standard if you started out
23 with a base of 40, rather than 114?

24 MR. RUBENSTEIN: In theory, yes.

25 MR. FREEDMAN: Now, on page 2, in the

1 last paragraph, your second sentence, you mention
2 that you have assumed 20-hour operation of
3 construction equipment during the months of June
4 through September. What's your basis for making
5 that assumption?

6 MR. RUBENSTEIN: The 20-hour assumption
7 came from my discussions with Calpine to ascertain
8 exactly what was meant by the accelerated
9 construction schedule. And what was indicated to
10 me was an activity schedule that would be on the
11 order of, I believe it was 21 or 22 calendar hours
12 in a day, but with not all the equipment operating
13 all the time.

14 And as a result of that, allowing for
15 downtime, I interpreted that as meaning 20 hours
16 of equipment activity each day which could occur
17 during any of the 24 calendar hours.

18 With respect to the June to September
19 period Calpine had indicated to me that this
20 accelerated schedule was likely to occur only for
21 two months.

22 I assumed a four-month duration so that
23 in the event, for example, someone outside of this
24 proceeding were to delay the construction activity
25 so that they didn't start until August instead of

1 June, that the analysis would still cover the
2 meteorology associated with those months. And
3 we'd have this four-month duration for this
4 heavier activity period.

5 MR. FREEDMAN: And would the modeling
6 have been any different had you looked at the
7 months of October and November?

8 MR. RUBENSTEIN: Oh, you mean if someone
9 were to delay the project so long that
10 construction didn't start until October and this
11 intense period occurred?

12 MR. FREEDMAN: That's correct.

13 MR. RUBENSTEIN: And then assuming that
14 even though the project had been delayed that far,
15 that they would still use this accelerated
16 construction schedule in October and November?

17 MR. FREEDMAN: That's correct.

18 MR. RUBENSTEIN: No, I did not
19 hypothesize that scenario.

20 MR. FREEDMAN: And is it your sense that
21 the results would be at all different from the
22 ones that you put forward here?

23 MR. RUBENSTEIN: They would. Whether
24 the differences are significant or not, I don't
25 know. It would also depend on whether you assumed

1 that this accelerated schedule just occurred
2 during those two months of October and November,
3 or whether you assumed it proceeded from June all
4 the way through October and November.

5 MR. FREEDMAN: I'd like to ask a
6 question about 8.1D-3 again. When you modeled
7 maximum construction impact on a 24-hour basis and
8 you come up with this 37 figure, is that an
9 average over the period? Is that maximum the
10 worst day within that period? How many days would
11 it cover? Could you explain a little bit?

12 MR. RUBENSTEIN: Yes, that is the
13 highest 24-hour average concentration that the
14 model predicted throughout the entire calendar
15 year. I don't know offhand whether that high
16 concentration is, in fact, associated with the 20-
17 hour construction schedule that we assumed for
18 June through September, or whether that particular
19 number is associated with the shorter construction
20 duration that we assumed for the other months. I
21 don't have the detailed numbers in front of me.

22 But that is the highest 24-hour average
23 PM10 concentration predicted to occur at any
24 location throughout the entire 365 days that we
25 modeled.

1 MR. FREEDMAN: Just one moment, please.

2 Sorry.

3 (Pause.)

4 MR. FREEDMAN: Does the model show how
5 many days during this period the maximum impact
6 would be achieved?

7 MR. RUBENSTEIN: By definition there is
8 only one maximum.

9 MR. FREEDMAN: So the model shows that
10 only one day during the entire period this would
11 be the impact? Or that this maximum impact could
12 recur on multiple days throughout the process?

13 MR. RUBENSTEIN: The model produces a
14 listing of every 24-hour average concentration
15 that it predicts for every 24-hour average period
16 for every receptor.

17 And so it identifies all of them. If
18 you question to me is do I know how many times
19 during the one-year period that we modeled the
20 peak concentration at any receptor was 37
21 mcg/cubic meter, I don't offhand know the answer
22 to that question.

23 I do know, based on the location of the
24 maximum on the west side of the property line,
25 given that the wind doesn't blow in that direction

1 very often, that there could not, in fact, be many
2 days. Because the wind wouldn't carry the dust in
3 that direction on many days.

4 MR. FREEDMAN: Okay, thank you very
5 much.

6 HEARING OFFICER WILLIAMS: Applicant,
7 we're looking to take a break here pretty soon.
8 Do you have much redirect?

9 MS. LUCKHARDT: I have a couple minutes.
10 We could take a break now if you'd like, or I
11 could continue; it's your preference.

12 HEARING OFFICER WILLIAMS: Yeah, let's
13 come back at about --

14 PRESIDING MEMBER KEESE: We'll take a
15 five-minute break; that means we'll start in ten
16 minutes.

17 (Laughter.)

18 (Brief recess.)

19 MS. LUCKHARDT: I have just a few
20 additional questions.

21 REDIRECT EXAMINATION

22 BY MS. LUCKHARDT:

23 Q Mr. Ratliff asked you about the
24 visibility of PM10. Would you anticipate any
25 situation where you would have PM10 and yet no

1 visible dust?

2 MR. RUBENSTEIN: No, not anyplace that
3 was in close proximity to the construction site,
4 which is all of the locations we're talking about
5 in this particular instance.

6 MS. LUCKHARDT: And then in regards to
7 questions from Mr. Freedman, he asked you about a
8 net contribution and you indicated, I believe,
9 that the net contribution from construction of
10 PM10 would be something other than zero.

11 Would you consider that contribution to
12 be significant?

13 MR. RUBENSTEIN: No. And the reason is
14 that provided the recommended dust mitigation
15 measures are carried out, and that they're
16 enforced by assuring that there's no visible dust
17 that crosses the property line, I don't think that
18 any modeled prediction of concentrations greater
19 than zero would be significant in that case.

20 MS. LUCKHARDT: And then he also asked
21 you about exceeding state standards. And you
22 indicated -- he asked you something to the effect
23 that is it possible that with the construction
24 impacts you could exceed a state standard. And I
25 believe you responded in theory yes.

1 Could you please explain that response?

2 MR. RUBENSTEIN: Certainly. The
3 question seems to be getting at the issue that Mr.
4 Freedman was pursuing in his earlier questions of
5 what constitutes a significant impact. Trying to
6 quantify that in some way.

7 I believe that that is inappropriate,
8 especially for construction dust emissions. And
9 you could simply look at the following example.

10 If the state air quality standard is 50
11 mcg/cubic meter, and if your background
12 concentration was 51, and you added 5 mcg/cubic
13 meter on top of that, well, you're not causing a
14 violation, so would you call that a significant
15 impact? Well, if it's properly mitigated you'd
16 assume it was not. And, in fact, that's the
17 rationale that the Commission Staff uses on a
18 consistent basis.

19 On the other hand, if the background
20 concentration was 44 and you added the 5 mcg on
21 top of it, you'd conclude that the total was 49,
22 it was less than the standard. And would you say,
23 well, the impacts are not significant whether I do
24 mitigation or not? Well, that doesn't quite seem
25 right, either.

1 And if the background concentration is
2 47 and you add 5, and the total is 52, and you go,
3 oh, my gosh, I'm causing a violation of the state
4 standard. Is that the one case where you suddenly
5 raise a red flag and go, oh, we have a significant
6 impact and we can't mitigate its significance.

7 There's really no logic associated with
8 distinguishing an identical project which has an
9 impact of 5 mcg/cubic meter with those three small
10 distinctions between what background
11 concentrations are.

12 And I think the logic becomes
13 particularly absurd when you talk about
14 construction dust impacts. There's a well
15 established set of mitigation requirements that
16 have been developed over the years. There's a
17 goodly body of experience to indicate that when
18 those mitigation measures are properly implemented
19 that you don't have visible dust crossing a
20 property line. And consequently you don't have
21 significant impacts.

22 I think that's the appropriate basis for
23 making this kind of a judgment. And whether the
24 background levels are slightly above or slightly
25 below the air quality standard, whether the

1 project's modeled or predicted impacts cross that
2 threshold, I really think that's a much lesser
3 importance. And in this case, really borders on
4 irrelevance.

5 MS. LUCKHARDT: Thank you. I have
6 nothing further.

7 HEARING OFFICER WILLIAMS: Just for the
8 record, Mr. Freedman indicated that he had to
9 leave. He indicated he may or may not return.
10 Ms. Schilberg is taking his place.

11 So, applicant, do you have any further
12 questions --

13 MR. RATLIFF: Staff. No.

14 HEARING OFFICER WILLIAMS: Excuse me.
15 Staff.

16 MS. SCHILBERG: I'll just ask one
17 question.

18 RECROSS-EXAMINATION

19 BY MS. SCHILBERG:

20 Q So you're saying if the background
21 levels have already exceeded the state standard,
22 and the applicant's project, with mitigation, is
23 going to add to the PM10 content, that that's not
24 a problem?

25 MR. RUBENSTEIN: I'm saying regardless

1 of whether the existing standard is currently
2 being violated or not. If an applicant is
3 proposing to use the recommended dust mitigation
4 measures and insure that there's no visible dust
5 that crosses the property line, then those
6 construction dust impacts are not significant,
7 regardless of whether there's a preexisting
8 violation of the standard or not.

9 MS. SCHILBERG: So your definition of
10 significance is whether or not they are using the
11 measures?

12 MR. RUBENSTEIN: With respect to
13 construction dust, that's correct.

14 HEARING OFFICER WILLIAMS: Sir.

15 MR. BRECHER: I do have one question.

16 RE-CROSS-EXAMINATION

17 BY MR. BRECHER:

18 Q What's the basis of your assertion that
19 if the dust isn't visible as it crosses the
20 property line it's not significant?

21 MR. RUBENSTEIN: The basis is that by
22 the time dust gets to the property line there is
23 not necessarily sufficient time for the larger
24 particles to settle out, and so you have a fairly
25 intact dust cloud.

1 And I can't tell you what the
2 concentration of PM10 is within that cloud. But
3 it would certainly be much larger than the state
4 air quality standard.

5 Whether that cloud were to persist for
6 24 hours or not, and actually cause a violation,
7 in my mind is irrelevant. What that visible cloud
8 does, though, is indicates that insufficient care
9 has been taken in mitigating the dust impacts.

10 And consequently I believe that the
11 impacts would be significant because not all of
12 the recommended mitigation measures are being
13 properly carried out.

14 It's not that the dust cloud causes a
15 violation or can be associated with some numerical
16 quantity of PM10. Rather it's that the dust
17 cloud, as an indicator, that the mitigation
18 measures are not being properly implemented.

19 MR. BRECHER: So that the quantity of
20 dust that crosses the property line is irrelevant
21 in your view, other than as an indicator that the
22 performance-based standards have not been
23 achieved?

24 MR. RUBENSTEIN: That's correct.

25 MR. BRECHER: No further questions.

1 HEARING OFFICER WILLIAMS: Thank you,
2 Mr. Brecher. Anything further?

3 MS. LUCKHARDT: I would like to offer
4 applicant's exhibits into evidence. That would be
5 exhibit 4B1, including the modified condition in
6 rule 403, and exhibit 4C1. Those deal with air
7 quality and public health.

8 HEARING OFFICER WILLIAMS: Any
9 objections?

10 MR. RATLIFF: No.

11 HEARING OFFICER WILLIAMS: So admitted.
12 Does that take care of air quality and
13 public health?

14 MS. LUCKHARDT: I believe from the
15 applicant's testimony, unless you have further
16 questions.

17 HEARING OFFICER WILLIAMS: And, staff,
18 you have --

19 MR. RATLIFF: Staff has two witnesses.
20 The air quality witness, Gabriel Behymer, and the
21 public health witness, Alvin Greenberg. Perhaps
22 we could put them up here at --

23 (Pause.)

24 MR. RATLIFF: Both of these witnesses
25 have been previously sworn in this proceeding.

1 HEARING OFFICER WILLIAMS: Let's just
2 swear them again.

3 Whereupon,

4 GABRIEL BEHYMER 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 MR. RATLIFF: These witnesses will
9 testify as a panel, but I would like them to
10 summarize their testimony for the Committee. This
11 won't take very long, but I think we should do it.

12 DIRECT EXAMINATION

13 BY MR. RATLIFF:

14 Q Mr. Behymer, you provided supplementary
15 testimony in this proceeding; most recently the
16 supplemental testimony on air quality, is that
17 correct?

18 MR. BEHYMER: That's correct.

19 MR. RATLIFF: Is this going to be a
20 confusion if we both use this microphone? It's
21 not going to create a problem? Okay.

22 Is that testimony true and correct to
23 the best of your knowledge and belief?

24 MR. BEHYMER: Yes, it is.

25 MR. RATLIFF: Do you have any changes to

1 make in that today?

2 MR. BEHYMER: No, I do not.

3 MR. RATLIFF: You provided the prior
4 staff testimony in this case, is that correct?

5 MR. BEHYMER: Yes, I did.

6 MR. RATLIFF: You based that testimony
7 on an eight-hour construction schedule, is that
8 correct?

9 MR. BEHYMER: That's correct.

10 MR. RATLIFF: And you testified in the
11 last proceeding that if a 20-hour or 24-hour
12 construction schedule were utilized that you would
13 expect the emissions increase to be roughly
14 linear, is that correct?

15 MR. BEHYMER: That is correct, to my
16 best estimation.

17 MR. RATLIFF: And now that has been
18 modeled is that correct?

19 MR. BEHYMER: Correct.

20 MR. RATLIFF: And that's reflected in
21 your testimony?

22 MR. BEHYMER: That is correct.

23 MR. RATLIFF: And is it roughly linear?

24 MR. BEHYMER: Yes, it is.

25 MR. RATLIFF: Could you briefly

1 summarize the testimony for the Committee, please?

2 MR. BEHYMER: Yes. Staff's supplemental
3 air quality testimony addressed the potential
4 impacts from the proposed expedited construction
5 schedule for this project.

6 This analysis was based on an air
7 quality modeling analysis that was assumed worst
8 case emissions ambient parameters, and also
9 assumed average construction mitigation efficiency
10 levels.

11 Given average construction mitigation
12 efficiency staff believes there may be significant
13 impacts from the proposed expedited construction
14 activities when compared to the original
15 construction project schedule.

16 However, experience has shown that a
17 large degree of the uncertainty associated with
18 the construction mitigation efficiency levels
19 values is due to a varying degree of vigilance on
20 the part of construction personnel.

21 Particularly this is true with respect
22 to dust control, earth-moving activities and
23 emissions from unpaved roads that are frequently
24 present on construction sites.

25 Staff is confident that given a high

1 degree of day-to-day vigilance on the part of
2 construction personnel, and thus a higher than
3 average degree of mitigation efficiency, that the
4 construction emissions from the expedited schedule
5 of this project will be minimized and/or
6 eliminated and will not cause new violations or
7 significantly contribute to existing violations of
8 state ambient air quality standard for PM10.

9 Staff believes that the only way to
10 guarantee a higher than average day-to-day
11 mitigation effort on site is to set up
12 construction real time upwind/downwind monitoring
13 stations that will continuously monitor the
14 efforts of the construction personnel.

15 MR. RATLIFF: Does that conclude your
16 testimony summary?

17 MR. BEHYMER: Yes, for my summary, yes.

18 MR. RATLIFF: Thank you. Dr. Greenberg.

19 DR. GREENBERG: Yes.

20 MR. RATLIFF: You provided supplemental
21 testimony on public health, is that correct?

22 DR. GREENBERG: Yes, I did.

23 MR. RATLIFF: And in that testimony you
24 also, like Mr. Behymer, recommended monitoring
25 construction emissions, is that correct?

1 DR. GREENBERG: Yes, I did.

2 MR. RATLIFF: Could you briefly
3 summarize your reasons for doing so?

4 DR. GREENBERG: First of all, I concur
5 with the applicant's testimony that insofar as
6 public health impacts from diesel emissions, from
7 construction equipment during construction
8 activities, that there would be no significant
9 impact, even with the expedited construction
10 schedule.

11 And I agree with the numbers that the
12 applicant had provided as far as the .8 in a
13 million cancer risk from the expedited schedule.

14 However, concerning PM10, 2.5, values,
15 the 37 mcg/cubic meter increase, when added to the
16 existing background level could, indeed, result in
17 significant adverse impacts on public health.

18 However, it is my experience, as well as
19 the experience of USEPA, CalEPA, and various air
20 districts around the state, that construction
21 PM10, 2.5 impacts, fugitive dust impacts, can be
22 mitigated to an insignificant level if aggressive
23 dust control methods are indeed implemented.

24 I recommend, however, that these
25 aggressive methods not only be implemented, but

1 that they be monitored by the use of PM10, 2.5
2 real time monitoring, upwind versus downwind, for
3 the construction activities.

4 And this is part of a mitigation program
5 because the mitigation program will only be as
6 successful as it is implemented. So this is part
7 of that program. Otherwise, it would be very
8 difficult to determine whether or not the
9 aggressive program is working.

10 MR. RATLIFF: Dr. Greenberg, you heard
11 the prior testimony of Mr. Rubenstein questioning
12 the effectiveness of upwind/downwind monitoring
13 for emissions impacts.

14 In that testimony I think it's fair to
15 say that Mr. Rubenstein suggested that such
16 monitoring is not effective. Do you agree or
17 disagree with that?

18 DR. GREENBERG: I disagree with that.

19 MR. RATLIFF: Can you explain why?

20 DR. GREENBERG: Well, first of all, the
21 monitoring programs that Mr. Rubenstein is
22 familiar with and that I'm familiar with, are
23 indeed effective, and have been demonstrated to be
24 effective. And they would be effective at this
25 particular location.

1 To take a step back, what Mr. Rubenstein
2 is suggesting, and through him, the applicant is
3 suggesting that they implement what's known as a
4 technology-based mitigation plan. In other words
5 the South Coast Air District, along with the Bay
6 Area Air Quality Management District, has an
7 approach -- the Bay Area Management District has a
8 tiered approach, due to the size of the
9 construction site, where if one implements these
10 technology-based dust control methods, that one is
11 deemed in compliance.

12 The Bay Area CEQA guidance was developed
13 and submitted in April of '96. It has not been
14 amended since then. And we've made several
15 advances in the areas of particulate monitoring,
16 as well as there has been many advances in the
17 area of public health impacts due to certain
18 concentrations of PM10 and 2.5.

19 What I'm suggesting, and what staff is
20 suggesting, is that we continue along the line of
21 a technology-based approach that is also a health-
22 based approach, adding state-of-the-art, real-
23 time, continuous upwind and downwind sampling is
24 consistent with this technology-based approach, in
25 that that is really the only way of determining

1 the effectiveness of the program.

2 The program of dust mitigation can be
3 very effective if implemented aggressively. I
4 agree with Mr. Rubenstein's testimony that on some
5 construction sites when you see dust being
6 generated it's usually not due to a failure of the
7 dust control methods, but rather a failure to
8 implement the dust control methods in a suitable
9 timeframe.

10 So one thing that we must focus on is
11 the ability to control the dust and decrease what
12 would be a very significant impact to public
13 health is to implement that program aggressively,
14 the dust control program aggressively. And it
15 needs to be monitored.

16 The applicant's expert, Mr. Rubenstein,
17 has stated that South Coast uses the no-visible
18 dust approach at the fenceline, and that's what he
19 is advocating.

20 First of all, I respectfully disagree
21 with him, and the data that I have presented in
22 the four references that counsel has listed, so I
23 think you do have those before you. And they were
24 submitted for the docket?

25 MR. RATLIFF: They have not been, but

1 they can be.

2 DR. GREENBERG: Okay.

3 MR. RATLIFF: They're the references
4 that Mr. Greenberg has in his testimony.

5 DR. GREENBERG: Definitely supports my
6 contention that if you have no visible dust at the
7 fence line that does not mean, at all, that there
8 is not PM10 and 2.5.

9 Now, it's true that if you have no
10 visible dust at all at the site that the dust is
11 being generated from, in other words the source,
12 that chances are you're not generating any
13 particulate matter at all, or very little.

14 But the fence line of this particular
15 site could be, I guess, as long as 600 to 800 feet
16 away, if one were working in one area of the site.
17 And I think the site, the Los Esteros site is
18 perhaps as long as 800 feet away.

19 The heavier particles will indeed fall
20 out over 800 feet, an 800-foot distance. Even
21 much less than 800 feet. So that there would be
22 no visible dust at the fence line. But there
23 definitely would be PM10 and PM2.5.

24 Just one of the references I've
25 listed --

1 PRESIDING MEMBER KEESE: Let me ask one
2 question to give me a reference. How many
3 monitors are you thinking of?

4 DR. GREENBERG: Certainly that depends
5 on the number of sources. We have a unique
6 situation here. If this were just one shift of
7 construction we wouldn't be here asking for
8 particulate monitors.

9 But we're talking about an expedited
10 construction schedule that staff has not seen
11 before. We're looking at about 20 or 22 hours.
12 So there could be --

13 PRESIDING MEMBER KEESE: So do I gather
14 you --

15 DR. GREENBERG: -- multiple sources --

16 PRESIDING MEMBER KEESE: -- haven't
17 asked for monitoring on other projects, but
18 because this is expedited you might?

19 Okay, and I didn't ask, but I gather
20 what Mr. Rubenstein was talking about was one
21 monitor on one side and one on the other for the
22 worst case scenario.

23 DR. GREENBERG: They'll actually need
24 more than that, sir. It depends on what
25 sources --

1 PRESIDING MEMBER KEESE: How many
2 monitors are you thinking of?

3 DR. GREENBERG: I don't know their exact
4 construction schedule --

5 PRESIDING MEMBER KEESE: The words were
6 upwind and downwind, as I heard. I believe in the
7 application at one time, and then monitoring in
8 the next one.

9 DR. GREENBERG: Let me just give you an
10 example. If they have a trenching operation going
11 in one area the same time that they're also doing
12 major excavation that includes the use of a
13 backhoe, putting it into a dump truck and moving
14 it to a storage pile, which would be typical for a
15 construction site, then there may have to be as
16 many as three downwind monitors.

17 And one of my references does indeed
18 point out --

19 PRESIDING MEMBER KEESE: Would you move
20 these each day depending on which way the wind is
21 blowing?

22 DR. GREENBERG: Yes, sir. In other
23 words, Commissioner, certainly they're going to
24 know which way the wind is blowing when they start
25 up. Should the wind shift, two things might

1 occur.

2 One, the other monitors that they have
3 might be able to pick up what's coming from their
4 various activities. Talking about sources of PM10
5 and 2.5.

6 And if the wind shifted completely
7 around, their upwind monitors could serve now as
8 the downwind monitors.

9 However, what we are proposing that they
10 use a real-time portable PM10 monitors that have
11 been certified by USEPA and by the California Air
12 Resources Board that are easily moved.

13 And so they'll literally have to just
14 pick them up and follow the wind patterns.

15 PRESIDING MEMBER KEESE: So, I gather
16 you're talking about a 20-hour-a-day monitor who's
17 responsible for moving the monitoring equipment?
18 And did I hear a 30-minute timeframe was what you
19 wanted?

20 DR. GREENBERG: Yes. What we were
21 asking for really is that any time there is a 5
22 mcg/cubic meter exceedance over the upwind
23 concentration that that starts a tiered approach.

24 PRESIDING MEMBER KEESE: Putting more
25 water on or --

1 DR. GREENBERG: Or -- right, more
2 aggressive application of their existing method,
3 which is probably going to start with water. If
4 that continues after 30 minutes or whatever is in
5 the standard, or our proposed condition of
6 certification, I don't remember it precisely
7 offhand, but the next stage you'd add a second
8 mitigation measure.

9 And then if there is no response, a
10 lowering of the downwind concentration, somebody's
11 doing something wrong. It would have to be a
12 brief respite from construction activities until
13 they got things worked out.

14 The basis, by the way, of the 5 mcg/
15 cubic meter difference is analytical equipment.
16 The USEPA certified TM1400A has a variance range
17 of plus or minus 5 mcg/cubic meter.

18 So we obviously didn't want to have
19 something less than the machine's ability to read
20 that off, and that's over a ten-minute period.
21 Some very good sensitivity for a ten-minute
22 period. Obviously for a 30-minute period it would
23 get a little bit less.

24 But that's the basis of the 5 mcg/cubic
25 meter standard that we're proposing.

1 Staff is proposing that the applicant
2 prepare the sampling protocol consistent with what
3 the construction schedule will be. We don't know
4 what the construction schedule will be. We don't
5 know how many monitors should be right now.

6 I could certainly help them and prepare
7 it once I know exactly the construction schedule
8 and where the sources of particulate matter would
9 be, but we'll leave that to them. It's a
10 performance standard. We'll review it and
11 evaluate it.

12 And there is certainly ample opportunity
13 for them to not have two major sources at one
14 time. They might be able to schedule construction
15 activities so that they have one major source and
16 a minor source. And then maybe later on go to a
17 second major source and a second minor source so
18 as to decrease the number of monitors that would
19 be necessary. But that's up to them.

20 PRESIDING MEMBER KEESE: The expedited
21 time schedule that applicant is -- we haven't
22 heard about that, I guess, but is suggesting, does
23 that result in the equivalent amount of expediting
24 the dirt-moving, the earth-moving activities which
25 -- the dust-creating activities that you're

1 talking about, -- I mean have you decided that
2 that means instead of moving, creating dust for
3 six months, they're going to create dust for two
4 months? Is that --

5 DR. GREENBERG: Yes. It is, however,
6 over the 24-hour period that staff is most
7 concerned about, because they're compressing,
8 instead of having one shift in a 24-hour period,
9 which we found could be mitigated adequately, now
10 we're dealing here with perhaps three shifts in a
11 24-hour period. So the dust is going to
12 continually be generated, or at least it's going
13 to be continually suppressed.

14 And we just want to make sure that it is
15 indeed suppressed. And if it is suppressed to the
16 point where we don't notice any significant
17 difference upwind or downwind, according to the
18 ability of the machines to measure it, or the
19 instruments, rather, to measure it, then we're
20 convinced that the mitigation measures are indeed
21 working. And they should work.

22 We are concerned about the public health
23 impacts, not just over a 24-hour period, but
24 recent epidemiological investigations that have
25 been reported in the scientific literature show

1 that even one-hour spikes in a day can cause an
2 exacerbation of asthma, and cause an increase in
3 the risk for mortality.

4 I'm sure the Commission is indeed aware
5 of the "New England Journal of Medicine" article
6 from December 2000 that showed a .5 percent
7 increase in mortality for every 10 mcg/cubic meter
8 increase in PM10 over a long period of time.

9 Yet now this is starting to be
10 extrapolated down to shorter periods of time. And
11 the California Air Resources Board has just
12 started rulemaking on a state PM2.5 standard of 25
13 mcg/cubic meter over a 24-hour period.

14 So, the health effects of particulate
15 matter are now becoming much well known. We're in
16 an area here that is already in exceedance, well
17 in exceedance of the state 24-hour standard. The
18 state is looking to lower -- not lower, but to
19 actually initiate a 2.5 standard, and we now know
20 that certain short-term, one-hour spikes in PM10
21 exposure can result in an increase health effects.

22 Staff believes that the applicant can
23 indeed mitigate the PM10 emissions. The only way
24 to show that it is and enforce that is to have
25 monitoring.

1 PRESIDING MEMBER KEESE: And the
2 monitoring on the fenceline will assure that to
3 you? You don't want any impact outside the
4 fenceline? Or is it -- is there a population
5 you're concerned about?

6 DR. GREENBERG: That is the population
7 we are concerned about, the --

8 PRESIDING MEMBER KEESE: The fenceline?

9 DR. GREENBERG: However, the precise
10 location of the monitors would be determined by
11 the applicant and then, of course, staff would
12 review and evaluate it.

13 It could very well be that some of the
14 monitors for some of the onsite sources might be
15 within the fenceline.

16 Just, again, as a method of determining
17 the effectiveness of the dust suppression systems.

18 MR. SMITH: Mr. Greenberg, just for
19 clarification, when you say fenceline are you
20 referring to the power plant, the discrete power
21 plant, itself, or the entire property line bounded
22 by Coyote Creek and 237 and Zanker Road?

23 DR. GREENBERG: Just the power plant.

24 HEARING OFFICER WILLIAMS: Does that
25 conclude it?

1 DR. GREENBERG: Any further questions?

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

4 HEARING OFFICER WILLIAMS: Okay.
5 Applicant, do you have questions? I'm sure you
6 do.

7 MS. LUCKHARDT: You're correct, I do
8 have questions.

9 CROSS-EXAMINATION

10 BY MS. LUCKHARDT:

11 Q The question really is where to start.
12 Dr. Greenberg, you explained, I believe, in your
13 testimony that you were requiring this unusual --
14 have you ever required this of any other
15 Commission project, this monitoring? Energy
16 Commission project.

17 DR. GREENBERG: No, I have not.
18 Although I have considered it for the projects.

19 MS. LUCKHARDT: But you have not?

20 DR. GREENBERG: I have not.

21 MS. LUCKHARDT: And your, I believe it's
22 correct that you said you were requiring this
23 because there's an expedited schedule?

24 DR. GREENBERG: Correct.

25 MS. LUCKHARDT: And just out of

1 curiosity, the impacts predicted for a 24-hour of
2 this project, are they higher or lower than most
3 of the construction impacts for projects presented
4 to this Commission?

5 DR. GREENBERG: It would be just a guess
6 and I wouldn't want to guess or speculate on that,
7 so I don't know the answer.

8 MS. LUCKHARDT: So you don't know
9 whether these impacts are higher than other
10 Commission projects?

11 DR. GREENBERG: No, I don't. I do know,
12 however, the time marches on, and this is now the
13 year 2002, and what we know about the health
14 impacts and what we know about the mitigation
15 control and the ability for on-time monitoring has
16 advanced.

17 So I don't have the historical context,
18 but I do know about the present. And I can also
19 opine on the future.

20 MS. LUCKHARDT: Well, isn't it true that
21 most of the effects that you're referring to,
22 health effects that you're referring to are
23 related to PM2.5? The smaller version of the
24 particles?

25 DR. GREENBERG: Well, yes and no. When

1 you say most, are you referring to 90 percent
2 most, or 51 percent? Because certainly the
3 studies of impacts of PM10 down to 2.5 conducted
4 in Alaska point out that we should not forget the
5 2.5 to 10 mcg size.

6 MS. LUCKHARDT: Well, regarding the
7 reference that you made earlier to this study, I
8 believe it was "The New England Journal", did that
9 study focus on associated problems with PM10 or
10 PM2.5?

11 DR. GREENBERG: That was PM10.

12 MS. LUCKHARDT: So then are you implying
13 that this method of monitoring is going to be
14 required of Commission projects that don't have an
15 accelerated construction schedule, which impacts
16 could be higher than this?

17 DR. GREENBERG: Yes, I am implying that.
18 You might see other projects after this one having
19 the same request from staff in a proposed
20 condition of certification.

21 MS. LUCKHARDT: Okay, so then it isn't
22 based on the accelerated construction schedule for
23 this project?

24 DR. GREENBERG: It isn't -- for this
25 project, in my view, yes.

1 MS. LUCKHARDT: In your view it is, then
2 that would defy -- how can you claim that when you
3 are unsure as to whether this project has a higher
4 level of impact than any of those other projects?

5 DR. GREENBERG: I take each project as
6 it exists, and I look at what the background
7 levels are. And I also look at what the impacts
8 are proposed to be. And let me know when you're
9 ready to hear the rest of my answer.

10 MS. LUCKHARDT: I'm sorry.

11 (Laughter.)

12 MS. LUCKHARDT: Okay, go ahead.

13 DR. GREENBERG: And I'm not always
14 assigned to evaluate the public health impacts of
15 every CEC project.

16 MS. LUCKHARDT: I'll let that one go.

17 DR. GREENBERG: Thank you.

18 (Laughter.)

19 MS. LUCKHARDT: If you were to assume
20 that the impacts from this project are less,
21 smaller than the impacts from typical CEC
22 construction projects, then if that were the case,
23 would the accelerate schedule have anything to do
24 with it?

25 DR. GREENBERG: I think it would, and if

1 you'll permit me to elaborate on that. We have a
2 situation here where there will be construction
3 activities not just during the daytime, but in
4 dawn, dusk, in the middle of the night.

5 And, again, I would respectfully
6 disagree with the applicant's expert, Mr.
7 Rubenstein, that traveling the fenceline with a
8 flashlight is going to be adequate enforcement.

9 If you just want to do this one shift
10 during the day you'd probably get a different
11 answer from me unless the impacts were going to
12 be, you know, horrendous.

13 But as I previously stated, in my
14 previous testimony, based on one shift, I didn't
15 find that the impacts would be significant, and
16 the dust control methods, if implemented
17 aggressively, would mitigate this.

18 We have a different animal at this
19 point, and I'd prefer to address the specifics of
20 this particular project as we know it.

21 MS. LUCKHARDT: I'm curious if Mr.
22 Behymer is aware of standard levels of 24-hour
23 PM10 impacts from construction projects, any other
24 Commission projects.

25 MR. BEHYMER: I have some familiarity,

1 but not extensively.

2 MS. LUCKHARDT: And are you aware of
3 whether the impacts predicted for an accelerated
4 schedule is higher or lower than those impacts?

5 MR. BEHYMER: Some are higher.

6 MS. LUCKHARDT: Thank you. Okay, Dr.
7 Greenberg, isn't it true that construction impacts
8 are localized?

9 DR. GREENBERG: To a certain extent.
10 When you're dealing with construction impacts
11 there can be significant drift over even, you
12 know, contributing to the overall PM10, 2.5 of an
13 air basin. That might be a small contribution,
14 but it can still be a real contribution.

15 And your definition of localized could
16 be up to a mile.

17 MS. LUCKHARDT: But wouldn't, if the
18 CEC's mitigation measures were implemented,
19 wouldn't those impacts be localized then?

20 DR. GREENBERG: Yes. And the way to
21 insure that the dust mitigation plan is indeed
22 implemented is to monitor to make sure.

23 MS. LUCKHARDT: And I believe you were
24 clear in responding to the Commissioner that you
25 didn't have, as of yet there is no clear plan on

1 how to do this?

2 DR. GREENBERG: There is a clear plan
3 once we know what the construction schedule will
4 be, and you know, which activities would create
5 sources of particulate matter.

6 So, to that extent, then, it's not
7 clear. But to a certain extent it is. And I was
8 trying to, at one point, hold up a diagram from
9 one of the references listed in my testimony that
10 would show you how to monitor for certain
11 construction activities, such as areas swept up by
12 earth-moving equipment, dirt piles, et cetera. So
13 that much is clear.

14 MS. LUCKHARDT: But nonetheless with an
15 accelerate project you're asking for a brand new
16 type of monitoring program, correct?

17 DR. GREENBERG: Brand new for the
18 California Energy Commission.

19 MS. LUCKHARDT: Correct.

20 DR. GREENBERG: Yes.

21 MS. LUCKHARDT: And are you aware that
22 under staff's proposed noise conditions they have
23 requested that we relocate the residence at the
24 Silker property?

25 DR. GREENBERG: I wasn't aware of that,

1 no.

2 MS. LUCKHARDT: And, Dr. Greenberg, you
3 testified that the Bay Area Air Quality Management
4 District had not amended their CEQA guidelines
5 since 1996, is that correct?

6 DR. GREENBERG: Just in this particular
7 area.

8 MS. LUCKHARDT: But they have updated
9 their guidelines since then, isn't that true?

10 DR. GREENBERG: A couple sections, yes.
11 But I wasn't aware that they updated this
12 particular issue.

13 MS. LUCKHARDT: But they have addressed
14 the guidelines, and there has been an update since
15 '96?

16 DR. GREENBERG: Yes.

17 HEARING OFFICER WILLIAMS: I just want
18 to announce that it's the Committee's intention to
19 take a lunch break sometime between 12:00 and
20 12:30, so just for planning purposes.

21 MS. LUCKHARDT: That's all I have.

22 HEARING OFFICER WILLIAMS: Okay.

23 PRESIDING MEMBER KEESE: I have a
24 generic question for staff. Does this project
25 involve more earth moving than the typical

1 project, or less? Do we have a handle on that at
2 all?

3 MR. BEHYMER: It's likely less moving,
4 considering the smaller scale of the project
5 compared to the average. I assume you're
6 referring to the average project being a larger
7 combined cycle facility.

8 PRESIDING MEMBER KEESE: Yes, and I'm
9 considering the surface that we're dealing with.
10 Are we carving out half a mountain so that we can
11 set a power plant in the corner, or are we dealing
12 with rolling hills where we have to shave them
13 off? Or are we dealing with a flat piece of
14 property?

15 It seems to me that what we're talking
16 about here is the significance of the -- we're
17 saying it's dust, fugitive dust, that's what we're
18 trying to handle.

19 And so the question is how much movement
20 that causes dust, how much activity that causes
21 this dust is going to take place?

22 MR. BEHYMER: The only other project
23 that the expedited construction schedule was
24 explicitly compared to to determine the level of
25 significance was the non expedited Los Esteros

1 construction schedule.

2 We did not compare it to other
3 construction schedules to determine the level of
4 significance.

5 PRESIDING MEMBER KEESE: And essentially
6 he same amount of dust is going to be created by
7 the project whether it's expedited or not. The
8 concern is that by expediting it you increase the
9 amount that is put out any given day?

10 MR. BEHYMER: That's very accurate, and
11 the problem is we're dealing with 24-hour
12 particulate matter standard, health based
13 standard. So when you take a amount of dust that
14 was proposed to be emitted over an approximately
15 six-month to year period and you compress that
16 down to a two- to four-month period, you're
17 substantially increasing the health impacts.

18 PRESIDING MEMBER KEESE: Okay. Have you
19 given, you know, I did not see a defined plan that
20 said, well, other than your first proposal which
21 was upwind and downwind, which sounded like two
22 monitors. One monitor at one end and a monitor at
23 the other.

24 And the more generic term in your final,
25 I believe, which says monitoring.

1 Do we have more specifics about what you
2 have in mind?

3 MR. BEHYMER: The condition of
4 certification requires the applicant to --

5 PRESIDING MEMBER KEESE: Submit a plan
6 that you approve?

7 MR. BEHYMER: -- to hire -- essentially
8 to hire an expert to submit a ambient air quality
9 monitoring plan. This is very similar to the
10 source test monitoring that's required on an
11 operational facility. A independent party is
12 usually a professional is hired, a professional
13 contractor of sorts.

14 PRESIDING MEMBER KEESE: Do we know if
15 you're talking about somebody that's going to
16 watch this monitor 24 hours a day, 20 hours a day?

17 MR. BEHYMER: There is a construction
18 mitigation manager which is required by other
19 conditions of certification that is required to be
20 onsite and to full time monitor --

21 PRESIDING MEMBER KEESE: At all times
22 construction is taking place? Now, are we talking
23 about three people, or --

24 MR. BEHYMER: I'm not positive on that
25 issue. I'd have to get back to you.

1 The construction mitigation manager is a
2 full-time individual, yes.

3 PRESIDING MEMBER KEESE: Is a full time,
4 one full-time person?

5 MR. BEHYMER: One full-time person on an
6 expedited schedule, the applicant may see it
7 necessary to hire more than one individual. This
8 is normally an individual -- they have duties that
9 require activity during all construction.

10 So the applicant may see it necessary to
11 hire more than one individual to do those duties.

12 PRESIDING MEMBER KEESE: Okay, and it is
13 your assumption that if the applicant's talking
14 about an expedited schedule, that they would do
15 earth moving 20 hours a day?

16 MR. BEHYMER: The applicant did not
17 furnish us with a construction schedule. So, the
18 conditions --

19 PRESIDING MEMBER KEESE: Well, we may
20 hear some more on that later, but --

21 MR. BEHYMER: The condition was
22 intentionally written to be vague to allow the
23 applicant the flexibility to implement the dust
24 control and the monitoring of the dust control
25 measures in the most efficient way necessary in

1 order to achieve the goals of minimizing dust.

2 PRESIDING MEMBER KEESE: And I heard a
3 suggestion, I believe, that a major and a minor
4 construction activity at the same time might be
5 more acceptable than two major construction
6 activities. Are you suggesting putting something
7 like that into the --

8 DR. GREENBERG: Commissioner Keese, I'm
9 not suggesting that we do that because I do prefer
10 that this be a performance oriented standard as
11 opposed to specifying you're going to have so many
12 here or so many major sources or minor sources.

13 If I could refer you, please, to number
14 three of our proposed conditions of certification,
15 it states provisions for monitoring multiple
16 sources on the project site simultaneously.

17 If they have only one true source during
18 the construction, then they can have one upwind
19 and one downwind. If they're going to have two
20 sources of PM10, 2.5 from construction activities,
21 they might get away with one upwind and two
22 downwind; they may need two upwind and two
23 downwind if they're at opposite ends of the
24 facility.

25 We don't know that.

1 PRESIDING MEMBER KEESE: But it does
2 sound like the applicant was thinking upwind and
3 downwind meant on that most significant day in the
4 direction that the wind took on that most
5 significant day, they would put one monitor at one
6 end and one on the other. Because the applicant
7 it seems, if I recall, suggested that 90 percent
8 of the time the wind didn't blow that way.

9 But that on the most serious infraction
10 day it did. You're suggesting that that -- I
11 think we're not agreeing on what this proposal is.
12 You're suggesting a number of monitors that will
13 move, three upwind and three downwind.

14 DR. GREENBERG: However number it takes.
15 I certainly do not agree with the applicant's
16 interpretation that there would just be one upwind
17 and one downwind of a particular location that
18 they had modeled. That's not my --

19 PRESIDING MEMBER KEESE: Which was the
20 most -- which, in their, as I understood the
21 presentation, was in the wind direction that would
22 result in the highest concentration at the
23 fenceline.

24 DR. GREENBERG: We're not proposing that
25 at all. I don't understand how they arrived at

1 that interpretation.

2 PRESIDING MEMBER KEESE: Thank you.

3 MS. LUCKHARDT: I think, Commissioner,
4 what we're dealing with here is a brand new
5 condition that has just, it's come out of the
6 blue. We haven't seen it before in Energy
7 Commission projects. We didn't see it until mid
8 last week.

9 There's obviously some confusion between
10 ourselves and staff as to what they really
11 intended. And so, you know, it's very difficult
12 for us to judge as to, you know, how to implement
13 this within the time we have to get this project
14 underway.

15 PRESIDING MEMBER KEESE: I think I'm --
16 I'd like to understand staff's proposal, also, as
17 we head into our deliberations.

18 MR. BEHYMER: I would like to point out
19 that there are established procedures for this
20 type of monitoring. This is an exercise which has
21 occurred on numerous project sites before. Maybe
22 not Energy Commission project sites, but this is
23 an established procedure. USEPA --

24 PRESIDING MEMBER KEESE: For
25 construction?

1 MR. BEHYMER: For construction, earth-
2 moving activities, various forms of fugitive dust
3 generation activities. Monitoring upwind and
4 downwind, onsite monitoring has been done in many
5 cases and there are individuals who are experts at
6 this. There are firms who specialize in this.
7 And this is established, there are established
8 procedures for this activity.

9 MR. RATLIFF: Commissioner, if I may, I
10 would just point out that certainly Mr. Rubenstein
11 is aware that the Energy Commission has, the staff
12 is proposing monitoring in the Morro Bay case.

13 And in that case it's my understanding
14 that there's no opposition to upwind/downwind
15 monitoring.

16 MS. LUCKHARDT: I think in the sense
17 that Mr. Rubenstein is extremely familiar with
18 Morro Bay, that we have some differences of
19 opinion to that effect. But you can continue, and
20 then we'll give our impression.

21 HEARING OFFICER WILLIAMS: Well, it
22 sounds like --

23 MS. LUCKHARDT: Of the monitoring
24 requirements of Morro Bay.

25 HEARING OFFICER WILLIAMS: It sounds

1 like you all need some time to get together to
2 work this thing out. And I don't think that it's
3 a good idea to try to work it out in the midst of
4 evidentiary hearings.

5 But certainly to the extent you can, you
6 know, if you can get together and try to come up
7 with something that agreeable to both sides.

8 COMMISSIONER BOYD: Mr. Williams, let me
9 just say that something Ms. Luckhardt said a
10 moment ago about there being confusion is
11 certainly not confined to this issue in this
12 project. It's been a very confusing project.

13 I do note, though, that even the
14 original staff AQSC1 references the use of onsite
15 monitoring devices, period, with absolutely no
16 criteria, definition or what-have-you.

17 So, this is an area where better
18 agreement needs to be made on what does it take to
19 do, you know, the job in question.

20 And I don't fault people's continuing
21 growing concern about the health effects of
22 particulate matter, PM10 or more likely PM2.5.
23 But we've got to find a fair and perhaps middle
24 ground on this one, because it is very unclear to
25 me what exactly is intended here.

1 And I do think it deserves some very
2 quick discussion to design a little bit of
3 criteria as to what would dictate. I know there
4 was reference to a plan, but it takes a move by
5 this Committee to require that plan. And I must
6 confess it's a little fuzzy, even to someone who
7 has 20 years of air quality experience, myself, to
8 totally understand, you know, what we're going for
9 here.

10 And we may need some quick consultation
11 with other air quality experts resident down the
12 street in the State of California to get a better
13 fix on this.

14 MS. LUCKHARDT: If I might suggest, it
15 might be best if the Committee can authorize a
16 short meeting, perhaps over lunch, to see if we
17 could resolve this issue. We feel that we have
18 proposed what we believe is a reasonable
19 condition. But if you would prefer that we meet
20 with staff, we might be able to resolve it shortly
21 over lunch.

22 HEARING OFFICER WILLIAMS: That sounds
23 real good. I have a proposal that the
24 participants make whatever necessary contacts that
25 need to be made to allow us to proceed as long as

1 we need to today, to both include this kind of
2 resolution workshop, if you will, and I think we
3 could take a little bit longer lunch break to
4 allow for that.

5 And then come back this afternoon with
6 the expectation that we may be going late into the
7 evening if need be, to complete our proceedings
8 today.

9 That's my proposal. Does anybody have a
10 problem with that?

11 MS. LUCKHARDT: I don't have a problem
12 going late. I think for this particular issue we
13 will probably either reach agreement or not reach
14 agreement with staff within an hour. I don't
15 think an extended period of time is going to solve
16 this. We're either going to find something we can
17 all agree to, or we're not.

18 HEARING OFFICER WILLIAMS: Well, you've
19 got to eat, too, so we'll throw in a half an hour
20 for that.

21 (Pause.)

22 HEARING OFFICER WILLIAMS: So, with
23 that, I think it's the Committee's preference then
24 that we break now. And try to --

25 MS. LUCKHARDT: I just am wondering if

1 we should allow other folks the opportunity to
2 cross staff if they so desire.

3 PRESIDING MEMBER KEESE: Well, I was --
4 well, we'll give them a chance at it. I was
5 thinking that if we're going to do a workshop
6 between staff and applicant, you might want to
7 wait till you hear what they come up with before
8 you start your cross.

9 But if you'd like to cross now, -- I was
10 thinking we'd all be better off if we had some
11 clarity before we proceed on this issue.

12 MS. SCHILBERG: I do have a couple of
13 issues that haven't been addressed that might, as
14 I bring them up, then perhaps they will be mixed
15 in with the workshop issues.

16 PRESIDING MEMBER KEESE: That's fine.

17 MS. SCHILBERG: Yes.

18 PRESIDING MEMBER KEESE: I mean I think
19 that's, if you have new issues that you'd like to
20 throw in, it would be a good time.

21 MS. SCHILBERG: A few questions.

22 CROSS-EXAMINATION

23 BY MS. SCHILBERG:

24 Q The first is to Mr. Behymer about
25 originally in your testimony you said that under

1 the 12-month construction process you expected the
2 highest months of emissions to be in the middle
3 months, which I assume is like six and seven.

4 Under a six-month construction schedule
5 would you have that same expectation that the
6 highest emissions might be in month three and
7 four?

8 MR. BEHYMER: The construction schedule
9 furnished by the applicant, the original
10 construction schedule was approximately seven-
11 month construction schedule, so that was
12 specifically addressed; yes, months three and
13 four.

14 MS. SCHILBERG: So you would expect the
15 highest emissions in three and four?

16 MR. BEHYMER: Yes.

17 MS. SCHILBERG: Okay, so if the
18 applicant started construction on July 1st, so the
19 highest emissions would be in September and
20 October, right? That would be month three --

21 MR. BEHYMER: On a six-month or a four-
22 month schedule?

23 PRESIDING MEMBER KEESE: I would just
24 say I would assume earth moving takes place in the
25 first two months, but --

1 MS. SCHILBERG: Well, okay, this is one
2 of my questions, when does the earth moving
3 happen, and where I'm trying to relate it to is
4 your diagram that the emissions, the PM10
5 emissions are at peak levels in certainly October
6 and over the standard sometimes in September. And
7 so this timing issue is of concern.

8 MR. BEHYMER: I agree.

9 MS. SCHILBERG: And I don't think that
10 it has -- I've seen any concrete evidence, various
11 people allege that the applicant can move
12 construction different ways, but I don't think
13 that's going to address the timing of when the
14 worst emissions are going to be.

15 Let me ask another question about the
16 general upwind/downwind monitoring. Now, when it
17 says five -- first, let me go back.

18 The applicant has calculated that on
19 maximum days there would be maximum 37 mcg of PM10
20 added to the air in a day per cubic meter.

21 Well, let me ask Mr. Behymer, I think
22 you were not sure if based on page 5 if that was
23 based after mitigation or before mitigation, is
24 that correct, on your page 5. You say it's
25 unclear which of the mitigation measures were

1 already included in the modeling analysis.

2 So, is it true then that they could have
3 included all of these mitigation measures and
4 still, after the mitigation, come up with 37, is
5 that your understanding?

6 MR. BEHYMER: In the additional analysis
7 that I've done since the preparation of the
8 supplemental testimony it has become clear that
9 some of the mitigation measures were included at
10 an average level.

11 MS. SCHILBERG: So the 37 already
12 includes some of the mitigation measures from --

13 MR. BEHYMER: It includes an average
14 number of mitigation measures, an average
15 efficiency.

16 MS. SCHILBERG: So then the 37 -- so
17 you're saying that there's not a whole lot more --
18 well, they would have to do a lot more in order to
19 impact that 37?

20 MR. BEHYMER: No. I'm saying that they
21 would have to mitigate at above average. Above
22 average level of mitigation efficiency.

23 Again, this goes back to the largest
24 degree of uncertainty in these mitigation
25 efficiency numbers are due to the vigilance of the

1 construction personnel.

2 If you have a mitigation measure applied
3 perfectly, very very efficient, nearly 100
4 percent. If you have it not applied at all, then
5 you're zero, the average would be 50 percent
6 efficiency. And those average numbers are used in
7 the analysis.

8 It's staff's belief that applying above
9 average level, achieving above average level of
10 efficiency of those mitigation measures is
11 reasonably achievable.

12 MS. SCHILBERG: So if they do just
13 average they're going to add 37 extra milligram
14 per cubic meter on their maximum days, right?

15 MR. BEHYMER: On the worst case
16 assumptions, yes. Worse cast, ambient worst case
17 emissions assumptions.

18 MS. SCHILBERG: So now that's 37 for one
19 day. Now if we divided that into 20 hours, so
20 we're almost at two per hour, is that right? A
21 little less than 2 mcg/cubic meter per hour?

22 MR. BEHYMER: No, that's not how the
23 averaging works.

24 MS. SCHILBERG: How does it work?

25 MR. BEHYMER: It would work that it

1 would actually divide to the same number.

2 MS. SCHILBERG: Oh, so every hour there
3 are a million-thirty-seven?

4 MR. BEHYMER: The 24-hour average means
5 that over those 24 hours the average per hour was
6 37 micrograms. I'm sorry, the average was 37
7 micrograms in the ambient.

8 MS. SCHILBERG: Okay. And so if I had
9 an upwind and a downwind monitor I would register
10 a difference of 37, then, more or less, on a worst
11 day?

12 MR. BEHYMER: Averaged over 24 hours,
13 yes. So it could be twice that for 12 hours, and
14 then half that for 12 hours. Yes.

15 MS. SCHILBERG: Okay, so when you're
16 recommending 5, you're recommending less than one-
17 fifth of what they would have done under their
18 average mitigation?

19 MR. BEHYMER: Correct.

20 MS. SCHILBERG: Okay. And as I
21 understood it, the 5 is essentially, you can't get
22 more accurate than 5, is that basically what the
23 reason was?

24 DR. GREENBERG: That is the reported
25 accuracy of one of the instruments used to measure

1 PM10, 2.5, as averaged over a 10-minute period.
2 They could get more accurate over a 30-minute
3 period, but we think that this is a scientifically
4 based standard at this point.

5 That way we know that anything in excess
6 of 5 is real, averaged over a 30-minute period.

7 MS. SCHILBERG: So on one of these worst
8 days, if, for example, it happened that it was in
9 October and there's this emission you have your
10 maximum here of 114 in this October picture in
11 your supplemental air quality figure 1, if it were
12 114 and you added -- and you had the upwind/
13 downwind monitoring, you could end up with 119, is
14 that correct, with your procedures?

15 DR. GREENBERG: Yes. Let me further
16 explain that that's plus or minus 5 mcg/cubic
17 meter accuracy over a ten-minute period. That
18 means when the machine is showing a 5 over, that
19 could be 5 over, it could be zero, it could be 5
20 under, I mean, you know, --

21 MS. SCHILBERG: Yeah, right.

22 DR. GREENBERG: -- so, --

23 MS. SCHILBERG: Whereas if this happened
24 under the applicant's -- well, under the
25 applicant's modeling you would have the 114 plus

1 37?

2 MR. BEHYMER: That's correct.

3 MS. SCHILBERG: And the applicant has
4 not stated under their proposed revised AQSC1,
5 they haven't stated what their number would be
6 under theirs, is that --

7 MS. LUCKHARDT: Now you're asking staff
8 what applicant's number is? I'm wondering --

9 MS. SCHILBERG: Okay, we can strike
10 that. I think those are the other issues that I
11 wanted to raise at this point.

12 HEARING OFFICER WILLIAMS: Okay.

13 COMMISSIONER BOYD: Mr. Chairman, you
14 get a question clarified here. The 5 micrograms
15 that we're talking about here, averaged over 30
16 minutes, I see in recommendation is a trigger
17 level, as I read your proposal, a trigger level to
18 occasion the aggressive application of measures.
19 Am I understanding that correctly?

20 DR. GREENBERG: Yes, you are,
21 Commissioner.

22 HEARING OFFICER WILLIAMS: Mr. Brecher,
23 do you have some --

24 MR. BRECHER: Yes.

25 //

1 CROSS-EXAMINATION

2 BY MR. BRECHER:

3 Q When you mentioned the average
4 mitigation levels that we start with, are we
5 talking about this is something that the
6 Commission would ordinarily accept as proper
7 procedure?

8 MR. BEHYMER: This is something that
9 staff has recommended acceptance of in the past.

10 MR. BRECHER: So that until this day
11 staff and the Commission was satisfied with a set
12 of mitigation procedures such that as much as 37
13 mcg/cubic meter would reach the fenceline?

14 MR. BEHYMER: Again, in this analysis we
15 specifically did not accept the 37 --

16 MR. BRECHER: I understand, but
17 ordinarily that would be acceptable, the 37 level?

18 MR. BEHYMER: This is an expedited
19 schedule. I'm not aware of any other projects
20 that have an expedited schedule, so I can't
21 comment on how it would be treated in other
22 projects.

23 MR. BRECHER: Well, what was the --
24 before the expedited schedule made its appearance,
25 what was the amount of mcg/cubic meters that would

1 have been acceptable at the fenceline?

2 MR. BEHYMER: I don't have that data in
3 front of me. It's different on each project,
4 and --

5 MR. BRECHER: On this one.

6 MR. BEHYMER: On this one?

7 MR. BRECHER: Yeah.

8 MR. BEHYMER: 13.7 I think was the --
9 approximately 14 -- 13.2.

10 MR. BRECHER: Okay. And that did not
11 anticipate aggressive mitigation measures, is that
12 correct?

13 MR. BEHYMER: The staff was comfortable
14 that the average level of mitigation --

15 MR. BRECHER: Right.

16 MR. BEHYMER: -- mitigate that.

17 MR. BRECHER: Could you describe for us
18 the difference between the average level of
19 mitigation and the aggressive level of mitigation
20 that you're seeing in terms of what people do on
21 the ground.

22 MR. BEHYMER: You mean give a specific
23 example, or --

24 MR. BRECHER: Yeah. Or several
25 examples.

1 MR. BEHYMER: I can give one specific
2 example would be if there was earth-moving
3 activity with a large vehicle, such as a backhoe
4 or a bulldozer, and there was water being applied
5 to the earth-moving activity, the extreme best
6 case scenario would be that the water was being
7 applied very well, and that sufficient water was
8 being applied with great attention to detail, and
9 that very little or no dust was being emitted.

10 The worst case situation would be that
11 no water was being applied, and that the full
12 amount of dust was being emitted.

13 MR. BRECHER: And now I'd like you to
14 contrast the average level of mitigation that
15 would have been acceptable under the previous
16 schedule for this project, as opposed to the
17 aggressive level that you're now seeking.

18 MR. BEHYMER: Compare the two?

19 MR. BRECHER: Yes.

20 MR. BEHYMER: The aggressive level would
21 be that in most, if not all, cases the correct
22 amount of water would be applied, in my example,
23 and applied with good attention to detail so that
24 very little or no dust was emitted.

25 The average case would be over the

1 course of the project construction that you had
2 full range of mitigation efficiencies and they
3 would average to approximately half way between
4 the two extremes.

5 MR. BRECHER: And until the expedited
6 schedule made its appearance, the staff was
7 content to accept the mitigation strategy that was
8 similar to what you just described, is that
9 correct? Where some of the time there would not
10 be good attention to detail, and the best watering
11 methodologies would not be employed, is that
12 correct?

13 MR. BEHYMER: Staff recommended all
14 reasonable assurance that the best level of
15 mitigation would be employed; however, under the
16 worst case assumptions that are included in the
17 modeling analysis, they assumed a average level of
18 efficiency.

19 MR. BRECHER: So let me understand, I'm
20 assuming that before the expedited schedule made
21 its appearance, one was anticipating that they
22 would do the best job they could on mitigation,
23 isn't that correct?

24 MR. BEHYMER: One was anticipating they
25 would -- one was anticipating that the emissions

1 impacts would not be worse than the worst case
2 modeling analysis prepared.

3 MR. BRECHER: Well, could you answer the
4 question I actually asked you?

5 MR. BEHYMER: I'm sorry, could you
6 restate it?

7 MR. BRECHER: Yes. Was one not
8 assuming under the previous mitigation regime that
9 the applicant would be using the best attention
10 and detail and effort to mitigate properly, is
11 that correct?

12 MR. RATLIFF: Can I ask that be
13 clarified? When you say do you assume, do yo mean
14 do you assume for the purposes of writing the
15 condition, or do you assume for the purposes of
16 modeling the impact?

17 Because I think those are two different
18 answers.

19 MR. BRECHER: Let's have each answer.

20 MR. BEHYMER: For the purpose of
21 modeling the impact, staff would assume that the
22 applicant would, at best, do an average level of
23 mitigation. In other words, that there would be
24 full range of mitigation activities efficiency
25 onsite, and it would come out to an average over

1 the whole project.

2 In terms of writing conditions, staff
3 would assume that the level of mitigation would be
4 average or above average.

5 MR. BRECHER: And does that mean that
6 seeing your experience over the years, you know
7 that sometimes people fall asleep at the wheel and
8 they don't do the best possible job. Even though
9 it was their intent to do a better job?

10 MR. BEHYMER: That's essentially
11 correct.

12 MR. BRECHER: Okay, and now let's move
13 on to our current situation where we have an
14 expedited schedule and we're looking for more
15 aggressive mitigation measures.

16 How are we going to prevent people from
17 falling asleep at the wheel now when we didn't
18 used to be able to do that?

19 MR. BEHYMER: The proposed AQSC5, staff
20 proposed AQSC5 requires real time monitoring, and
21 the CMM, the construction mitigation manager,
22 would be in charge of enforcing additional
23 mitigation measures if there's a measure
24 violation.

25 So in the case that the monitors picked

1 up dust leaving the project site, the construction
2 personnel would be directed to implement their
3 construction mitigation again. Which staff hopes,
4 staff believes that that would prevent such lapses
5 that you described.

6 MR. BRECHER: So we have a heightened
7 vigilance under the aggressive monitoring
8 scenario?

9 MR. BEHYMER: Precisely, under this
10 aggressive construction schedule staff places a
11 heightened level of monitoring, of enforcement, if
12 necessary.

13 MR. BRECHER: And are you saying that
14 were we not to have an expedited construction
15 schedule that the vigilance, it would be
16 acceptable to have the vigilance relax somewhat
17 from what you're now proposing?

18 MR. BEHYMER: Under the non expedited
19 construction schedule our analysis has already
20 shown that we believe that an average level of
21 vigilance is sufficient to mitigate the -- under a
22 non expedited schedule.

23 MR. BRECHER: Okay, but three weeks ago
24 there was nothing to prevent the staff from having
25 required the same level of vigilance which it is

1 now requiring, is there?

2 MR. BEHYMER: Can you clarify what you
3 mean by nothing to prevent the staff?

4 MR. BRECHER: Yeah, in other words why
5 did the staff not think that people should be
6 extra super vigilant under a regular schedule, and
7 now they think they should be under an expedited
8 schedule?

9 MR. BEHYMER: I believe under the
10 regular schedule the benefit would be much less of
11 requiring a heightened level of enforcement than
12 under the expedited schedule.

13 MR. BRECHER: Okay, you didn't do an
14 economic analysis, you're not claiming it would
15 have been uneconomical before and now it is
16 economical?

17 MR. BEHYMER: No, I'm referring to air
18 quality benefits and health based benefits.

19 MR. BRECHER: Okay. No further
20 questions.

21 PRESIDING MEMBER KEESE: I have one
22 quick question, and then an observation.

23 Mathematically I heard the number 12
24 would have been acceptable under an eight-hour
25 day, which gets us to 96, which is close to 100.

1 And what you've proposed is 5 for 20 hours, which
2 gets us close to 100.

3 Would I assume that's pretty much what
4 you're seeking? Or is that terribly naive?

5 DR. GREENBERG: I think we're both a
6 little bit confused by the questions.

7 PRESIDING MEMBER KEESE: Well, I thought
8 i heard in answer to the previous question that
9 your standard in the past would have been 12 over
10 ambient.

11 MR. RATLIFF: Commissioner, I think
12 there's some confusion caused here by the way
13 we're talking about it, --

14 PRESIDING MEMBER KEESE: Okay, all
15 right. So if I'm just wrong I'll just forget it.

16 MR. RATLIFF: When we said 12 or 13 that
17 was an impact assumption that was essentially --

18 PRESIDING MEMBER KEESE: Would have been
19 acceptable --

20 MR. RATLIFF: -- a worst case
21 assumption.

22 PRESIDING MEMBER KEESE: -- for an
23 eight-hour day?

24 MR. RATLIFF: It's what you might call a
25 reasonable worst case assumption of the

1 effectiveness, which is --

2 PRESIDING MEMBER KEESE: But it would
3 have been acceptable in an eight-hour day? Which
4 if I multiplied the two I get 96, which is close
5 to 100.

6 And now under an expedited you're saying
7 5 is going to be your standard --

8 MR. BEHYMER: I think I can answer that.
9 The original modeling analysis predicted 13.2
10 being the maximum impact from the construction.

11 PRESIDING MEMBER KEESE: For eight
12 hours.

13 MR. BEHYMER: For eight hours. Our
14 condition requires a 5 microgram, which is lower,
15 you're correct, is lower than 13.2 trigger level.

16 The assumption is that if that 5 is
17 triggered there will, in fact, be a much higher,
18 possibly much higher, but definitely higher than 5
19 impact.

20 So between that 5 and that 13.2 is
21 safety margin.

22 PRESIDING MEMBER KEESE: Okay, thank
23 you.

24 DR. GREENBERG: If I could phrase a
25 response just -- well, a different way, if you

1 take that 13.2 and assume just a moderate
2 mitigation measures, you'll get 50 percent control
3 rather easy. And that's already then down to 6.5,
4 which is very close to the 5 level that we're
5 looking for.

6 PRESIDING MEMBER KEESE: Okay, thank
7 you.

8 We're going to take our break now.
9 We're going to take an hour and a half. So it
10 looks like we will reconvene at 2:00.

11 MS. LUCKHARDT: I have --

12 PRESIDING MEMBER KEESE: I would like
13 three points --

14 MS. LUCKHARDT: I've just one thing I'd
15 like to note for the record whenever it's
16 appropriate.

17 PRESIDING MEMBER KEESE: Okay, there's
18 three points that I'd like here, whether we're
19 talking about PM2.5 or PM10, because I keep
20 hearing it referred to differently.

21 I'd like people to explain to me the
22 difference between what I heard was it seems to me
23 a 50 standard by the South Coast and the Bay Area,
24 and you're talking about a standard of 5.

25 And the 24-hour standard versus a 30-

1 minute. I'm just saying, as you have your
2 deliberations, please come back and be clear, try
3 to make it clear for me, who doesn't have 20 years
4 experience as Mr. Boyd does, in air, exactly what
5 we're talking about.

6 Ms. Luckhardt.

7 MS. LUCKHARDT: And I would just like to
8 note for the record that the Metcalf decision has
9 been entered into the record in this proceeding.
10 That reflects a 24-hour PM10 construction impact
11 of 157 mcg/cubic meter. We're talking about 37 in
12 this case, with the expedited schedule.

13 PRESIDING MEMBER KEESE: Thank you.

14 Okay, we'll reconvene at 2:00.

15 (Whereupon, at 12:20 p.m., the hearing
16 was adjourned, to reconvene at 2:00
17 p.m., this same day.)

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1 AFTERNOON SESSION

2 2:07 p.m.

3 PRESIDING MEMBER KEESE: Staff. Do we
4 have any report?

5 MR. RATLIFF: Yes, Commissioner, we just
6 finished a long, and I think somewhat productive,
7 hopefully productive conference in which I think
8 we agreed on a conceptual approach which staff
9 believes achieves what it was trying to achieve,
10 but which is not objectionable to the applicant.

11 And Mr. Rubenstein is going to read the
12 list of measures that create this, or basically
13 the cornerstones of this plan.

14 What we would propose to do is after we
15 conclude this topic area we have the air quality
16 staff and Mr. Rubenstein go back and write the
17 condition as it would read that we would propose,
18 and stipulate to as a proposal to the Committee
19 for the air quality requirement.

20 Because we aren't quite ready to do
21 that. The details of some of the things are not
22 in the list that we're going to give, but we want
23 to give you the -- we think if we had another hour
24 or two, we could probably write the whole
25 condition out with the protocols and the

1 verification and so forth.

2 We would propose to do that afterwards
3 and give it to you before the end of the day, so
4 we can reach a complete agreement on everything
5 today.

6 PRESIDING MEMBER KEESE: That sounds
7 reasonable because we actually believe we may wind
8 up before the afternoon is over in a similar
9 situation on other issues. So why don't we hear
10 the explanation, and before we leave today
11 we'll --

12 MR. RATLIFF: I'd like to have Mr.
13 Rubenstein read that list and --

14 PRESIDING MEMBER KEESE: Right.

15 MR. RATLIFF: -- then have Mr. Greenberg
16 respond. I think that's probably the best way to
17 do it.

18 PRESIDING MEMBER KEESE: Okay.

19 MR. RUBENSTEIN: Thank you, Mr. Ratliff.

20 What we have agreed to in principle as
21 an alternative to the staff's proposal of or
22 modification to AQSC5 is the following set of
23 principles that will guide us in drafting a
24 revised condition.

25 First, we are both remaining focused on

1 performance based mitigation for dealing with
2 construction dust impacts as currently embodied in
3 the requirements of AQSC1.

4 Second, the construction mitigation
5 manager established to enforce, among other
6 things, the requirements of AQSC1, will be an
7 independent individual hired by the Energy
8 Commission, but paid for by the applicant.

9 And the construction mitigation manager
10 who, of necessity, during the early stages, may
11 comprise more than one individual, will be onsite
12 during all construction activities that have the
13 potential to generate any kind of dust.

14 The construction mitigation manager will
15 interface with the most senior member of the
16 construction crew that's present onsite during the
17 course of the day.

18 And the construction mitigation manager
19 will use three different sources of information to
20 determine whether the performance based mitigation
21 measures are being accurately implemented.

22 One will be the periodic measurements of
23 moisture which can be done in the field and soil,
24 to make sure that adequate watering is done to
25 suppress dust.

1 Second will be visual observations to
2 insure that there is no visible dust being
3 generated by activities which could have the
4 potential to allow PM10 to cross the property
5 line.

6 And then third, portable PM10 monitors,
7 which I'll discuss more in just a moment, all
8 three of those sets of data and information will
9 be used by the construction mitigation manager to
10 determine whether the construction dust mitigation
11 is properly being carried out.

12 In the event the construction mitigation
13 manager determines that these dust measures are
14 not being properly carried out, a tiered set of
15 responses will be implemented.

16 The first will be more aggressive
17 application of whatever the primary mitigation
18 measure is for that activity. For example,
19 increased use of water.

20 If that isn't sufficient in the CMM's
21 opinion to cure the problem, an additional
22 mitigation measure appropriate to that activity
23 would be required. That, for example, could be a
24 change in how a particular piece of equipment is
25 operating.

1 And then finally if that additional
2 mitigation measure is not sufficient in the CMM's
3 opinion to cure the problem, the CMM will have the
4 ability to direct that that particular activity be
5 stopped for an hour while further mitigation
6 measures are instituted with the possibility of a
7 phone call from someone at the site to someone at
8 the Commission to appeal that decision if there
9 are some truly extraordinary circumstances. And
10 we haven't exactly worked out what that mechanism
11 would be, but there would be some kind of relief
12 clause for extraordinary conditions.

13 As I mentioned earlier, one of the three
14 pieces of information that the construction
15 mitigation manager would rely upon would be
16 monitoring. We're envisioning this as a
17 demonstration or evaluation program using a pair
18 of either Datarams or some similar portable PM10
19 monitor that could be easily relocated from one
20 location to another.

21 Those monitors would collect data which
22 could then be reviewed by the compliance project
23 manager at the CEC to evaluate the performance of
24 the CMM. And as I said earlier, it would be one
25 of the pieces of information that the CMM would

1 rely upon, but it would not be the only piece of
2 information. And ultimately it would be the CMM's
3 professional judgment that would determine whether
4 or not additional mitigation was necessary at any
5 particular time for any particular activity.

6 And I think I covered everything on the
7 list. Dr. Greenberg, if you wanted to --

8 PRESIDING MEMBER KEESE: Do we have a
9 standard? I mean what is the -- do we have an
10 achievable goal here?

11 MR. RUBENSTEIN: We have --

12 PRESIDING MEMBER KEESE: Not to exceed?

13 DR. GREENBERG: The staff believes that
14 an achievable goal is indeed no net difference
15 between upwind and downwind PM10 concentrations.
16 We think this is readily achievable with
17 aggressive and continuous and appropriate dust
18 mitigation measures.

19 And within the limits of the ability of
20 the instruments to confirm that, we think it's
21 very achievable and the applicant should have no
22 problem achieving that. That's staff's goal.

23 COMMISSIONER BOYD: No threshold, no
24 trigger mechanism?

25 PRESIDING MEMBER KEESE: So basically

1 you're saying 5 --

2 DR. GREENBERG: We will have --

3 PRESIDING MEMBER KEESE: -- you're
4 saying that sounds like 5, because that was the
5 measuring capability of the monitor.

6 DR. GREENBERG: To answer both your
7 questions, Commissioners, yes, within the ability
8 of the instruments to detect a measurable
9 statistically significant difference, that trigger
10 level could be 5 mcg/cubic meter.

11 We are presently trying to work that out
12 with the applicant to arrive at a consensus on
13 what that trigger level would be.

14 COMMISSIONER BOYD: My compliments to
15 the staff and the applicant --

16 PRESIDING MEMBER KEESE: And both of you
17 are satisfied with that?

18 MS. LUCKHARDT: Yes.

19 MR. BEHYMER: Yes, we are.

20 MS. LUCKHARDT: Go ahead. Sorry.

21 MR. RUBENSTEIN: The part that I'm
22 satisfied is not necessarily the selection of a
23 particular number, but the fact that the CMM will
24 be using all three pieces of information and
25 ultimately will be a person and not an instrument

1 that will be determine, based on their judgment,
2 whether additional mitigation is required.

3 PRESIDING MEMBER KEESE: Okay. Mr.
4 Boyd, any questions?

5 COMMISSIONER BOYD: No, I think it's a
6 good compromise. As I said, maybe you didn't
7 hear, my compliments to both the staff and the
8 applicant. It's what I was looking for,
9 personally.

10 PRESIDING MEMBER KEESE: Okay.

11 COMMISSIONER BOYD: Maybe I need to be
12 complimenting everybody at the table there, I
13 don't know. I didn't mean to exclude the others,
14 and I guess maybe we'll hear from the other
15 parties at the table.

16 HEARING OFFICER WILLIAMS: Yeah, I think
17 that's appropriate now, to hear from the other
18 parties at the table, the intervenors.

19 MS. SCHILBERG: I have a question. I
20 think Mr. Ratliff indicated that you would be
21 following up with protocols and verification.
22 Harmonization, because I note that at the present
23 the verification proposed condition of the
24 applicant, which is 15 days prior to breaking
25 ground, the copy of the dust mitigation plan would

1 be provided. Whereas for staff it's 60 days prior
2 to breaking ground there would be a compliance
3 report set out.

4 Do you have any indications of how that
5 harmonization of those two is going to be
6 achieved?

7 MR. RATLIFF: Yes. The 60 days was, I
8 think, an oversight on our part when we drafted
9 the original condition. We'll go to some shorter,
10 more abbreviated number. I'm not sure what number
11 that will be, but 60 days would be more than we
12 need.

13 HEARING OFFICER WILLIAMS: Is that
14 microphone on down there? We're having a kind of
15 hard time hearing you.

16 MR. RATLIFF: Am I not being heard?
17 Maybe if I speak up.

18 Staff didn't really intend 60 days.
19 That is not the number that we want for that
20 verification. So --

21 PRESIDING MEMBER KEESE: Okay, but it
22 sounds to me like we're moving towards a submittal
23 here in the short term as to most of the project.
24 Most of the parameters will be set here in a
25 submittal that you will jointly make to us that

1 everyone will see?

2 MR. RATLIFF: Yes, our goal, at least,
3 is to have something by 5:00 --

4 PRESIDING MEMBER KEESE: So, we're --

5 MR. RATLIFF: -- that's final.

6 PRESIDING MEMBER KEESE: -- we're, to a
7 large extent, avoiding the need for a new plan 60
8 or 15 days in advance, because you'll have one?
9 You're going to lay most of it on us by tonight?

10 MR. RATLIFF: We will lay the complete
11 condition on you tonight.

12 PRESIDING MEMBER KEESE: Okay.

13 MR. RATLIFF: That's right.

14 PRESIDING MEMBER KEESE: Does that
15 answer -- rather than buying a pig in a poke and
16 seeing what it is, 60 or 15 days before, they're
17 going to tell us what the conditions are.

18 MS. SCHILBERG: So the 15 versus 60 days
19 was the submittal of a plan. And my understanding
20 is they're going to figure out whether it's 60 or
21 15 or somewhere in between, but is it true that
22 some sort of plan is still going to be required or
23 no?

24 MR. BEHYMER: Yes, the plan --

25 MS. LUCKHARDT: Well, for AQSC1 I

1 believe we've already submitted a plan, a draft
2 plan for review by the Commission.

3 MR. BEHYMER: Yes.

4 MR. SALAMY: Yes. I believe it was
5 actually commented on. I believe the applicant
6 did submit a plan. It was commented upon by the
7 Commission. Those comments were incorporated and
8 the plan was resubmitted for approval.

9 Obviously as a result of AQSC5, the plan
10 would have to be amended.

11 MS. LUCKHARDT: But the broad parameters
12 of the program would be specified in the condition
13 that these folks are going to work on right now.

14 PRESIDING MEMBER KEESE: That is laid
15 out -- that you're going to work on later this
16 afternoon, later this afternoon.

17 MS. LUCKHARDT: Yes.

18 MR. BRECHER: May I ask a question?

19 PRESIDING MEMBER KEESE: Certainly.

20 MR. BRECHER: When will the amended plan
21 be available?

22 PRESIDING MEMBER KEESE: It sounds
23 like --

24 MS. LUCKHARDT: The amended plan is
25 typically a compliance type of activity; it is

1 what executes the condition. It's not something
2 that is, in most cases, typically provided before
3 certification in this case, because the project
4 would like to start construction as soon as
5 possible. We've already started with compliance
6 filings.

7 So that may be filed shortly.

8 PRESIDING MEMBER KEESE: So rather than
9 having a general plan submitted by 5:00, they just
10 say we'll have a plan, they're going to give us
11 reasonable specifics on a plan by 5:00. And then
12 the actual plan will be worked out with the
13 compliance manager before the start of
14 construction.

15 Did you pick a date as to when you --
16 because the specific question was is it 60 days or
17 15 days.

18 MR. SALAMY: It's 15.

19 MS. LUCKHARDT: Fifteen.

20 MR. RUBENSTEIN: AQSC1 is 15 days prior
21 to construction. AQSC5, I believe will no longer
22 have a requirement for a separate plan. The only
23 plan will be that required by AQSC1.

24 MS. LUCKHARDT: To be worked out --

25 MR. RUBENSTEIN: I guess we'll have to

1 work out that detail --

2 MS. LUCKHARDT: -- my guess is that it
3 would be a 15 day --

4 PRESIDING MEMBER KEESE: Sounds like 15
5 days.

6 MS. LUCKHARDT: -- 15 days.

7 PRESIDING MEMBER KEESE: Fifteen days,
8 okay.

9 HEARING OFFICER WILLIAMS: Any more
10 questions? Does that do it for air quality and
11 public health? Do we have anybody on the phone?

12 So I think we can move on, subject to
13 the later piece of information.

14 Biological resources is next.

15 MS. LUCKHARDT: I'm sorry, Major, I
16 didn't hear you. Which subject area are we taking
17 up next? Are we taking up noise? Are we
18 following the original schedule or --

19 HEARING OFFICER WILLIAMS: Is it noise?
20 Let me double check here. Noise.

21 PRESIDING MEMBER KEESE: Noise.

22 HEARING OFFICER WILLIAMS: Sorry.

23 MS. LUCKHARDT: Okay.

24 (Pause.)

25 MS. LUCKHARDT: The applicant calls Mr.

1 Bastasch. If you'd please state your name and --
2 actually, you need to be sworn first.

3 Whereupon,

4 MARK BASTASCH

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

8 DIRECT EXAMINATION

9 BY MS. LUCKHARDT:

10 Q And then if you would please state your
11 name and spell your name for the record.

12 A Mark Bastasch, M-a-r-k B, as in boy,
13 a-s-t-a-s-c-h.

14 Q And do you have a copy of applicant's
15 testimony on noise marked as -- it will be marked
16 as exhibit 3B1, in front of you?

17 A Yes.

18 Q And was this testimony prepared by you
19 or at your direction?

20 A It was.

21 Q And does this testimony, or does your
22 previous testimony include a description of your
23 qualifications?

24 A It did.

25 Q And do you have any corrections or

1 clarifications that you would like to make to your
2 testimony?

3 A No.

4 Q And are the facts contained in this
5 testimony true to the best of your knowledge?

6 A Yes.

7 Q And do the opinions contained therein
8 represent your best professional judgment?

9 A Yes.

10 Q And do you adopt this testimony on noise
11 as your testimony in this proceeding?

12 A Yes.

13 Q And could you please provide a summary
14 of your analysis of nighttime construction noise
15 impacts?

16 A Sure. As you know the project site is
17 located adjacent to a relatively busy highway.
18 The Silker home, itself, is located within a
19 couple hundred feet of the highway. The mobile
20 home park is also within a couple hundred feet of
21 the highway.

22 It's exposed to around-the-clock noise;
23 noise does drop down for several hours during the
24 middle of the night, but it's still at a
25 relatively high background level, the 40s to 50s.

1 The project, given the ambient
2 conditions of the site and of the receptors, the
3 project construction noise at night should not
4 represent an impact especially with the conditions
5 being proposed.

6 Q And do you agree with staff's additional
7 proposed mitigation to relocate the Silker
8 residence during construction?

9 A Yes, I do.

10 Q And is this type of mitigation standard
11 for a temporary impact such as construction?

12 A Yes, it's been offered up when there's a
13 relatively few receptors and when it's acceptable
14 to the residents.

15 Q And in your professional opinion does
16 the potential noise from construction at night,
17 when mitigated with the conditions proposed by
18 Commission Staff, create a significant adverse
19 impact?

20 A No.

21 MS. LUCKHARDT: Mr. Bastasch is
22 available for cross.

23 HEARING OFFICER WILLIAMS: Do you have
24 any questions?

25 MR. RATLIFF: No.

1 MR. BRECHER: No.

2 MS. SCHILBERG: I have no questions.

3 HEARING OFFICER WILLIAMS: Okay. No
4 questions. We'll move right along to staff.

5 MR. RATLIFF: The staff witness is
6 Brewster Birdsall.

7 Whereupon,

8 BREWSTER BIRDSALL

9 was called as a witness herein, and after first
10 having been duly sworn, was examined and testified
11 as follows:

12 DIRECT EXAMINATION

13 BY MR. RATLIFF:

14 Q Mr. Birdsall, did you prepare the staff
15 testimony presented in the staff assessment on
16 noise?

17 A Yes, I did.

18 Q And you also prepared the supplementary
19 testimony that you're sponsoring today, is that
20 correct?

21 A Yes, I did.

22 Q Can you summarize that testimony
23 briefly?

24 A The supplemental testimony addressed the
25 24-hour impacts, or the 24-hour effects of the

1 noise that would occur at night.

2 The staff took a more conservative
3 approach, or took a conservative approach, I'll
4 say, by assuming that not all of the heavy
5 equipment activity could be restricted to the
6 daytime hours given the expedited schedule. And
7 that some kinds of heavy equipment activity could
8 occur at night.

9 In order to take a conservative approach
10 we assumed that the noise levels caused by the
11 heavy equipment at night would be similar to those
12 that were presented by the applicant for similar
13 activities occurring in the daytime.

14 We normally, from staff's perspective,
15 consider construction impacts to be mitigated when
16 all feasible -- well, to be mitigated when
17 nighttime noise is avoided as possible.

18 Seeing that that might not be entirely
19 possible with an expedited construction schedule,
20 we took a look at quantifying what the noise
21 levels would be at the nearest residences, and
22 this included the Silker property and the mobile
23 home park.

24 And made an attempt at understanding
25 what the level of change would be at night if the

1 construction of the site were to occur pretty much
2 at full bore at any hour of the day.

3 We determined that at the trailer home
4 park, which is a little bit further away and
5 across the freeway, that with hourly restrictions
6 on pile-driving, the noisiest activities, that the
7 nighttime noise levels would change by roughly 5
8 decibels, and this is with the construction
9 activities.

10 In the case of operation of the power
11 plant, 5 decibel increases, normally considered to
12 be at the edge of what would be a significant
13 increase in noise levels, given that the case the
14 construction schedule be expedited, and that the
15 construction effects would be limited to the short
16 term of just the four to six months, the staff
17 determined that with hourly restrictions on pile
18 driving, the remaining construction activities
19 could occur at the project site, and not cause a
20 significant impact to the trailer homes.

21 For the Silker property we have a
22 discrete location of one group of residences, not
23 an entire neighborhood. We considered the options
24 of limiting source noise, which is to say
25 restricting the activity at the project site at

1 night versus the feasibility or effectiveness of
2 putting barriers in between the Silker house and
3 the project site, versus the more extreme approach
4 of just simply providing the Silkers the
5 opportunity to relocate themselves at, of course,
6 the expense of the applicant, should they
7 determine in their perception that they are being
8 significantly impacted.

9 So, we tried to craft a mitigation
10 measure and this is the revised condition of
11 certification Noise-6 that's in my staff
12 assessment.

13 We attempted to craft a condition of
14 certification that provided the Silkers with the
15 ability to essentially mitigate -- let me back up.
16 We created a conditions of certification that
17 would eliminate the noise impact by eliminating
18 the receptor during those times when the receptor
19 would be most exposed.

20 And in conclusion, with the receptor
21 relocated, the impact would be less than
22 significant.

23 Q Does that conclude your testimony?

24 A That does.

25 MS. LUCKHARDT: No questions.

1 HEARING OFFICER WILLIAMS: Questions?

2 MR. BRECHER: No.

3 PRESIDING MEMBER KEESE: Do we have
4 anybody on the phone with us?

5 MS. LEE: Yes.

6 PRESIDING MEMBER KEESE: Please identify
7 yourself.

8 MS. LEE: This is Elena Lee from the
9 City of San Jose Planning Division.

10 PRESIDING MEMBER KEESE: Thank you.
11 We're just finishing up the issue of noise, as you
12 heard. We've heard from applicant' we've heard
13 from staff. There are no questions. Did you have
14 anything to add to that issue?

15 MS. LEE: No, we do not.

16 PRESIDING MEMBER KEESE: Thank you.

17 HEARING OFFICER WILLIAMS: Okay. So
18 we'll move into -- I guess you'll move into
19 evidence the exhibits?

20 MS. LUCKHARDT: Oh, yes, I'd like to
21 move applicant's exhibit 3E1 into evidence. It's
22 applicant's supplemental testimony on noise.

23 HEARING OFFICER WILLIAMS: So moved.

24 And, staff, your --

25 MR. RATLIFF: How do you want to do

1 that? Do you want to move the whole thing in at
2 the close of the testimony, or do you want to move
3 it --

4 HEARING OFFICER WILLIAMS: Yeah, we can
5 move it in as a group at the close.

6 MR. RATLIFF: As a group, okay.

7 HEARING OFFICER WILLIAMS: Okay. All
8 right, so that will close out noise.

9 And traffic is next.

10 (Pause.)

11 MS. LUCKHARDT: Okay, applicant recalls
12 Mr. Salamy; he has previously been sworn.
13 Whereupon,

14 JERRY SALAMY
15 was recalled as a witness herein, and having been
16 previously duly sworn, was examined and testified
17 further as follows:

18 DIRECT EXAMINATION

19 BY MS. LUCKHARDT:

20 Q Why don't you please restate your name
21 for the record.

22 A My name is Jerry Salamy, J-e-r-r-y
23 S-a-l-a-m-y.

24 Q And do you have a copy of applicant's
25 supplemental testimony on traffic and

1 transportation marked as exhibit 3K1?

2 A Yes, I do.

3 Q And was this testimony prepared by you
4 or at your direction?

5 A Yes, it was.

6 Q And does this testimony, or did your
7 previous testimony include a description of your
8 qualifications?

9 A Yes, it did.

10 Q And do you have any corrections or
11 clarifications you would like to make to your
12 testimony?

13 A No, I do not.

14 Q And are the facts contained in your
15 testimony true to the best of your knowledge?

16 A Yes, they are.

17 Q And do the opinions contained therein
18 represent your best professional judgment?

19 A Yes, they do.

20 Q And do you adopt this testimony as your
21 testimony on traffic and transportation in this
22 proceeding?

23 A Yes, I do.

24 Q Did the traffic and transportation
25 analysis performed for construction impacts

1 originally performed for the AFC include a 24-
2 hour-a-day construction?

3 A It envisioned two construction shifts,
4 which we assumed to be 24 hours a day.

5 Q And --

6 A Yes.

7 Q Okay, that's fine. And what were the
8 conclusions of that analysis of construction
9 traffic?

10 A That analysis concluded that there would
11 be no significant transportation or traffic
12 impacts from construction.

13 Q And does the accelerated construction
14 schedule change that analysis in any way?

15 A No, it does not.

16 Q And how did you arrive at your
17 conclusion that there would not be any impacts?

18 A We first analyzed the potential roads
19 affected by the construction traffic, both
20 employees, as well as deliveries to the project
21 site of materials.

22 We looked at the potential traffic
23 associated with those deliveries and the roadway
24 segments. We analyzed the level of service both
25 with and without the project. And compared the

1 project impacts to local significance criteria.

2 Q And did Commission Staff propose
3 mitigation measures for construction traffic?

4 A Yes, they did. They proposed initially
5 two conditions of certification, and then
6 rescinded one of them. And that requires the
7 preparation of a transportation management plan.

8 Q And do Commission Staff's proposed
9 mitigation measures adequately address
10 construction traffic?

11 A I believe they do.

12 Q And does that mitigation plan require
13 certain peak hours where traffic is to be
14 minimized, or construction traffic?

15 A The condition of certification requires
16 that construction traffic occur offpeak times.
17 And the schedule proposed in the testimony for
18 traffic and transportation would accomplish that.

19 Q So taking into account the construction
20 management plan and construction schedule, in your
21 professional opinion will the construction traffic
22 for the accelerated construction schedule or
23 otherwise create a significant adverse impact?

24 A No, it will not.

25 MS. LUCKHARDT: Mr. Salamy is available

1 for cross.

2 HEARING OFFICER WILLIAMS: Any
3 questions?

4 MR. RATLIFF: No questions.

5 MR. BRECHER: No questions.

6 MS. SCHILBERG: No questions.

7 HEARING OFFICER WILLIAMS: Okay.

8 MS. LUCKHARDT: I guess at this time I
9 should move Mr. Sality's testimony on traffic and
10 transportation, marked as exhibit 3K1, into
11 evidence.

12 HEARING OFFICER WILLIAMS: It's
13 received.

14 Staff.

15 MR. RATLIFF: No objection.

16 HEARING OFFICER WILLIAMS: Do you want
17 to --

18 MR. RATLIFF: Staff actually presented
19 no new testimony on this issue. We only
20 reiterated that the Trans condition 1 require
21 consultation with Caltrans regarding the
22 scheduling of any traffic.

23 HEARING OFFICER WILLIAMS: Okay, then we
24 can close out traffic -- at least if there are no
25 questions we can close out traffic and move on to

1 the next topic, which is transmission system
2 engineering.

3 MS. LUCKHARDT: Applicant calls Ali
4 Amirali to testify on transmission system
5 engineering. He has not been sworn.
6 Whereupon,

7 AMANALI "ALI" AMIRALI
8 was called as a witness herein, and after first
9 having been duly sworn, was examined and testified
10 as follows:

11 DIRECT EXAMINATION

12 BY MS. LUCKHARDT:

13 Q And, Mr. Amirali, if you could state and
14 spell your name for the record.

15 A Full name Amanali Amirali,
16 A-m-a-n-a-l-i, last name Amirali, A-m-i-r-a-l-i.

17 Q And do you have a copy of applicant's
18 testimony on transmission system engineering
19 marked as exhibit 4F1?

20 A I do.

21 Q And was this testimony prepared by you
22 or at your direction?

23 A It was.

24 Q And does this testimony or did your
25 previous testimony include a description of your

1 qualifications?

2 A It did.

3 Q And do you have any corrections or
4 clarifications you'd like to make to that
5 testimony at this time?

6 A No.

7 Q And are the facts contained in your
8 testimony true to the best of your knowledge?

9 A They are.

10 Q And do the opinions contained therein
11 represent your best professional judgment?

12 A They do.

13 Q And do you adopt this testimony on
14 transmission system engineering as your testimony
15 in this proceeding?

16 A Yes, I do.

17 Q And could you please describe the
18 temporary interconnection proposed for Los Esteros
19 Critical Energy Facility?

20 A The temporary interconnection Los
21 Esteros Critical Energy Facility will be connected
22 to the PG&E system via a 2000-foot, 115 kV wood
23 pole transmission line. That will be the
24 temporary interconnection prior to the -- for the
25 interconnection that has been stated as the

1 permanent interconnection, which will be after the
2 construction of the PG&E Los Esteros substation.

3 Q And is this temporary interconnection
4 dependent in any way upon the construction of
5 PG&E's Los Esteros substation?

6 A No, it's not. Los Esteros Critical
7 Energy Facility will be online and operational
8 much earlier than PG&E's Los Esteros substation.
9 And should the date of the Los Esteros substation
10 slip or should the project even fall off PG&E's
11 radar screen, it will not make any difference
12 because all the impacts of the project with the,
13 under the temporary interconnection are mitigated.

14 Q And then please describe the projected
15 interconnection after PG&E builds the Los Esteros
16 substation.

17 A After PG&E constructs its Los Esteros
18 substation, there will be what is called a
19 permanent interconnection which will involve a
20 approximate 215 feet of underground line and the
21 project will be connected directly to the Los
22 Esteros buss 115 kV.

23 Q And has PG&E prepared execution
24 documents for the generator special facilities
25 agreement and the generator interconnection

1 agreement?

2 A Yes, they have, and they are attached to
3 my testimony.

4 Q And has Calpine accepted those terms?

5 A Yes, we have. And we have a signed
6 agreement and we have returned the signed
7 agreement to the PG&E.

8 Q Great.

9 MS. LUCKHARDT: I have no further
10 questions.

11 HEARING OFFICER WILLIAMS: Questions?

12 MR. RATLIFF: No questions.

13 MR. BRECHER: No questions.

14 MS. SCHILBERG: I have just a few
15 questions.

16 CROSS-EXAMINATION

17 BY MS. SCHILBERG:

18 Q So, as I understand it, the detail of
19 the special facilities charge is what is
20 applicable to the temporary line, is that correct?

21 A The one that you have in front, yes.

22 Q So in your attachment Trans-1 there is a
23 generator special facilities agreement of several
24 pages, --

25 A Um-hum.

1 Q -- and then at the end is an appendix A,
2 detail of special facilities charges?

3 A Yes.

4 Q So I do have a question. I notice that
5 the charges on line 2A and 2C are blank.

6 MS. LUCKHARDT: Those have been deleted.
7 The amount of the interconnection fee, I believe,
8 is irrelevant to this proceeding. The interest of
9 this Commission is as to whether there is one or
10 not. Not to the cost of the interconnection.

11 BY MS. SCHILBERG:

12 Q So you would confirm that that number
13 has been agreed upon by Calpine and by PG&E, it's
14 just been deleted from this document, is that the
15 situation?

16 A This is the total charge that you see in
17 front of you.

18 Q Okay, the one that I have --

19 MS. LUCKHARDT: They have a whited-out
20 version, Ali.

21 MR. AMIRALI: Oh, okay.

22 (Laughter.)

23 MR. AMIRALI: Yes, it has been agreed
24 upon by the parties.

25 //

1 BY MS. SCHILBERG:

2 Q Okay. The second thing that I wanted to
3 mention for the record about five or six pages
4 later there's a letter from Tom Markil to Nick
5 Gaglia of March 27, 2002.

6 A Um-hum.

7 Q I know earlier there had been a
8 controversy in the hearing as to whether or not
9 the decision of this Commission prevails in terms
10 of what has to be filed for special facilities.

11 And I think, if you look at the last
12 paragraph, midway down the last paragraph, it says
13 PG&E will have to file for a notice to construct,
14 an NOC, with the CPUC in order to comply with the
15 CPUC general order 131D once the CEC approves the
16 project.

17 The NOC is expected to take
18 approximately 60 calendar days, although it may
19 take longer depending on any public comments that
20 may be received by the CPUC, correct?

21 A I see the -- yeah, I see it written
22 there, yeah.

23 Q Right. I think that might contradict a
24 statement by Mr. Ratliff earlier in the record
25 that essentially said that there was no--

1 MS. LUCKHARDT: Is this a question?

2 HEARING OFFICER WILLIAMS: Well, I think
3 she's -- she's just trying to clarify Mr.
4 Ratliff's comments at the March 11th proceeding
5 which indicated that the Commission has
6 jurisdiction up to the initial point of
7 interconnect. And because the Commission has
8 jurisdiction over that first point of
9 interconnect, then -- and I don't remember
10 precisely what your remarks were, but it had to do
11 with the CPUC's involvement in --

12 MR. RATLIFF: I believe that I was
13 responding to the implication of the cross-
14 examination by TURN at that time that there would
15 have to be another environmental analysis for any
16 PUC revision, any subsequent PUC action to allow
17 the building of the TAP line.

18 And what I was saying is no, the Energy
19 Commission is the lead agency that grants the
20 permit; it does the environmental analysis to the
21 first point of interconnection.

22 HEARING OFFICER WILLIAMS: That's right.
23 So that what that leads to, I believe the
24 clarification is that the PUC would not require
25 any further environmental work on that aspect of

1 the project.

2 MS. SCHILBERG: All I was trying to
3 clarify is that there is a PUC step that has some
4 time associated with it in creating the special
5 facilities.

6 BY MS. SCHILBERG:

7 Q Is that your understanding?

8 MS. LUCKHARDT: I don't think he quite
9 understands the question that you're asking.

10 MS. SCHILBERG: Well, I think it's
11 sufficient to draw it to the Commission's
12 attention that there is a document that slightly
13 contradicts maybe what was in the transcript. And
14 that was basically all I wanted to --

15 PRESIDING MEMBER KEESE: As I understand
16 the question, is there a PUC step still to be
17 taken, is that correct? You're asking is there
18 another step? Do we have a filing at the PUC? Do
19 we need PUC action?

20 MS. LUCKHARDT: I think what we're
21 referring to here is that -- are PG&E's
22 requirements with the PUC. And in order for PG&E
23 to build anything they have to file a notice to
24 construct with the PUC.

25 So this is very standard. It happens on

1 every project that PG&E has to construct; and in
2 this instance, and in instances where the Energy
3 Commission has jurisdiction, the environmental
4 documentation has already been completed. There
5 are usually not questions over cost because the
6 cost has been agreed to and paid by the applicant,
7 in this instance, and not PG&E.

8 So it doesn't raise concerns of whether
9 the Public Utilities Commission is willing to pay
10 what PG&E thinks the cost of the installation
11 would be.

12 So the issues have been greatly
13 diminished on these items.

14 HEARING OFFICER WILLIAMS: Does that
15 provide the clarification?

16 MS. SCHILBERG: Yes. No further
17 questions.

18 HEARING OFFICER WILLIAMS: Okay. Great.
19 Staff, do you -- is there anything that you have
20 to offer on this?

21 MR. RATLIFF: Staff did not file any
22 supplementary testimony on this, but we did bring
23 back our witness from the prior hearing to answer
24 any questions the Committee may have regarding any
25 of the testimony or anything that is unresolved to

1 the Committee.

2 HEARING OFFICER WILLIAMS: I don't
3 believe that we have any further questions. So
4 you can release your witness if you like. Thank
5 you for coming.

6 MS. LUCKHARDT: At this point I would
7 like to move applicant's exhibit on transmission
8 system engineering, if I can find it quickly,
9 exhibit 4F1, into the record.

10 HEARING OFFICER WILLIAMS: Okay, we'll
11 receive it.

12 And we'll close the record on
13 transmission system engineering and move to the
14 next topic, biological resources.

15 MS. LUCKHARDT: Okay, the applicant
16 calls John Reese and E.J. Koford; they both need
17 to be sworn.

18 Whereupon,

19 JOHN REESE and E.J. KOFORD
20 were called as witnesses herein, and after first
21 having been duly sworn, were examined and
22 testified as follows:

23 DIRECT EXAMINATION

24 BY MS. LUCKHARDT:

25 Q Okay, Mr. Koford, if you could state

1 your name and spell your name for the record.

2 A I'm E.J. Koford, K-o-f-o-r-d.

3 Q And, Mr. Reese, if you could do the
4 same?

5 A I'm John Reese, R-e-e-s-e.

6 Q And then we have joint testimony in this
7 instance, so perhaps I'll run through the basics
8 with Mr. Reese.

9 Do you have a copy of applicant's
10 exhibit on -- applicant's supplemental testimony
11 on biological resources, marked as exhibit 4I2?

12 MR. REESE: Yes, I do.

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

15 MR. REESE: Yes, it was.

16 MS. LUCKHARDT: And does this testimony
17 include a description of your qualifications?

18 MR. REESE: Yes, it does.

19 MS. LUCKHARDT: And, Mr. Koford, were
20 your qualifications previously filed with your
21 previous testimony?

22 MR. KOFORD: Yes, they were.

23 MS. LUCKHARDT: And, Mr. Reese, are the
24 facts contained in this testimony true to the best
25 of your knowledge?

1 MR. REESE: Yes, they do.

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

5 MR. REESE: Yes.

6 MS. LUCKHARDT: And do you adopt this
7 testimony as your testimony on water and
8 biological resources in this proceeding?

9 MR. REESE: Yes, I do.

10 MS. LUCKHARDT: And continuing, Mr.
11 Reese, has Calpine submitted or has the project
12 submitted final design for the stormwater system
13 to the Santa Clara Valley Water District?

14 MR. REESE: Yes, the final design was
15 completed in early May after close coordination
16 with the water district.

17 MS. LUCKHARDT: And does that design
18 respond to comments received from the water
19 district?

20 MR. REESE: Yes. They had some
21 comments, some fairly minor adjustments they would
22 like to make. We accommodated those in this
23 interactive period that began in late April and
24 concluded with our submission on the 7th of May.

25 MS. LUCKHARDT: And does this design, in

1 your opinion, require an Army Corps permit?

2 MR. REESE: No. The Corps has expressed
3 interest in anything occurring at or below the
4 ordinary high water mark. We are some seven to
5 eight feet above that where the project elevation
6 occurs.

7 MS. LUCKHARDT: And, Mr. Koford, has the
8 project applied for a 1603 streambed alteration
9 permit?

10 MR. KOFORD: Yes, we have.

11 MS. LUCKHARDT: And to your knowledge is
12 this application complete?

13 MR. KOFORD: I believe it's complete.
14 The Department of Fish and Game has not given us a
15 determination.

16 MS. LUCKHARDT: But have they requested
17 additional information and was that supplied?

18 MR. KOFORD: They've requested
19 additional information and we supplied it. They
20 requested one more additional piece of information
21 which we should be supplying tomorrow.

22 MS. LUCKHARDT: And in your experience
23 how long does it take Fish and Game to issue a
24 1603 permit once the application's complete?

25 MR. KOFORD: 1600 permits are a 30- to

1 45-day permit, generally; a very short time.

2 MS. LUCKHARDT: And in your experience
3 are 1603 permits regularly rejected?

4 MR. KOFORD: It's pretty rare that
5 they're rejected. The only cases where they'd be
6 rejected is if there's a significant adverse
7 environmental impact, for which there's no
8 environmental document prepared.

9 MS. LUCKHARDT: And is that the case for
10 this project?

11 MR. KOFORD: No. This is, as 1603s go,
12 this is a very clean one.

13 MS. LUCKHARDT: And in your experience
14 are these the types of permits that are typically
15 obtained post-certification?

16 MR. KOFORD: Yes, often. Often.

17 MS. LUCKHARDT: And with the conditions
18 of certification proposed by staff, in your
19 professional opinion, will the construction and
20 operation of the stormwater structures create a
21 significant adverse biological impact?

22 MR. KOFORD: No, not create a
23 significant adverse biological impact.

24 MS. LUCKHARDT: And with the conditions
25 of certification proposed by Commission Staff, in

1 your professional opinion will the expedited
2 construction, nighttime construction, cause a
3 significant adverse impact to biological
4 resources?

5 MR. KOFORD: No. In this case it's not
6 significantly different.

7 MS. LUCKHARDT: The witnesses are
8 available for cross.

9 HEARING OFFICER WILLIAMS: Any
10 questions?

11 MR. RATLIFF: No questions.

12 MR. BRECHER: No questions.

13 MS. SCHILBERG: Just a quick question to
14 Mr. Koford.

15 CROSS-EXAMINATION

16 BY MS. SCHILBERG:

17 Q So you mentioned the 1603 permit would
18 probably take 30 to 45 days. Is that permit
19 required before you can begin construction?

20 MR. KOFORD: Yeah, before you could
21 discharge you'd have to have the permit in hand.
22 Before you could move dirt you'd have to have the
23 permit in hand.

24 So, I mention that these are often
25 issued after certification. Often you don't have

1 the final details on the design outfall. We're
2 actually much further along on that than would be
3 typical.

4 So it would be normal to say Fish and
5 Game gets the last crack at whatever changes they
6 might require. And in this case we're almost
7 fully designed. Fish and Game has been involved
8 and we've responded to their concerns. We don't
9 expect any hiccoughs in that.

10 MS. SCHILBERG: So what is the timeframe
11 you're expecting to receive this permit?

12 MR. KOFORD: Well, to be clear with you,
13 we don't believe that we're within the
14 jurisdiction of the 1600 permit. And we've issued
15 a letter to Fish and Game requesting their
16 determination of whether or not we need such a
17 permit.

18 So it may be that they'll review our
19 material, come back and say you don't require a
20 1603. So, it might be misleading for me to give
21 you a date when we're going to get the permit.

22 What they might do, within a week's
23 time, say you don't need it. And both staff and I
24 have been in contact with Fish and Game to get
25 them to make that determination soon.

1 If they chose to issue a permit, if they
2 decide this was in their area, 30 days out from
3 their determination we have assurances that that
4 determination would occur this week.

5 MS. SCHILBERG: So you're saying then
6 between, given this is the 20th of May, so if it
7 happens by the 25th. So you're saying 30 to 45
8 days from the 25th of May?

9 MR. KOFORD: Yeah, and I'm saying 45,
10 anticipating that they might have additional
11 questions or issues, I'm trying to give them a
12 conservative number.

13 On a typical project outside the CEC
14 process, and not controversial, 30 days would be
15 plenty.

16 MS. SCHILBERG: So the earliest you
17 could get the permit is about June 25th then?

18 MR. KOFORD: If we require a permit, I
19 suspect it will be about that timeframe, yeah.

20 MS. LUCKHARDT: Are you finished?

21 MS. SCHILBERG: I'm finished.

22 MS. LUCKHARDT: I have one clarifying
23 question.

24 //

25 //

1 REDIRECT EXAMINATION

2 BY MS. LUCKHARDT:

3 Q Mr. Koford, when Ms. Schilberg said that
4 you could not start construction, would that
5 include the whole project, or just that portion of
6 the project?

7 MR. KOFORD: No, Fish and Game's
8 jurisdiction would only be in what they call the
9 bed and banks of a river or a creek. They
10 wouldn't exercise jurisdiction over the remainder
11 of the project.

12 And the bed and banks in this case,
13 because the area has been so changed, it has
14 levees and so developed, the bed and banks is a
15 rather loose definition. The Fish and Game code
16 is not clear about what bed and banks are.

17 Unlike the Corps definition that Mr.
18 Reese spoke of, there's not a manual a half an
19 inch thick to explain what the limits are. And so
20 it's a case-by-case determination.

21 In this case we're 200 feet from the
22 actual channel of Coyote Creek. We're outside a
23 manmade levee. So in our view that is clearly
24 outside the bed and banks. Fish and Game is
25 considering it, which is what they're supposed to

1 do, and make the determination whether they feel
2 they should be there.

3 MS. LUCKHARDT: Just to clarify, this
4 would allow construction of the facility up to
5 what point, should they require a 1600 permit?

6 MR. KOFORD: They couldn't punch through
7 the east side of the levee, the side that enters
8 into Coyote Creek without the 1600 permit. They
9 could do anything else outside that area without
10 Fish and Game having any participation whatsoever.

11 MS. LUCKHARDT: Okay.

12 MS. SCHILBERG: I wasn't sure I
13 understood what you said.

14 RE-CROSS-EXAMINATION

15 BY MS. SCHILBERG:

16 Q Have you read the staff's testimony on
17 biology?

18 MR. KOFORD: Yes, I believe so.

19 MS. SCHILBERG: The supplemental?

20 MR. KOFORD: Yes.

21 MS. SCHILBERG: If I understood you
22 correctly you said you felt there were no
23 biological impacts from the expedited schedule.
24 My reading the staff's testimony is that they
25 believe there are, and they need to be mitigated.

1 Do you disagree on that?

2 MR. KOFORD: Well, it's a matter of
3 judgment, I would say, whether or not nighttime
4 construction would actually disturb any biological
5 resources in that area, considering the high level
6 of disturbance they are.

7 The mitigations proposed by staff to not
8 allow nighttime construction in the area are
9 entirely acceptable and conservative. And I have
10 no quarrel with that.

11 My determination, if I were the last
12 statement on it, would be these animals are in an
13 area that's highly disturbed already, and it
14 probably wouldn't make a lot of difference.

15 On the other hand, it isn't a burden,
16 either, and probably good conservative practice,
17 to do some of those limitations. And I happen to
18 agree with staff.

19 HEARING OFFICER WILLIAMS: Anything
20 else?

21 MS. LUCKHARDT: I would like to, at this
22 point, if there are no further questions, move
23 applicant's testimony on biological resources,
24 exhibit 4I2 into the record.

25 HEARING OFFICER WILLIAMS: That will be

1 received.

2 Staff.

3 MR. RATLIFF: Yes, the staff witness for
4 biological resources is Natasha Nelson. And I
5 have with me also the water witness, Joe Crea, to
6 assist in answering any questions that may have to
7 do with the project outfall, as he is familiar, as
8 is Ms. Nelson, but they have sort of complementary
9 and overlapping understanding of that issue. So I
10 wanted to have him available, as well.

11 HEARING OFFICER WILLIAMS: Thank you.

12 MR. RATLIFF: She has been sworn, but if
13 you want her to be sworn again, she may --

14 HEARING OFFICER WILLIAMS: Swear her.

15 (Laughter.)

16 Whereupon,

17 NATASHA NELSON

18 was called as a witness herein, and after first
19 having been duly sworn, was examined and testified
20 as follows:

21 HEARING OFFICER WILLIAMS: The

22 gentleman, too, in case there are --

23 Whereupon,

24 JOE CREA

25 was called as a witness herein, and after first

1 having been duly sworn, was examined and testified
2 as follows:

3 DIRECT EXAMINATION

4 BY MR. RATLIFF:

5 Q Ms. Nelson, did you prepare the staff
6 testimony for the staff assessment?

7 MS. NELSON: Yes, I did.

8 MR. RATLIFF: And did you also prepare
9 the supplemental testimony that you're sponsoring
10 today?

11 MS. NELSON: Yes, I did.

12 MR. RATLIFF: Is it true and correct to
13 the best of your knowledge and belief?

14 MS. NELSON: Yes, it is.

15 MR. RATLIFF: Could you summarize very
16 briefly the additional supplementary testimony?

17 MS. NELSON: As identified before, the
18 riparian corridor for Coyote Creek is the most
19 sensitive area near Los Esteros Critical Energy
20 Facility.

21 Staff was concerned that the increased
22 lighting and noise at night would disturb wildlife
23 that were using the riparian area for resting or
24 for migration during the sunset and sunrise time.

25 And that the continuous light and noise

1 may preclude the more sensitive species from using
2 the area at all.

3 We spoke with Department of Fish and
4 Game Staff, as well as staff from Edwards National
5 Wildlife Refuge, to ask if they had concerns and
6 had mitigation that they would suggest.

7 All of them agreed that there was a
8 minimal amount of impact that was possible, but
9 took the conservative route saying that we should
10 continue to direct light and noise away from the
11 area. And the Department of Fish and Game was
12 concerned that any trenching be attended by
13 someone at least every six hours.

14 So I suggested a change to condition of
15 certification Bio-10; I altered number 9 and 10,
16 as you can read in my testimony, and added three
17 additional ones numbered 16, 17 and 18, that when
18 observed would reduce all potential impacts to
19 less than significant levels.

20 MR. RATLIFF: Does that complete your
21 summary?

22 MS. NELSON: Yes.

23 MR. RATLIFF: And did you also want to
24 say that condition 6 addresses nighttime noise, in
25 the noise section --

1 MS. NELSON: Yes.

2 MR. RATLIFF: -- noise condition 6.

3 MS. NELSON: In my testimony on page
4 4.2-25 I noted that the existing noise level at
5 the riparian corridor is 55 decibels. And that
6 activities such as pile driving, which would
7 increase almost double to 80 decibels, would
8 probably exceed the threshold for wildlife.

9 So I would recommend for biology that
10 noise-6 be admitted by the Commissioners into the
11 Presiding Member's Proposed Decision.

12 MR. RATLIFF: And if Noise-6 is adopted,
13 does it mitigate that impact to wildlife?

14 MS. NELSON: Yes, it does.

15 MR. RATLIFF: Okay, thank you. The
16 witness is available.

17 HEARING OFFICER WILLIAMS: Any
18 questions?

19 MS. LUCKHARDT: No questions.

20 HEARING OFFICER WILLIAMS: Any
21 questions?

22 MR. BRECHER: No questions.

23 MS. SCHILBERG: No questions.

24 HEARING OFFICER WILLIAMS: Okay.

25 PRESIDING MEMBER KEESE: And applicant

1 accepts the conditions proposed?

2 MS. LUCKHARDT: Yes.

3 PRESIDING MEMBER KEESE: Thank you.

4 HEARING OFFICER WILLIAMS: Okay. I
5 think -- did we receive your --

6 MS. LUCKHARDT: I think I moved it, but
7 just in case I haven't, I'll --

8 HEARING OFFICER WILLIAMS: Well, it's
9 received. We'll receive it if there are no
10 objections.

11 So, I think we can move on to visual.

12 MS. LUCKHARDT: We probably need about
13 five minutes. Our witness, I guess, is about five
14 minutes from here.

15 HEARING OFFICER WILLIAMS: We'll take a
16 stretch break.

17 (Brief recess.)

18 PRESIDING MEMBER KEESE: -- hear some
19 testimony on the likelihood this plant can be
20 constructed and in operation by December 31st.
21 And then at the end of that we will look at what
22 the Committee needs in submittals.

23 Visual.

24 MS. LUCKHARDT: Okay, applicant has four
25 witnesses in this area. I don't believe any of

1 them have been sworn, so it would be good to get
2 all four sworn at this time.

3 Whereupon,

4 VALERIE YOUNG, THOMAS PRIESTLEY

5 TODD STEWART and CHUCK VOSICKA

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 And then could each of you separately
12 state your name and spell your name for the
13 record.

14 MS. YOUNG: Valerie Young, V-a-l-e-r-i-e
15 Y-o-u-n-g.

16 DR. PRIESTLEY: I'm Thomas Priestley;
17 that's P-r-i-e-s-t-l-e-y.

18 MR. STEWART: I'm Todd Stewart, the last
19 name is spelled S-t-e-w-a-r-t.

20 MR. VOSICKA: I'm Chuck Vosicka, V, as
21 in Victor, -o-s, as in Sam, -i-c-k-a.

22 MS. LUCKHARDT: Since we basically have
23 one piece of testimony being sponsored in part by
24 four different witnesses, I'll go ahead and go
25 through the general introduction with Dr.

1 Priestley.

2 Do you have a copy of applicant's
3 testimony on visual resources, marked as exhibit
4 4H2, in front of you? That would be applicant's
5 supplemental testimony on visual resources.

6 DR. PRIESTLEY: I do.

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

9 DR. PRIESTLEY: It was.

10 MS. LUCKHARDT: And did your previous
11 testimony include a description of your
12 qualifications?

13 DR. PRIESTLEY: Yes, it did.

14 MS. LUCKHARDT: And, Ms. Young, did your
15 previous testimony also include a description of
16 your qualifications?

17 MS. YOUNG: Yes, it did.

18 MS. LUCKHARDT: And is that also the
19 case for you, Mr. Stewart?

20 MR. STEWART: You'll have to ask the
21 question again.

22 MS. LUCKHARDT: Did your previous
23 testimony include a description of your
24 qualifications?

25 MR. STEWART: Yes, it did.

1 MS. LUCKHARDT: And, Mr. Vosicka, is
2 that also the same for you?

3 MR. VOSICKA: Yes.

4 MS. LUCKHARDT: Thank you. And, Dr.
5 Priestley, do you have any corrections or
6 clarifications you'd like to make to your prefiled
7 testimony?

8 DR. PRIESTLEY: No.

9 MS. LUCKHARDT: And are the facts
10 contained in this testimony true to the best of
11 your knowledge?

12 DR. PRIESTLEY: Yes, they are.

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

16 DR. PRIESTLEY: They do. I might point
17 out that this testimony is being jointly
18 sponsored. Some of the opinions were developed in
19 collaboration with Valerie Young, Todd Stewart and
20 Chuck Vosicka. And I think as the testimony goes
21 along you'll see which person took responsibility
22 for which portion of the testimony.

23 MS. LUCKHARDT: And do you adopt this
24 testimony, with your fellow panel members, as
25 your testimony in this proceeding?

1 DR. PRIESTLEY: I do.

2 MS. LUCKHARDT: And could you please
3 describe how the Los Esteros Critical Energy
4 Facility has addressed the suggestions described
5 in Milpitas' opening brief?

6 DR. PRIESTLEY: Yes. As you all know
7 the Committee's order directed the applicant to
8 confer with Milpitas in the effort to develop an
9 appropriate mitigation plan to screen the proposed
10 project consistent with local LORS.

11 And so the applicant actually has taken
12 this directive very seriously and has made a good
13 faith effort to respond to the City of Milpitas'
14 concerns and its suggestions for additional
15 project visual enhancement.

16 And what I'd like to do right now is
17 just review the key suggestions made by the City
18 of Milpitas and indicate how the visual mitigation
19 plan has been modified to respond to those
20 suggestions.

21 As you know from their brief they had a
22 list of numbered suggestions. Their design
23 suggestion number one had to do with establishment
24 of an architectural character that will provide a
25 design theme that will not be regarded as

1 intrusive or objectionable with regard to visual
2 quality.

3 And this suggestion didn't really
4 provide any detail on what type of design theme
5 should be pursued, but there was a very specific
6 suggestion in there that a sound wall redesign
7 could be a good start in this area.

8 Mention was also made of color, texture
9 and lighting treatments.

10 Their suggestion number two was that the
11 landscape proposal should be revised. And more
12 specifically, Milpitas suggested the elimination
13 of the linear or geometric character of the design
14 and creation of a more naturalistic planting that
15 would be like the planting along the linear
16 corridor north of the site.

17 And for those of you who aren't entirely
18 familiar with the site, we think that the
19 plantings referred to are those along the southern
20 edge of the City of San Jose's wastewater
21 treatment ponds.

22 And Milpitas indicated that it was
23 looking for landscaping that would blend in more
24 with the overall setting.

25 So what I'd like to do now is review the

1 very specific things that we have done in an
2 effort to address these concerns.

3 And in doing so, I would like to refer
4 to the figures that are in the testimony that was
5 filed. I don't know, does everyone have a copy of
6 figure 1?

7 MS. LUCKHARDT: It should be, it was
8 appended to your testimony. It's attached to the
9 visual resources supplemental testimony.

10 (Pause.)

11 PRESIDING MEMBER KEESE: We do actually,
12 everybody up here has it, yes.

13 DR. PRIESTLEY: Okay, good. Well, I'll
14 still kind of want to point, I think will make it
15 easier for --

16 PRESIDING MEMBER KEESE: That's fine.

17 DR. PRIESTLEY: -- people to follow if I
18 do that. So, Valerie, if you could hold that up?
19 Thank you.

20 So, you might recall that in the initial
21 scheme what was proposed was a sound wall along
22 the southern edge of the project and along the
23 eastern edge. No wall on the west.

24 And in terms of landscaping, landscaping
25 was originally proposed along the western edge of

1 the project and along the southern edge.

2 And in the original conceptual landscape
3 plan, the landscape strip was in the order of 25
4 feet or less in width.

5 What's proposed now is rather different
6 from what was originally proposed, in an effort to
7 respond to the concerns and suggestions of the
8 City of Milpitas.

9 Along the southern and eastern
10 perimeters of the project there is now a 12-foot
11 high screening wall that is actually located on
12 top of five-foot high berms. And this has the
13 effect of creating a screen that is essentially 17
14 feet in height. And at this point if you would
15 refer to figure 2, you can see figure 2. This
16 would give you a pretty clear idea of what's going
17 on.

18 You can see that we have a five-foot
19 berm. On top of the berm there is a solid eight-
20 foot soundwall. And then on top of that there is
21 a four-foot high wooden lattice work. And then on
22 the elevation view, on the bottom of figure 2, you
23 can see this more clearly.

24 So the walls, themselves, are made of
25 solid masonry, and they serve both as a soundwall,

1 as well as a screening wall. And the solid
2 portions of the wall will be made out of precast
3 concrete panels that will be tinted with a pale
4 taupe color and will have a bricklike pattern on
5 them.

6 And then on top you're going to have
7 this, well, in between they will be supported by
8 these concrete pillars, which will also support
9 the wooden lattice work. The lattice work will
10 have the effect of providing partial screening of
11 views into the project. Lattice work was used
12 here to keep the wall from looking too heavy. And
13 it also creates a certain amount of small-scale
14 visual interest, as well. And as we'll talk about
15 a little later when I talk about the landscaping,
16 you'll see that it will work quite well with the
17 landscaping, as well.

18 Now, if we could go back to figure 1,
19 it's a little hard to see this at the scale of
20 figure 1, but if you'll look at, say, for example,
21 along the southern edge of the project, the
22 retaining wall is actually articulated. There are
23 long segments in the front, and then there are
24 setbacks.

25 And this is very helpful in breaking up

1 the overall sense of mass of the wall. And it
2 also helps to create a sense of depth and some
3 shadowing. And it also kind of sets up kind of a
4 sense of rhythm, as well.

5 The planting strip has been widened and
6 now is a minimum of 25 feet and in many places
7 extends out to 33 feet or more. And another thing
8 that's different, if you go back to figure 2, you
9 will see that in the area in front of the five-
10 foot berm there are also now some three-foot high
11 planting mounds, or planting berms.

12 And so the planting scheme has been
13 modified in specific response to the City of
14 Milpitas. Now that there's more room out there
15 which allows for a more naturalistic planting
16 pattern. And if you look at the plant schedule up
17 in the upper left-hand corner, it gives you an
18 idea of the trees and shrubs that are now being
19 proposed in this area.

20 What we're using is a mix of both native
21 and exotic species that pick up on the plants that
22 exist in the existing riparian corridor along
23 Coyote Creek. And then also in the artificial
24 planting barrier along the southern side of the
25 City of San Jose wastewater treatment plant.

1 So there is a mix of plants. The fact
2 that you have the mix of the deciduous and the
3 evergreen will assure that there's some screening,
4 yet at the same time with the seasonal change
5 there will be some visual interest that again will
6 relate to the existing tree patterns in the
7 surrounding area.

8 I should also note if you look on the
9 tree schedule you'll see in the far right column
10 that we're proposing a variety of plant sizes.
11 Normally in an installation of this type, a 15-
12 gallon size tree would be used. Those trees tend
13 to be about seven to nine feet at the time you
14 plant them. And there are a lot of very good
15 reasons for that.

16 But because of the interest of the City
17 of Milpitas in having some more instant effect,
18 we're also specifying the use of some larger size
19 trees, which at least at the time of planting will
20 give you more of a sense of height and planting
21 mass. The reality is that after about five years
22 the smaller trees will catch up. But initially
23 they will provide, you know, an immediate effect.

24 So, within -- at the time that the trees
25 are planted, you know, given the fact that we're

1 using these larger size trees, many of them will
2 be 12 feet or more in height. And within five
3 years they'll be 20 feet in height.

4 And because of the placement on top of
5 the planting mounds, these trees will effectively
6 be three feet or more in height taller. So, you
7 may have some trees out there that within five
8 years will be 23 to 25 feet in height, in terms of
9 their effective height.

10 Something slightly different is
11 happening along the western edge of the property
12 due to some very specific space constraints.
13 There the screening wall will be at ground level;
14 it will not be on top of a berm. But it will
15 still be the eight-foot solid wall with the four-
16 foot lattice on top. And there will also be a
17 mixture of trees planted in front.

18 So the -- and although, on the western
19 side, although the wall will be articulated, there
20 isn't enough room for the eight-foot deep
21 articulations. The articulations will be much
22 shallower.

23 So, the effect of this screening wall I
24 think will be pretty significant in achieving the
25 objectives of the City of Milpitas, in terms of

1 providing a very substantial level of screening at
2 the end of construction. And this will be quite
3 important from an artistic or architectural and
4 visual point of view, because the screening wall
5 will essentially create a more unified appearance
6 for the project. And it will have the effect of
7 screening the views of the lower ground level of
8 equipment, it will screen that more thoroughly.
9 And very often it's that equipment which is more
10 complex and which could contribute to people's
11 perception of, you know, a visual clutter of
12 industrial like equipment. So that equipment will
13 be very substantially screened right off the bat.

14 The wall, itself, will be attractive in
15 its own right, and should compliment the
16 landscaping. And the landscaping is such that
17 although it, over time, will get tall enough to
18 screen many of the elements of the plant, it won't
19 be so tall that it will block the views towards
20 the upper reaches of the East Bay Hills. So that
21 vista view, which is one of the valued features of
22 the view from highway 237, will remain intact.

23 I might also mention that another
24 measure that the applicant is proposing to respond
25 to the City of Milpitas' concerns is more

1 attention to color of the plant. The applicant
2 has already agreed, -- yeah, come to an agreement
3 with the City of San Jose to respect their
4 interest in having the plant be painted a neutral
5 gray color, but the applicant is going to propose
6 that some modification be made to the color of the
7 stacks, to use some kind of a soft bluish-gray
8 color that would contrast with the body of the
9 facility, itself. Which would help to articulate
10 that, kind of break down the sense of mass to some
11 extent, and would be a color that could blend
12 better into the backdrop.

13 Something else that I want to mention
14 here is that in another one of its
15 recommendations, the City of Milpitas suggested
16 that the tree planting schedule be revised to
17 enable the perimeter landscaping to be installed
18 at the beginning of the construction process,
19 rather than at the end.

20 And, in fact, this is the kind of thing
21 that the applicant does very frequently on its
22 projects. Generally these are projects that have
23 a much longer construction period, say two years,
24 during which time the planting has the opportunity
25 to achieve some substantial growth.

1 But it is my understanding that in this
2 particular case that the applicant has made an
3 agreement with the City of Milpitas to, to the
4 extent that it is feasible, to install that
5 screening landscaping right at the start of the
6 construction.

7 You know, one of the factors that has to
8 be taken into account is, you know, conflict with
9 the construction activities. But my understanding
10 is to the extent that this is feasible that this
11 is going to be done in this case.

12 I might also add here that in effort to
13 respond to, kind of the motivation behind this
14 request that the landscaping be installed right at
15 the beginning of the project, to get that extra
16 tree growth, the applicant is making this
17 commitment to put in some larger trees that will
18 provide that, you know, more instant effect right
19 at the time that they are installed.

20 Another one of the suggestions that the
21 City of Milpitas made, suggestion number 6, is
22 that the design of the power plant visual
23 treatment be coordinated with the treatment that
24 PG&E is proposing for their adjacent Los Esteros
25 substation project.

1 And I guess maybe if I'd like, I'd like
2 to, if I can do this and still -- if you can still
3 hear me, is point some things out on this big
4 graphic over here.

5 Here is the PG&E substation site. To
6 the north the Los Esteros Power Plant site. We've
7 taken a close look at PG&E's landscape plan for
8 this facility. And in a nutshell what they are
9 proposing is a big row of California pepper trees
10 around the eastern side of the site and along the
11 northern side.

12 Along the western side there are pepper
13 trees and an Australian tree that's not very
14 large. So the bottom line on this is what PG&E is
15 proposing is a tree that is not a native tree;
16 it's a tree that is not in the surrounding area.
17 And is, at best, a medium height tree. These
18 trees get to be, oh, typically 30 to 40 feet high,
19 sometimes higher. They're very thick, very bushy.
20 In some ways they're a good screening tree.

21 But we have very specifically chosen not
22 to follow PG&E's planting plan in this case
23 because if we had done that, then our plans
24 wouldn't meet the other objectives of the City of
25 Milpitas in terms of providing more full screening

1 and in creating something visually that relates to
2 the existing vegetation along Coyote Creek, and in
3 relating to the vegetation along the southern edge
4 of the wastewater treatment plant ponds.

5 So, instead we have taken this other
6 strategy that I have just explained, that
7 provides, you know, taller, more effective
8 screening, which blends better with the
9 surroundings, and certainly provides greater
10 habitat value, as well, because of the use of
11 native plants.

12 So, what we have done, though, is
13 certainly not, you know, inconsistent with what
14 PG&E has done. The effect of this planting
15 scheme, both planting schemes will be to create
16 kind of you might say an island of technological
17 facilities that are kind of bunched together in
18 the middle of this open plain, and they will be
19 surrounded by this vegetation.

20 In fact, probably for the most of the
21 views that are seen by the public, particularly
22 from highway 237, it's going to be the screening
23 provided by the Los Esteros Critical Energy
24 Facility that people see that makes the biggest
25 visual impression.

1 PRESIDING MEMBER KEESE: As a point of
2 inquiry, the structures in the substation are
3 approximately how tall?

4 MS. LUCKHARDT: Commissioner Keese asked
5 how tall, if you knew, the structures in the
6 substation will be.

7 DR. PRIESTLEY: If you like, I can take
8 a moment to pull out the plans here and tell you
9 very specific terms.

10 PRESIDING MEMBER KEESE: Twenty, 30, 40,
11 I don't need specifics. Just generally speaking.

12 DR. PRIESTLEY: You know, I would
13 hesitate to say unless I would take a look. They
14 certainly, you know, except for things like the
15 take-off structures, I would suspect that most
16 features would not be as tall as say the power
17 plant stacks, which are 80 feet high.

18 PRESIDING MEMBER KEESE: My impression
19 would be 25 or 30, but I'm just --

20 DR. PRIESTLEY: Yeah, maybe a little bit
21 higher in some cases, but then there will be
22 things like, again the take-off structures.

23 PRESIDING MEMBER KEESE: Thank you.

24 MS. LUCKHARDT: Okay, and then in your
25 opinion does this plan that you've just described

1 address Mr. Clayton's desire for early screening
2 of the facility?

3 DR. PRIESTLEY: Yes, it does, because in
4 the revised version of Vis-3 that Mr. Clayton
5 prepared, the request is that trees and other
6 vegetation must be strategically placed and of
7 sufficient height and density to achieve maximum
8 effective screening of the proposed project
9 structures as soon as possible.

10 And I think that this mitigation scheme
11 that is now being proposed certainly does that in
12 terms of first of all providing right off the bat
13 17 feet of pretty good screening; then trees that,
14 you know, poke above that, and which in short
15 order will be 25 feet or higher.

16 It's a very, you know, thorough
17 screening scheme.

18 MS. LUCKHARDT: And, Dr. Priestly, just
19 to clarify something, do you recall the stack
20 height in this instance? I thought you said
21 earlier it was 80 feet? Is that your
22 recollection?

23 DR. PRIESTLEY: That's my recollection.

24 MS. LUCKHARDT: Would you want to check
25 your testimony to be sure?

1 (Pause.)

2 DR. PRIESTLEY: Okay, 90 feet.

3 MS. LUCKHARDT: Okay, thank you. And
4 now I'd like to shift to Mr. Vosicka for one quick
5 question.

6 Mr. Vosicka, one of the suggestions that
7 Mr. -- suggestions made by Milpitas that Mr.
8 Priestley has not addressed is placing the Los
9 Esteros Critical Energy Facility 15 feet below
10 grade.

11 Does lowering the base elevation of the
12 plant representing engineering or construction
13 challenges?

14 MR. VOSICKA: Very much so. The
15 groundwater table in that area can be as little as
16 five feet below ground surface. So you can
17 imagine depressing the facilities on site 15 or 20
18 feet presents a significant, both engineering and
19 construction, challenge. Very much akin to the
20 construction of the major bridge footings for say
21 the Golden Gate Bridge or the Bay Bridge.

22 You're working in a situation where
23 you're working below water level, not only are you
24 working in that elevation, but then after the
25 plant is built you'd be operating in that

1 situation.

2 It brings on the situation where
3 probably pumping water on a continual basis. That
4 brings on other issues in terms of disposal of
5 that water to Coyote Creek. And again, this is a
6 continuous stream. It would be a significant
7 challenge.

8 MS. LUCKHARDT: Thank you.

9 MR. VOSICKA: Thank you.

10 MS. LUCKHARDT: And then, play musical
11 chairs, if Mr. Stewart would be kind enough to
12 step up to the microphone.

13 Milpitas also suggested modifying the
14 facility layout and orientation. How would such
15 changes in the project configuration impact the
16 project construction and permitting?

17 MR. STEWART: Well, it would delay the
18 project construction and permitting substantially,
19 as new air modeling would be required, and noise
20 modeling would be required, as you move your major
21 point sources.

22 And at this point a complete re-
23 engineering of the facility would be required to
24 new foundation plans, piping plans, pipe supports,
25 conduit plans, wiring plans, schedules, connection

1 diagrams and the whole thing.

2 And most of these drawing packages go to
3 the CBO for a review cycle, as well.

4 MS. LUCKHARDT: And while you're there,
5 Mr. Stewart, how complete is the engineering for
6 this facility?

7 MR. STEWART: The engineering is more
8 than 95 percent complete.

9 MS. LUCKHARDT: Thank you. And then
10 returning to Dr. Priestley, how did you propose
11 addressing nighttime construction lighting with
12 the accelerated construction schedule?

13 DR. PRIESTLEY: Yeah, the applicant is
14 making a commitment to the extent that it's
15 consistent with safety requirements to limit the
16 amount of nighttime construction to that which is
17 exactly needed.

18 And to direct this lighting in a way
19 which reduces offsite lighting impacts.

20 MS. LUCKHARDT: Now, when you said limit
21 night construction to what is exactly needed, were
22 you talking about night lighting?

23 DR. PRIESTLEY: Night lighting, yes.

24 MS. LUCKHARDT: Okay. And is this
25 consistent with the biological condition Bio-10

1 regarding night lighting?

2 DR. PRIESTLEY: Yes, it is.

3 MS. LUCKHARDT: And then turning to Ms.
4 Young, just to clarify, in what city is the
5 project located?

6 MS. YOUNG: In San Jose.

7 MS. LUCKHARDT: And did San Jose make
8 findings of consistency with the general plan and
9 Alviso master plan?

10 MS. YOUNG: Yes, it did. The City made
11 findings of consistency when it approved the
12 project the first time around in April of 2001
13 with the Critical Reliable Energy Center of 49
14 megawatts, and approximately 90 backup diesel
15 generators.

16 And then again when the City approved
17 the project with the Los Esteros project in it in
18 February of this year. The City found that the
19 project is consistent with the San Jose 2020
20 general plan; and generally consistent with the
21 Alviso master plan.

22 And these are the two primary policy
23 planning documents that the City applies to the
24 project.

25 MS. LUCKHARDT: And for your

1 supplemental testimony today, did you prepare a
2 supplemental analysis of the project's consistency
3 with the San Jose visual resources policies?

4 MS. YOUNG: Yes, we did.

5 MS. LUCKHARDT: And why did you do this?
6 Why is this important?

7 MS. YOUNG: The staff assessment visual
8 resources section contains a table, table 3, that
9 provides a detailed analysis of the project's
10 consistency with San Jose's policies regarding
11 visual resources.

12 And that table makes conclusions of
13 inconsistency with about 15 policies. So we felt
14 that in light of a couple of different items that
15 it was important to re-look at those conclusions,
16 particularly with regard to the new or the revised
17 soundwall and landscaping element that has been
18 proposed and described by Dr. Priestley.

19 And also in light of a changed
20 circumstance that now will allow us to make a
21 finding of consistency with a policy.

22 We also felt it was important to point
23 out where certain policies might not be of
24 particular relevance to the project. And how even
25 a slight inconsistency would not result in a

1 significant impact.

2 MS. LUCKHARDT: And can you provide an
3 overview of the update table you provided in your
4 testimony?

5 MS. YOUNG: Yes. The table that's
6 provided for you in our supplemental testimony is
7 a duplicate of the staff assessment table 3. It
8 only has an additional new column at the far right
9 end of the table.

10 And this is the column that provides our
11 supplemental analysis of consistency with visual
12 LORS in light of the items that I've mentioned.

13 We found that the 15 policies basically
14 that were found to be inconsistent with the
15 project generally fall into three categories.
16 First is a set of policies intended to result in
17 attractive design of new buildings in the City and
18 in the Alviso area, particularly.

19 The second is a set of policies intended
20 to protect existing visual resources from the
21 adverse impacts of new developments. And then the
22 third is a set of policies intended to protect
23 environmental resources, or the visual qualities
24 of environmental resources through appropriate
25 project design.

1 And our supplemental analysis concludes
2 that with the proposed new screening plan
3 presented, the project can be found to be
4 consistent with most all of the policies in these
5 three categories.

6 As Dr. Priestley indicated, the
7 soundwall and landscaping provides an attractive
8 feature in the foreground view from all key
9 observation points. And substantially screens the
10 project.

11 As the trees grow they will create tree
12 masses of similar species and size that relate
13 visually to the existing tree rows in the vicinity
14 of the site, and then the trees will not grow so
15 tall as to block views towards the upper slopes of
16 the hills in the background, which is one of the
17 key vistas in the project vicinity.

18 And finally, the soundwall and landscape
19 design, itself, reflects a commitment on behalf of
20 the project to meet the City of San Jose's
21 requirements for high quality design and visual
22 attractiveness.

23 With regard to one of the changed
24 circumstances, one of the policies found to be
25 inconsistent was the Alviso master plan's height

1 limit for lands outside the village area. And as
2 has been testified to previously, a general plan
3 amendment to allow building heights up to 100 feet
4 was approved for the project by the City in
5 November 2001. So we no longer have an
6 inconsistency with that particular policy.

7 Finally, I'd like to draw your attention
8 to two other Alviso master plan design policies
9 for which inconsistency was found. And the first
10 is Alviso's policy guidance that new developments
11 incorporate seaside or maritime features into
12 their design.

13 I don't know how many of you know, but
14 Alviso was a functioning marina and port at one
15 time in its early history, and that's the genesis
16 of that guideline.

17 The City of San Jose typically applies
18 this guidelines to buildings, be they office
19 buildings, residential buildings, high tech
20 buildings. And it would not typically apply it to
21 an industrial facility like a power plant.

22 And, indeed, no requirement for such
23 seaside features in the power plant design was
24 included in the City's approval of the zoning.

25 And even the proposed U.S. Dataport

1 building design does not have a particularly
2 nautical theme. But the City did find that design
3 to be generally consistent with the Alviso design
4 policies.

5 So that's one that is not particularly
6 relevant, and yet inconsistency with it does not
7 create a significant impact.

8 A second master plan policy also that is
9 not particularly relevant is one that sets forth a
10 range of recommended building materials for new
11 developments. And as staff notes, in the
12 consistency table there's really only two
13 buildings on the Los Esteros site. All of the
14 rest of it is equipment.

15 And those two buildings are generally
16 going to be surfaced with metal siding, which is
17 not one of the building materials in the master
18 plan. However, these buildings will not be
19 visible from areas accessible to the public, and
20 the proposed screening plan provides additional
21 shielding of the facilities. And therefore
22 inconsistency with this policy, we feel, is not
23 particularly relevant, nor does it constitute a
24 significant impact.

25 MS. LUCKHARDT: So, in your professional

1 judgment Los Esteros Critical Energy Facility can
2 be considered to be consistent with the visual
3 resource policies of the City of San Jose?

4 MS. YOUNG: Yes.

5 MS. LUCKHARDT: And did the PD zoning
6 for this project include the easements required
7 from the City of San Jose, including those
8 required for the temporary transmission
9 interconnection?

10 MS. YOUNG: Yes, it did.

11 MS. LUCKHARDT: And, Mr. Stewart, I hate
12 to do this to you, but if you'd please come back
13 to the mike here. Could you provide -- the
14 Committee also asked for an update on your
15 progress on the easements with the City of San
16 Jose. If you could provide that?

17 MR. STEWART: With respect to the
18 easements for the City of San Jose, the access
19 easement our road, we are currently working with
20 the City Attorney's Office to get the final terms
21 and conditions of the access road easement
22 defined. We expect that to be done in the next
23 week or two, and complete the process going
24 through a committee called TPAC, which includes
25 City of Milpitas and City of Santa Clara because

1 the property that we're running our road over is
2 jointly owned or operated -- jointly managed by
3 San Jose, Santa Clara, and Milpitas.

4 We expect conclusion of the access
5 easement in the June timeframe.

6 MS. LUCKHARDT: I have no further
7 questions for these witnesses, and they'd be
8 available.

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

11 MR. RATLIFF: No questions.

12 HEARING OFFICER WILLIAMS: Mr. Brecher.

13 MR. BRECHER: Yes, I have a few.

14 CROSS-EXAMINATION

15 BY MR. BRECHER:

16 Q Mr. Priestley, have you -- are you
17 familiar with the tentative agreement that's been
18 reached between the City of Milpitas and the
19 applicant concerning visual impacts?

20 MS. LUCKHARDT: I think he's generally
21 familiar, but not familiar with the final drafts
22 or all of the final agreements.

23 MR. BRECHER: Do you have a witness here
24 who is familiar with those?

25 MS. LUCKHARDT: The person who's most

1 familiar would be Mr. Stewart.

2 MR. BRECHER: Okay. Well, I'll ask this
3 of the panel in general, just so I don't have to
4 keep asking this.

5 First of all, how much would the
6 landscaping plan that you've described, Dr.
7 Priestley, cost?

8 DR. PRIESTLEY: I can't give you a
9 figure.

10 MR. BRECHER: All right. Can anybody
11 give me a figure?

12 MS. LUCKHARDT: I don't know if those
13 numbers have been determined. Mr. Stewart, you'd
14 be the --

15 MR. STEWART: The numbers haven't been
16 determined specifically, but you're looking in a
17 range of \$250,000 to \$500,000.

18 MR. BRECHER: All right. Now, the
19 agreement with the City of Milpitas talks about
20 architectural treatment up to \$2 million. Are you
21 familiar with that, Mr. Stewart?

22 MR. STEWART: Yes.

23 MR. BRECHER: What type of architectural
24 treatment would be envisioned under these terms?

25 MR. STEWART: That is actually to be

1 determined by the representative committee.

2 MR. BRECHER: Understand. Are there
3 general categories of architectural treatments
4 that you or the applicant envision?

5 MR. STEWART: Well, unfortunately, Mr.
6 Brecher, not being an architect I'm really not
7 qualified to answer that question.

8 MR. BRECHER: Do you have anybody here
9 today who could answer that question?

10 MS. LUCKHARDT: I believe that that
11 issue has been presented by Milpitas, and that the
12 applicant has been looking for direction from
13 Milpitas on what it would like to see in this
14 area.

15 The brief and information from Gary Clay
16 provided potentially some general feeling, but I
17 think the point of the committee is to establish
18 an opportunity for Milpitas to have a direct input
19 into that process.

20 And it would seem rather presumptuous at
21 this point for us to present a proposal, since
22 this agreement was just entered into Friday.

23 MR. BRECHER: So am I correct in
24 assuming that there's a roughly \$1.7 million
25 available for that endeavor?

1 MR. STEWART: In a general sense.
2 You're in the ballpark. Again, I haven't done any
3 cost analysis on the existing landscape plans and
4 provided the range only as a general guideline.

5 MR. BRECHER: Okay. And, Ms. Clay,
6 (sic) before the May 3rd amendments to the
7 landscaping plans were adopted, was it your
8 opinion that the plans, minus those changes, met
9 all of the LORS?

10 MS. YOUNG: I believe that was our
11 conclusion, yes. We met most of the LORS in
12 agreement with the -- or in review of the staff
13 table 3.

14 MR. BRECHER: Were there any that you
15 did not meet when you said most, did that mean --
16 there must have been some that you did not meet?

17 MS. YOUNG: I'd have to go --

18 MS. LUCKHARDT: I'd just like to
19 clarify. You're talking about LORS, and I believe
20 Ms. Young is referring to policies. And I believe
21 from a general planning perspective those are
22 often two different things.

23 MR. BRECHER: All right.

24 MS. LUCKHARDT: It's my understanding
25 that from a planning perspective, something such

1 as a height limit would be more considered in
2 LORS, whereas a policy is more the general issue
3 for compliance under case law.

4 MR. BRECHER: All right, Ms. Young, did
5 you review the general plans for Alviso and San
6 Jose to see if there were any discrepancies
7 between the proposal, as proposed by the
8 applicant, and the terms of those general plans?

9 MS. YOUNG: Are you talking about the
10 proposed screening plan?

11 MR. BRECHER: No, I'm talking now about
12 the --

13 MS. YOUNG: I'm not sure what your
14 question is.

15 MR. BRECHER: -- plan prior to May -- on
16 May 1st of the year 2002. Before the May 3rd
17 changes were imposed.

18 MS. YOUNG: Yes, those were reviewed by
19 both Dr. Priestley and myself.

20 MR. BRECHER: And did you conclude prior
21 to May 3rd that all of the discrepancies found by
22 the staff, in fact, did not exist?

23 MS. YOUNG: Let me confer with Dr.
24 Priestley.

25 MR. BRECHER: Let me re-ask the

1 question. You were aware that the staff found
2 that there were 15 discrepancies between --

3 MS. YOUNG: Yes.

4 MR. BRECHER: -- the general plan --

5 MS. YOUNG: That was in the staff
6 assessment.

7 MR. BRECHER: -- and did you, was it
8 your opinion prior to May 3rd that all 15 of
9 those, in fact, did not exist?

10 MS. YOUNG: Right, we did not agree with
11 their conclusions that --

12 MR. BRECHER: So, --

13 MS. YOUNG: -- there were
14 inconsistencies.

15 MR. BRECHER: -- in your view that even
16 before the new landscaping plans came into play
17 there were no inconsistencies, is that correct?

18 MS. LUCKHARDT: If Dr. Priestley would
19 be the appropriate person to respond, he could.

20 DR. PRIESTLEY: Yeah, our testimony, I
21 think it was pretty clear the last time that we
22 got together, was that, you know, our professional
23 opinion was, in fact, that we disagreed with the
24 staff. And that we did not see clear
25 inconsistencies with the City of San Jose's design

1 policies in this area.

2 MR. BRECHER: Even with respect to say
3 the siding issue. Remember there was one of the
4 issues was what materials were to be used for the
5 siding? You did not see an inconsistency there,
6 is that correct?

7 DR. PRIESTLEY: No, we did not.

8 MR. BRECHER: All right.

9 DR. PRIESTLEY: I don't know whether I
10 should say more --

11 MS. LUCKHARDT: You need to respond to
12 the questions of Mr. Brecher. I think Ms. Young
13 also responded to that, so either of you could.

14 DR. PRIESTLEY: Yeah, you know, as Ms.
15 Young explained a little earlier, in fact there
16 are only two buildings on the site; the rest would
17 be classified as equipment.

18 Our view was that there was sufficient
19 screening of those buildings provided by the other
20 equipment, by the landscaping, by the soundwalls,
21 that those buildings would not be so visible as to
22 create a violation with that particular policy.

23 MR. BRECHER: So in your reading of the
24 policy then, you believe that the policy, as
25 written, states that if the siding materials are

1 screened, such that they cannot be seen, it
2 doesn't matter what the siding is made out of, is
3 that correct?

4 MS. YOUNG: That's a fair statement, you
5 know, without a City of San Jose representative
6 here to make a conclusive statement on that.

7 MR. BRECHER: Well, I'm interested in
8 your view.

9 MS. YOUNG: They would probably
10 interpret it very similar to the way we have
11 interpreted it. And actually, one of the items in
12 that allowable building materials list actually
13 says for roofing materials you can have
14 composition shingle, concrete shingle and metal
15 roof materials.

16 So these buildings on the Los Esteros
17 site that are going to be clad in metal siding and
18 have metal roofs are actually entitled, if you
19 will, to have metal roofs. So the only piece of
20 the building that is not consistent with this
21 would be the metal siding around the side of the
22 building.

23 MR. BRECHER: Okay, are you ready to
24 answer my question now?

25 MS. LUCKHARDT: Please don't harass the

1 witness.

2 MR. BRECHER: The question I asked --

3 MS. YOUNG: I thought I was answering
4 your question.

5 MR. BRECHER: Okay, the question I asked
6 was that in your view it doesn't matter what the
7 materials of the siding consist of if they are
8 screened from view, is that correct?

9 MS. YOUNG: Yes, that's correct, that's
10 my interpretation of this policy.

11 MR. BRECHER: Okay.

12 MS. YOUNG: And I would also state that
13 not being consistent with that particular
14 requirement for a building material does not
15 result in a significant impact.

16 MR. BRECHER: Okay. Okay, I'd like to
17 make a statement for the record at this point that
18 the City of Milpitas believes that with the
19 agreement that's been reached between the parties,
20 that it is prepared to withdraw its objections on
21 the basis of visual impacts.

22 As I mentioned, the City Council has not
23 yet voted on that. But it's also the City's view
24 that unless the agreement, as stated, goes into
25 effect that the visual impacts remain significant.

1 And with that I don't have any further
2 questions.

3 HEARING OFFICER WILLIAMS: Do you know
4 when the City Council will take up this matter?

5 MR. BRECHER: Well, we're going -- I am
6 going to discuss it with them tomorrow. Now
7 whether they are able to actually vote on the
8 agreement tomorrow I don't know.

9 HEARING OFFICER WILLIAMS: Okay. Well,
10 I've marked the draft agreement as exhibit 8. So
11 if there's no objection, --

12 MR. BRECHER: No objection.

13 HEARING OFFICER WILLIAMS: -- that will
14 be admitted.

15 MS. LUCKHARDT: Is that the -- so that
16 would be applicant's submittal, the chain of
17 letters that encompasses --

18 HEARING OFFICER WILLIAMS: Yes.

19 MS. LUCKHARDT: -- the agreement?

20 HEARING OFFICER WILLIAMS: Yes, there's
21 signed by Mr. Todd Stewart, cover page.

22 MS. LUCKHARDT: Yes, the cover letter
23 that precedes it.

24 HEARING OFFICER WILLIAMS: Yes.

25 MS. LUCKHARDT: And you marked that as

1 exhibit?

2 HEARING OFFICER WILLIAMS: Eight. It's
3 been received as exhibit 8.

4 PRESIDING MEMBER KEESE: May I make --
5 Mr. Brecher, I believe the Committee order has
6 indicated that the Committee plans to have its
7 proposed decision out before the end of the month.

8 MR. BRECHER: I will certainly bring
9 that to the Council.

10 PRESIDING MEMBER KEESE: It would be
11 extremely helpful if we could have guidance at the
12 earliest.

13 MR. BRECHER: I understand that, Mr.
14 Keese, and I will certainly bring that to the
15 City's attention.

16 PRESIDING MEMBER KEESE: Are we --

17 HEARING OFFICER WILLIAMS: Well, I
18 guess, staff, do you have any questions?

19 MR. RATLIFF: No.

20 HEARING OFFICER WILLIAMS: No, okay.

21 MS. SCHILBERG: I just have a few
22 questions. Some general things.

23 CROSS-EXAMINATION

24 BY MS. SCHILBERG:

25 Q Suppose that for one reason or another

1 the City of Milpitas does not, in the end, adopt
2 the settlement, the City Council does not. Is it
3 Calpine's intention to go ahead with the
4 screening?

5 MR. STEWART: The landscaping plan that
6 we've prepared and submitted would be implemented
7 regardless of whether Milpitas went forward with
8 the agreement.

9 MS. SCHILBERG: The landscaping plan.
10 Is that different from the screens, or are you
11 talking about that as a whole, the --

12 MR. STEWART: I'm talking about what was
13 presented on the board.

14 MS. SCHILBERG: By Dr. Priestley, okay.
15 Second question, if U.S. Dataport ever gets built,
16 do the screens remain, or do the screens come
17 down?

18 MR. STEWART: I think it would be
19 presumptuous to answer that question at this time.
20 It really depends on what the U.S. Dataport design
21 is going to look like. It may require
22 modification of some of the landscaping based on
23 location of their own buildings. Or it may
24 require redoing; it may stay the same. There's no
25 way to know at this point.

1 MS. SCHILBERG: Just physically, is the
2 placement of the screens -- could you describe
3 where the placement of the screens is vis-a-vis
4 where the Dataport buildings were originally drawn
5 in your application? Were the Dataport buildings
6 outside the screens or inside the current screen?

7 MR. STEWART: The Dataport buildings
8 were outside of the current screen.

9 MS. SCHILBERG: I just wanted to ask
10 another question about construction impacts.
11 Assuming that the landscaping goes in to the
12 extent feasible toward the beginning of the
13 process, I expect that the earth moving having to
14 do with the berms would provide those -- those
15 emission impacts would be toward the early period
16 like July or August, is that true? Or would that
17 be in month three and four?

18 MR. STEWART: I don't know if I really
19 understood your question. Can you help me through
20 that one, again?

21 MS. SCHILBERG: Okay. I suspect that
22 the creation of berms involves earth moving?

23 MR. STEWART: Yes.

24 MS. SCHILBERG: I think I heard Dr.
25 Priestley say that the landscaping, to the extent

1 feasible, was going to go in toward the beginning
2 of the period?

3 MR. STEWART: Yes.

4 MS. SCHILBERG: So do we assume then
5 that that is additional earth moving with the
6 consequences for PM10 would happen toward the
7 beginning of the period --

8 MS. LUCKHARDT: Are you asking whether
9 those impacts have been taken into account in the
10 general construction impacts? Is that what you're
11 asking?

12 MS. SCHILBERG: I'm trying to get at the
13 timing of when the PM10 emissions would -- in
14 terms of the background levels are worse toward
15 the September/October timeframe.

16 PRESIDING MEMBER KEESE: When do you
17 anticipate they'd build the berm?

18 MR. STEWART: To the extent that we can
19 install the berms and the mounds in the first
20 couple of months we will do that. To the extent
21 that it is required that we put in landscaping as
22 we agreed to in the string of emails towards
23 months five and six, we will do that.

24 MS. SCHILBERG: I have no further
25 questions.

1 HEARING OFFICER WILLIAMS: Thank you.

2 Staff, do you have a witness?

3 MR. RATLIFF: We do, and I realize that
4 you want to conclude this, but I'd like to take
5 about a five- to ten-minute recess if I can to
6 discuss some things with my witness before he
7 testifies, if I may.

8 HEARING OFFICER WILLIAMS: Okay. We'll
9 recess until 4:30.

10 (Brief recess.)

11 PRESIDING MEMBER KEESE: Let me just
12 mention that we're going to have a court reporter
13 break at 5:00 sharp. So, just keep that in mind.
14 We'll take a brief break, switch court reporters
15 at 5:00.

16 Mr. Ratliff.

17 MR. RATLIFF: Yes, the staff witness is
18 Michael Clayton.

19 DIRECT EXAMINATION

20 BY MR. RATLIFF:

21 Q Mr. Clayton, --

22 MR. RATLIFF: He has been sworn.

23 MR. CLAYTON: Not today.

24 MR. RATLIFF: No, not today.

25 HEARING OFFICER WILLIAMS: Let's swear.

1 Whereupon,

2 MICHAEL CLAYTON

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. RATLIFF:

8 Q Mr. Clayton, did you prepare the earlier
9 staff testimony, the staff assessment on visual
10 resources?

11 A Yes.

12 Q And you prepared the testimony that
13 you're sponsoring today that is the supplement to
14 that?

15 A Yes.

16 Q Is that testimony true and correct to
17 the best of your knowledge and belief?

18 A Yes, it is.

19 Q Do you have any changes to make in it?

20 A No.

21 Q When you wrote this testimony would it
22 be fair to say you were unaware of the discussions
23 between the applicant and the City of Milpitas?

24 A That is correct.

25 Q And when did you first become ware of

1 those, that negotiation and the results of it?

2 A The results of it today. The
3 negotiations a couple days ago when we were
4 talking, I think when the applicant had submitted
5 the recent landscaping plan.

6 Q Can you give us your appraisal of that
7 plan, and what your view on it is in terms of its
8 effectiveness?

9 A I can talk about it in general terms.
10 Typically we would want to see simulations of any
11 kind of a landscape plan or screening plan to be
12 able to accurately gauge its effectiveness.

13 However, I can address a couple of the
14 points fairly specifically. I'll break it down
15 into two items. First, the use of deciduous
16 trees, and then discuss the soundwall a bit.

17 Staff does not support the use of
18 deciduous trees. The intent, I think, was to try
19 and meet the City of Milpitas' objective of having
20 the screening vegetation look more naturalistic.
21 Staff's goal is not necessarily to make the
22 screening look more naturalistic; staff's goal is
23 to screen the project effectively.

24 Clearly with the use of deciduous
25 vegetation, particularly in the wintertime, you

1 wind up with a much more visible structure. Read
2 testimony where the contrast that would result
3 from the use of dense evergreen vegetation would
4 either appear inconsistent or would contrast with
5 the existing and natural vegetation on the site.

6 I would argue that the visual contrast
7 of the evergreen vegetation with existing
8 vegetation is substantially less than the visual
9 contrast that would result in a much more highly
10 visible project structure with the existing
11 vegetation.

12 So, staff still does not support the use
13 of deciduous trees in the context of the screening
14 plan.

15 Second point is with regards to the
16 soundwall. Just taking the view from highway 237,
17 it's hard to imagine how a 17-foot high soundwall
18 is going to have any substantial effect whatsoever
19 in terms of screening the proposed project.

20 In fact, and you may not have this image
21 in front of you, but in looking at visual
22 resources figure 7, which is the view from 237,
23 KOP-1, it's entirely possible that portions of
24 that soundwall will not even be visible above the
25 center barrier of the highway.

1 But even if it was completely visible it
2 would have very minimal effect on the screening of
3 the structures. And with respect to the sort of
4 offset design of the panels, at that distance it's
5 going to appear pretty much like a long, linear,
6 horizontal feature in the landscape, the more
7 intricate design aspects will not be particularly
8 effective.

9 Also, to the extent that the lattice,
10 the color of the wood lattice on the top of the
11 wall substantially differs from the lighter tone
12 of the concrete structures of the wall, that may
13 actually increase the horizontal line of that
14 structure.

15 So, to argue that the -- the argument
16 that this soundwall is somehow going to
17 effectively screen the project plant, staff would
18 soundly reject that argument.

19 We did not require that in the
20 conditions or mitigation we initially put forward
21 because quite frankly, effective implementation of
22 visual resources condition of certification Vis-3,
23 with effective screening, vegetative screening of
24 the project, you wouldn't see the soundwall at
25 all. It would be completely screened from sight.

1 So we found no value in that type of a
2 structure to screen the project. So, neither is
3 it effective from state route 237, nor would it be
4 actually visible if we fully and effectively
5 implemented Vis condition 3.

6 Q Is the staff's mitigation more reliant
7 on line of sight interference with views of the
8 project?

9 A Yes. Yes. We were able to confirm
10 through appropriate placement of trees, as we word
11 the condition we say strategic placement of trees
12 by appropriately locating trees in the project
13 vicinity between the viewers on SR-237 and the
14 project site, that we would be able to screen a
15 majority of the lower structural forms, not
16 necessarily the stacks, themselves, without
17 compromising distant sight lines to the East Bay
18 Hills.

19 So that analysis is based on line of
20 sight, and does confirm that we can effectively
21 screen the project within a reasonable amount of
22 time, as well.

23 Q Does that conclude your testimony?

24 A Yes, it does.

25 Q Thank you.

1 PRESIDING MEMBER KEESE: May I ask what
2 a reasonable period of time is?

3 MR. CLAYTON: We have concluded that by
4 planting vegetation in the general vicinity of the
5 U.S. Dataport landscaping zone, which is close to
6 237, you could achieve effective screening of the
7 project site with trees on the order of 20 to 25
8 feet tall, in that general height range.

9 Twenty-five-foot tall vegetation would
10 be, using fast-growing trees, easily accomplished
11 or readily accomplished within a five-year period
12 of time, which would meet our criteria for
13 significant visual impact.

14 If you used berms in conjunction with
15 that, then you could, as the applicant is
16 proposing, you could increase the height more, or
17 increase or expedite the screening process.

18 PRESIDING MEMBER KEESE: Which would be,
19 okay, five or seven years, is that what --

20 MR. CLAYTON: Within five years.

21 PRESIDING MEMBER KEESE: Within five
22 years.

23 MR. CLAYTON: By pulling the vegetation
24 closer to the viewers, closer to 237 --

25 PRESIDING MEMBER KEESE: Closer to 237.

1 MR. CLAYTON: -- you can achieve
2 screening quicker because you can go with, you
3 know, basically shorter vegetation will accomplish
4 your goal.

5 If you have vegetation back up against
6 the structures, 65-foot tall structure, then you
7 need to have vegetation that's 65 feet tall to
8 screen that structure, because of the sight line
9 effect, we're able to achieve that with much
10 shorter vegetation and quicker. And in an area
11 which is planned for landscaping at some point in
12 time.

13 PRESIDING MEMBER KEESE: So the berm and
14 wall and trees adjacent would be more amenable to
15 screening it from the buildings, the Dataport
16 buildings that are built right there, than it
17 would be from the highway, should the Dataport be
18 built within five years?

19 MR. CLAYTON: I'm sorry, I didn't quite
20 follow you.

21 PRESIDING MEMBER KEESE: I say if we
22 have a horseshoe around this power plant, U.S.
23 Dataport, 70 feet tall, which I believe --

24 MR. CLAYTON: Right.

25 PRESIDING MEMBER KEESE: That would

1 screen the project?

2 MR. CLAYTON: Exactly. With Dataport,
3 Dataport has, at least in the designs that we have
4 seen, would, for the most part, screen most of the
5 proposed project from view.

6 There might be some sight-lines
7 available through the southwest corner. The plans
8 that we originally saw there was, I guess it was
9 the primary entry into Dataport where they had a
10 landscaping area, and there was a break in between
11 two buildings. But that was going to be
12 landscaped.

13 So, theoretically, with U.S. Dataport
14 you don't see very much of the proposed project.

15 PRESIDING MEMBER KEESE: Okay, so do you
16 see your suggestion as an alternative if the
17 Dataport isn't built within a certain period of
18 time, then that screening should take place? Or
19 do you see that that screening should take place
20 anyplace, and if they build Dataport then they
21 don't have to keep up the -- they can cut down the
22 screening?

23 MR. CLAYTON: They could either cut down
24 the screening, or it might be incorporated into
25 the landscaping that would be proposed by U.S.

1 Dataport. But it should be implemented initially
2 with project -- at the outset of project
3 construction.

4 You know, we're not sure that Dataport
5 would actually be constructed, or what kind of
6 configuration or design it might actually be
7 constructed in. And if Dataport languishes for
8 two or three or four or five years, then we might
9 have a situation where we have a significant
10 visual impact extending out five, six, seven years
11 before Dataport or something else actually is
12 constructed.

13 But if something like Dataport, or if
14 Dataport is constructed in the configuration that
15 we have seen proposed, at that time it would
16 effectively screen the project, yes.

17 PRESIDING MEMBER KEESE: Thank you. I
18 think we'll hear whatever questions there are, but
19 as I mentioned on the earlier point, we hope to
20 close before the end of the month.

21 I see an open issue here in front of us,
22 so, Mr. Boyd, I hope you'll help me in making sure
23 we have all the input we need for a decision
24 making process.

25 If there are other questions?

1 HEARING OFFICER WILLIAMS: Applicant, do
2 you have any questions?

3 CROSS-EXAMINATION

4 BY MS. LUCKHARDT:

5 Q Well, I guess I'm trying to kind of
6 understand your comments, Mr. Clayton. Is your
7 area of concern dealing with -- is the item that
8 you don't like the soundwall? Do you find that
9 objectionable?

10 A I don't really have a problem with the
11 soundwall. Its effectiveness for any type of
12 structural screening I think is marginal at best.
13 And we would not suggest, recommend or require
14 such a structure, because in our mind the
15 landscaping that we are requiring in our
16 conditions would screen the soundwall.

17 So it's not -- I don't have a problem
18 with it, I just don't see it's value in terms of
19 screening the actual, screening the project.

20 Q Okay. And then did I hear correctly
21 that your disagreement is with the selection of
22 the type of trees, the proposal to use deciduous
23 trees?

24 A Yes. That is a basis of objection. We
25 would not suggest or require the use of deciduous

1 trees for the reason that it would have greater
2 structural visibility. We don't feel that
3 deciduous trees would provide a good screen of
4 project structures during periods of time in the
5 year.

6 And that would be something that we
7 would not want to see; and that is how we have
8 structured our condition of certification Vis-3,
9 is to use evergreen vegetation.

10 Q But am I correct to understand that you
11 did support the concept of using berms to elevate
12 the tree structures initially?

13 A I have no problem with the use of berms
14 in terms of elevating tree structures, that's
15 fine. Our goal is to get the vegetation to an
16 appropriate height to screen a majority of the
17 project structures within that five-year
18 timeframe. The use of berms is certainly
19 acceptable.

20 We have no objection with the use of the
21 soundwall, although, like I said, we see no value
22 in it.

23 Q Other than the need for soundwalls on
24 certain portions for noise purposes?

25 A For noise purposes, that's fine. Sure.

1 Q And then I guess I'm trying to
2 understand what you're advocating. Are you
3 advocating additional screening in a new location?

4 A No. Well, we're advocating screening in
5 locations that's different than what you're
6 proposing. Our condition of certification Vis-3
7 says strategically placed landscaping in order to
8 effectively screen project structures.

9 We have had workshops where we have
10 discussed with you the option, the possibilities
11 of planting vegetation closer to state route 237,
12 specifically in the area of U.S. Dataport's
13 landscaping zone, to achieve effective screening
14 of the project within the timeframe that we're
15 requiring.

16 So this is not a new issue.

17 Q Yeah, I guess we don't recall that
18 discussion. It may have been stated in a general
19 manner, but we didn't understand that that's what
20 you intended in Vis-3.

21 A Well, Vis-3 basically says you need to
22 have strategic placement, you need to place the
23 vegetation wherever you need to to be able to
24 screen the project from views from 237 and from
25 the Bay Trail. And you need to have achieved

1 certain heights within certain timeframes to
2 achieve effective screening.

3 How that actually is done, where it's
4 placed, if you started out with substantially
5 taller trees, which I'm not sure is feasible, you
6 could place it closer to the plant.

7 The goal, as stated in Vis-3, which is
8 to achieve effective screening of the project
9 structures, other than the stacks in that five-
10 year timeframe.

11 A simple line of sight analysis would
12 tell you that you're not going to, by planting the
13 vegetation, planting trees adjacent to the
14 structures you're not going to get effective
15 screening of those structures within five years.

16 HEARING OFFICER WILLIAMS: I don't see
17 the position of the parties as necessarily
18 inconsistent. I think it's something that can be
19 worked out in terms of placement.

20 Milpitas, do you have any objections to
21 the placement or possible language that deals with
22 placement of the trees?

23 MR. BRECHER: No. The more the merrier.

24 HEARING OFFICER WILLIAMS: That's sort
25 of how I feel. So, you know, the placement issue

1 is not something that I see as a sticking point.
2 We could easily meet that particular requirement
3 that staff has within the framework of this plan.
4 Unless I'm missing something?

5 PRESIDING MEMBER KEESE: Let me ask a
6 question. If we take the applicant's map that we
7 had previously, and we take the perimeter on the
8 south, how many feet are we talking about?

9 MS. LUCKHARDT: Between the project site
10 and 237?

11 PRESIDING MEMBER KEESE: I'm talking
12 about the screening proposal that we saw around
13 here. I'm looking at the south perimeter, the
14 south border.

15 MR. CLAYTON: That plan does not
16 accomplish the needs of our mitigation.

17 PRESIDING MEMBER KEESE: That's what I'm
18 going to -- that's question number two. So, on
19 this, what is the length of that south border?
20 Looks to me like it's about 1000 feet.

21 MR. STEWART: Yes, the width of the
22 property and the width of the screening on the
23 south would be 1020 feet.

24 PRESIDING MEMBER KEESE: It would be
25 1000 feet, all right. Staff is suggesting that

1 evidently that there should be trees along 237 on
2 the property from corner to corner to visually
3 screen the entire building.

4 MR. CLAYTON: Yes. There needs to be
5 vegetation planted much closer to 237, down
6 toward, I would say, the south side of the
7 Dataport property line.

8 PRESIDING MEMBER KEESE: Okay, so the
9 Milpitas/applicant proposal was for on that
10 border, approximately 1000 feet. Did you have an
11 idea what you're talking about?

12 MR. CLAYTON: I'm not sure of the exact
13 placement. There may need to be some extension of
14 that, of the screening line onto the City lands
15 adjacent to the buffer lands adjacent to the
16 Dataport property.

17 PRESIDING MEMBER KEESE: Onto lands that
18 applicant does not have control over?

19 MR. CLAYTON: We have views coming in
20 from the southwest, and so either the screen line
21 has to be brought up and away to the northwest,
22 where it intersects those sight lines, or extended
23 from further west along 237.

24 But, regardless, the vegetation has to
25 be planted closer to 237.

1 PRESIDING MEMBER KEESE: Does the
2 applicant have an idea of the width of the
3 property that you have under control on 237?

4 MR. STEWART: Yes, it's 1020 feet.

5 PRESIDING MEMBER KEESE: Now that's the
6 south of this project, but if you move -- is it
7 the same?

8 MR. STEWART: Yes, it's a rectangular
9 piece of property that is 1020 feet on the east/
10 west dimension. The picture is worth anything I
11 can say.

12 MR. BRECHER: While they're setting that
13 up, Mr. Keese, I wanted to emphasize that when I
14 said the more the merrier, I'm not authorized to
15 say that we should move the wall from the location
16 where the parties have agreed to, and take the
17 whole thing and move it along to 237. I would
18 have to get --

19 PRESIDING MEMBER KEESE: No, no, I
20 understand that.

21 MR. BRECHER: -- instruction on that.

22 PRESIDING MEMBER KEESE: What I --

23 MR. BRECHER: If that wall were in place
24 and additional planting were done along 237, we
25 would certainly have no objection to that.

1 PRESIDING MEMBER KEESE: Right. The
2 question I'm asking for clarification purposes
3 here is that I see up above that, that's about
4 1000 feet across. And the applicant is indicating
5 that they have control over 1000 feet at 237.

6 And staff sounds to me like they're
7 indicating that you needed to go that 1000 feet,
8 come towards yourself, and you need to go another
9 1000 feet on the right or the left --

10 MR. CLAYTON: No, we're not suggesting
11 you have to go that far. It would be preferable
12 to go further to the west somewhat. We haven't
13 seen any kind of simulations of that type of
14 landscaping plan. But they could either go
15 further to the west, or if you extended the north/
16 south planting along that line there, planting
17 there with some larger specimens and berms, again
18 to get the vegetation up higher, because it's
19 further away from the viewer we need to get it up
20 a bit higher sooner.

21 But I would also point out, just so that
22 there's no -- there isn't some misunderstanding
23 here, that this applies to the east side of the
24 project site, as well, because we're concerned
25 about the Bay Trail. And so we have to get

1 substantial screening of vegetation along the east
2 side, as well. And the use of deciduous trees,
3 again, is not going to solve that conflict.

4 PRESIDING MEMBER KEESE: And are you
5 suggesting that applicant has to move outside that
6 perimeter again?

7 MR. CLAYTON: No, I'm --

8 PRESIDING MEMBER KEESE: I mean for this
9 purpose you're suggesting applicant move outside
10 the perimeter of the power plant here.

11 MR. CLAYTON: On the east side?

12 PRESIDING MEMBER KEESE: On the south.

13 MR. CLAYTON: On the south side.

14 PRESIDING MEMBER KEESE: Are you
15 suggesting they would move outside of it on the
16 east, also.

17 MR. CLAYTON: I don't think so.

18 PRESIDING MEMBER KEESE: Okay, so the
19 size of the trees you're not objecting to. The
20 deciduous nature is what you're --

21 MR. CLAYTON: Well, yes, and not
22 necessarily. Yes, that we are objecting to
23 deciduous trees --

24 PRESIDING MEMBER KEESE: But at that
25 distance from the trail you're not going to screen

1 this facility?

2 MR. CLAYTON: The problem is that we
3 have not seen any simulations at anytime of the
4 landscaping as viewed from these Bay trails along
5 the east side there. So I couldn't tell you how
6 effective their new proposal is because this is
7 something new that we haven't been able to
8 actually evaluate.

9 So I don't know what the height -- I
10 think they mentioned that within a few years
11 they'd have heights above 25 feet, when you
12 factored in the berm, as well. We would have to
13 assess whether or not that is going to be
14 effective within five years.

15 The closer it is, here again, the closer
16 it is to the Bay trail alignments, the smaller the
17 vegetation. You could probably get fairly
18 effective screening with, you know, 10-, 15-foot
19 trees within a very short period of time if it's
20 close in to the Bay trail alignments.

21 MS. LUCKHARDT: If I might, I think that
22 a lot of these issues are proposed to be resolved
23 in the agreement with Milpitas, wherein even this
24 landscaping plan is available for review by the
25 Committee, which does include Commission Staff.

1 And as you well know, as the jurisdictional
2 entity, the Commission does have final approval
3 over whatever is proposed.

4 And this is included in this plan. And
5 I think that that is an appropriate forum to
6 resolve just these types of issues.

7 In that instance, Milpitas will have
8 representatives. They will have people available.
9 The committee includes representatives from San
10 Jose, Alviso community. It includes the project
11 and it includes Commission Staff.

12 And so there is a real opportunity to
13 resolve these issues, I think, in a constructive
14 forum where Mr. Clayton's concerns can be taken
15 into account. They can look at the feasibility of
16 the limitations on property that Calpine owns and
17 what's available inside or not outside of that
18 property.

19 And I think that that would be an
20 appropriate forum for addressing just these types
21 of concerns.

22 PRESIDING MEMBER KEESE: Let me ask the
23 City of Milpitas, is your deal with the applicant
24 contingent upon them building a five-foot berm,
25 building a 17-foot wall, and putting deciduous

1 trees behind it?

2 MR. BRECHER: Well, that's the agreement
3 as it's stated now. I don't know if it's a deal-
4 breaker if that were taken back.

5 MS. LUCKHARDT: The agreement is --

6 PRESIDING MEMBER KEESE: If flexibility
7 were introduced. I'm not trying to push anybody
8 into anything here.

9 MR. BRECHER: I can't commit to that at
10 this point, Mr. Keese.

11 MS. LUCKHARDT: Yeah, I mean the
12 agreement specifically talks about a revisiting of
13 the landscape plan as proposed. I don't know that
14 Milpitas totally bought off on it. I think that
15 they appreciated the concepts and the movement by
16 Calpine in this direction.

17 But it does specifically contemplate a
18 reevaluation of this landscape plan --

19 PRESIDING MEMBER KEESE: With all the
20 parties -- with different parties involved?

21 MS. LUCKHARDT: With all the different
22 parties by the committee; there's a proposed
23 architectural committee. All of this is included
24 in the filing that you have just entered as
25 exhibit 8, I believe.

1 And there is also that specific
2 provision, a revisiting of that provision.
3 There's also specific recognition that the
4 Commission is the jurisdictional entity and that
5 if it is not approved by the Commission it has to
6 go back to the committee to be resolved. The
7 architectural committee, not this Committee.

8 And so the attempt in this, I think, was
9 to come up with a setting, the appropriate setting
10 for resolving these types of issues, recognizing
11 the Commission's jurisdiction. And unless Mr.
12 Brecher is aware of some specific item that is of
13 great concern to Milpitas that we aren't aware of,
14 it would probably be good to know that if he has
15 that information.

16 MR. BRECHER: No, I'm not. And I don't
17 see this --

18 HEARING OFFICER WILLIAMS: Can we take a
19 quick time out so we can switch court reporters?
20 And then we'll get back on the record.

21 (Brief recess.)

22 PRESIDING MEMBER KEESE: We were having
23 a multi-party discussion about a framework that
24 might be used. What is our next step here? Are
25 you -- is applicant suggesting that the agreement

1 with Milpitas contains the terms for something
2 that might be acceptable to staff and everyone?

3 MS. LUCKHARDT: I think it presents an
4 opportunity for various views, screening, tree
5 selection and tree planting, to be discussed and
6 resolved.

7 It proposes an architectural committee
8 consisting of all parties; that being the City of
9 San Jose, Alviso -- they're the jurisdictional
10 city, the City of Milpitas to address their
11 concerns, the project and the Energy Commission.

12 And we believe that this is the
13 appropriate way to resolve these types of issues.
14 And we believe that these issues can be resolved
15 within the compliance process, and within this
16 structure.

17 PRESIDING MEMBER KEESE: Okay. Before
18 we go to staff, then, is Milpitas reading it about
19 the same way that the applicant just explained it?

20 MR. BRECHER: I frankly don't know, Mr.
21 Keese. All I know is I'm not authorized to give
22 back the soundwalls and the berms. Now, if people
23 want to have a process whereby those features are
24 retained, because those are what we agreed to, and
25 additional landscaping features are added to that,

1 I can't imagine that Milpitas would have any
2 objection to it.

3 Furthermore, I don't think that Milpitas
4 is about to say, if we don't get deciduous trees
5 we're not agreeing.

6 (Laughter.)

7 MR. BRECHER: That might happen, but I
8 don't predict that kind of thing happening. But I
9 am not able to -- I mean the staff appears to say
10 we want those trees along 237. Milpitas has been
11 bargaining for we want them up next to the plant.

12 I am not authorized to say okay, we'll
13 put them along 237.

14 PRESIDING MEMBER KEESE: Okay. Staff,
15 what is staff's reaction, having not seen this
16 very much in advance?

17 MR. RATLIFF: Yeah, it wasn't our intent
18 to come in and blow up the deal between the
19 applicant and the City of Milpitas. But, I think
20 the reason we're kind of the spoilsport at the
21 party is because ultimately we felt that the
22 mitigation in Vis-3 was effective, but that it was
23 only effective because it provided screening
24 close-up in the line of sight.

25 And for that reason I guess for us the

1 most important aspect is to get that line of sight
2 mitigation in Vis-3. In other words, the
3 landscaping plan, a landscaping plan that provides
4 that is the most important element to staff.

5 That doesn't appear to be part of the
6 plan that Milpitas and the applicant worked out.
7 I know this puts the applicant at somewhat of a
8 disadvantage, because they're dealing with two
9 different masters here, they're trying to address
10 issues that both of us, both entities have raised.

11 But we still want a landscaping plan
12 with an ambitious line of sight obstruction of the
13 views of the project. We don't have any inherent
14 objection to the additional kinds of mitigation
15 which may be presented by the soundwall and the
16 things that go with the soundwall.

17 But that was not what we intended to
18 require, nor do we think that that's the most
19 effective way to achieve the mitigation.

20 PRESIDING MEMBER KEESE: Okay, let me
21 ask one more additional question to try to scope.
22 Would somebody from the applicant come out and
23 indicate to me the property over which applicant
24 has control on this map? What property is under
25 the control of the applicant?

1 MR. STEWART: The parcel that Calpine
2 purchased is this parcel right here. This area is
3 under a procedure by PG&E, and they're taking
4 control of this land for their substation. So the
5 parcel that we have long-term control over is this
6 piece right here.

7 The piece that we have control over
8 currently is represented by this rectangle. The
9 piece that we have long-term control over because
10 PG&E couldn't place the substation right here is
11 this rectangle.

12 PRESIDING MEMBER KEESE: Okay, so it's
13 the rectangle where the power plant will be
14 located, and an additional piece of property from
15 that property to highway 237?

16 MR. STEWART: That is correct.

17 PRESIDING MEMBER KEESE: Thank you.
18 Applicant, a comment?

19 MS. LUCKHARDT: I guess our confusion
20 arose from the staff assessment which indicated
21 that they did not want vegetation planted in close
22 proximity to 237. So, it's not that we are
23 absolutely against it, it's just new. And we're
24 trying to work it on the fly as much as we can.

25 PRESIDING MEMBER KEESE: Yes, it would

1 be nice to have time to have another workshop
2 here, but --

3 MS. LUCKHARDT: Well, yeah, I mean we --

4 PRESIDING MEMBER KEESE: -- I don't
5 think that that's going to be in the cards.

6 HEARING OFFICER WILLIAMS: As I see it,
7 applicant is not opposed in principle to Vis-3, is
8 that correct?

9 MS. LUCKHARDT: No, and Vis-3 actually
10 does not define projects or vegetation near 237.
11 And I think what would be -- I mean I'd be
12 guessing, and, Todd, you'd have to clarify as to
13 what would be feasible to allow you to still use
14 that property. My guess would be property edge-
15 lines would be more acceptable than putting
16 something in the middle of the property.

17 MR. STEWART: That's correct.

18 MS. LUCKHARDT: I think -- Todd's
19 confirming that that's the case.

20 HEARING OFFICER WILLIAMS: Okay, and
21 then we also have the framework set out for
22 resolution of these issues. So, I think there's
23 certainly a way that we can address a resolution.

24 (Pause.)

25 PRESIDING MEMBER KEESE: We're working

1 on the fly, also.

2 (Laughter.)

3 MR. BRECHER: I guess, Mr. Ratliff, in
4 hindsight you didn't get to go to the party.

5 (Laughter.)

6 HEARING OFFICER WILLIAMS: Well, I think
7 the Committee is satisfied that we have a
8 framework to reach a resolution on these issues.
9 Some of it might be done in the compliance phase.
10 Of course, whatever the Committee does, has to be,
11 I believe -- has to respect the agreement that
12 Milpitas has made with the applicant.

13 So the framework that we're talking
14 about would essentially be to address staff's --
15 the framework would address staff's concerns on
16 top of what Milpitas has already agreed to
17 essentially, although it hasn't been approved yet.

18 So it's kind of a dual track. But the
19 Committee sees that the framework that the
20 Milpitas agreement provides is sufficient to
21 assure us that there will be a means of resolution
22 of this landscaping issue that ultimately will lie
23 in the hands of the Commission.

24 So we're satisfied that we can address
25 these matters in a way that can accommodate staff.

1 So, with that, --

2 PRESIDING MEMBER KEESE: With that the
3 question, have we heard all the presentations on
4 visual? Are there any more questions? Do we have
5 any -- you didn't get to question someone?

6 MS. SCHILBERG: Could I just ask a
7 question of staff for clarity.

8 CROSS-EXAMINATION

9 BY MS. SCHILBERG:

10 Q If Dataport is not built, and therefore
11 Calpine does not have control over this eastern
12 segment of land, is it your position that a line
13 of vegetation on the eastern border of the parcel
14 that Calpine currently owns does not meet the
15 requirements of Vis-3?

16 A Could you repeat that last part, please?

17 HEARING OFFICER WILLIAMS: Well, let me
18 just add, I don't -- from what I'm hearing staff
19 hasn't really had sufficient time to view the
20 proposed agreement between Milpitas and the
21 applicant that sets forth the screening plans and
22 the vegetation and whatever, am I correct?

23 MR. CLAYTON: That is correct. All
24 we've been able to do is assess it; it is not
25 consistent with what we've been requiring.

1 HEARING OFFICER WILLIAMS: Okay, so to
2 that extent the Committee will provide that -- the
3 Committee believes that the framework of the
4 Milpitas agreement allows for a resolution of the
5 staff issues that address the screening on the
6 east side of the plant, as well as the south side.

7 Now, the precise issues will have to be
8 worked out within that framework and within the
9 compliance section of the Energy Commission.

10 MS. SCHILBERG: But I wanted to raise
11 the issue that you are giving jurisdiction to a
12 committee to say for a solution that may not be
13 resolvable by that committee.

14 Because if staff feels that a line of
15 vegetation along the eastern border is required to
16 meet Vis-3, and if the applicant doesn't own that
17 property, or for some reason can't negotiate to
18 make line of trees, that means that you have not
19 licensed the project with the conditions meet-
20 able. Because this committee can't make it
21 happen.

22 HEARING OFFICER WILLIAMS: Well, if the
23 committee can't make it happen, then it would
24 return to the Committee to possibly hold another
25 hearing to determine what types of mitigation

1 could be imposed.

2 So it's not left entirely with the
3 committee, the landscaping committee. The
4 landscaping committee provides a forum for
5 discussion and possibly a resolution. But
6 ultimately compliance section of the Energy
7 Commission has the final say. Is what we have in
8 mind.

9 MS. SCHILBERG: I think I would just
10 like to have on the record what the staff feels
11 about this eastern border. If there is no line of
12 trees along the eastern border, does that, in your
13 opinion, violate Vis-3?

14 MR. RATLIFF: I think our witness would
15 like to address that, and I would just like to add
16 to that, in addition, though, that the impact that
17 we're talking to is an impact to a trail which is,
18 although it's conceptually planned, it has not
19 been financed, and there is no timetable for its
20 construction.

21 And so in terms of purely CEQA black law
22 it is not really a foreseeable project.

23 MR. CLAYTON: Condition Vis-3 requires a
24 screening of the project from view from both 237
25 and the Bay trail alignments, both reaches 1 and

1 2.

2 Clearly on the east side, if it's closer
3 to the trail it's easier to screen the project.
4 Because the closer the screening is to the viewer,
5 the shorter the vegetation, the quicker it can be
6 accomplished.

7 If they cannot gain access or choose not
8 to plant in that location, they simply have to
9 plant where they choose to plant in a way, in a
10 fashion, and with a species that will achieve the
11 appropriate heights and density to screen those
12 views.

13 So it becomes a little more challenging,
14 but we do not feel it is impossible to accomplish
15 the goals of condition Vis-3. And that applies to
16 both -- that applies all the way up the side, of
17 the east side, including the southbound views
18 which will actually look into the north side of
19 the property.

20 MR. BRECHER: Could I ask who holds the
21 land that the proposed Bay trail will be built
22 upon? Do we know that?

23 MS. LUCKHARDT: Which Bay trail?

24 (Parties speaking simultaneously.)

25 MS. LUCKHARDT: The San Jose side along

1 Coyote Creek?

2 MR. YOUNG: It would be held by one of
3 two parties. One would either be the Santa Clara
4 Valley Water District, who has jurisdiction over
5 that waterway, and a substantial flood channel.

6 Or it would be the owners of the Silker
7 property.

8 MR. BRECHER: Okay, thank you.

9 PRESIDING MEMBER KEESE: Thank you.
10 Anything else on this issue? All right. That
11 somewhat disposes of visual.

12 Do we have a report from our workshop?

13 MS. LUCKHARDT: We do. I want to make
14 sure that I have entered applicant's visual
15 resources testimony into the record. My records
16 of that have gone underneath the pile.

17 We do have a report from the air quality
18 folks. I don't know if anyone else is around. I
19 think we're very fortunate that we were able to do
20 this. We didn't have to wait for briefing and
21 we're able to provide it at this time.

22 It is a revised condition, revisions to
23 AQSC1 and I believe this is a new AQSC5. Both
24 have been revised, I believe, -- Gabe is kind
25 enough to pass out copies to everyone.

1 (Pause.)

2 MS. LUCKHARDT: I guess I'd just like to
3 clarify one thing. Alvin, you may be able to
4 answer this easily. The proposed FDMM, fugitive
5 dust mitigation manager, I gather, I would gather
6 that this individual could also do other
7 monitoring functions if they were capable and
8 trained, say for cultural or some other things
9 that --

10 DR. GREENBERG: If they were capable,
11 qualified and had the time.

12 MS. LUCKHARDT: Fair enough.

13 HEARING OFFICER WILLIAMS: We'll mark
14 this for identification as joint exhibit 1.

15 MS. LUCKHARDT: Joint exhibit 1?

16 HEARING OFFICER WILLIAMS: Yeah. Is
17 that acceptable? I see it has elements of both
18 applicant's proposal and staff's proposal. So,
19 joint exhibit 1.

20 MR. RATLIFF: Commissioners, I also want
21 to -- I don't want to cut off the discussion of
22 this, but I also want to remember to move the
23 staff testimony into evidence. And also remind
24 you that we have a very patient witness who has
25 waited throughout the day to testify --

1 PRESIDING MEMBER KEESE: Yes, we have
2 one other issue.

3 HEARING OFFICER WILLIAMS: So moved,
4 your exhibits in.

5 MR. RATLIFF: Okay.

6 PRESIDING MEMBER KEESE: Okay, let's
7 just clarify for the record that both applicant
8 and staff are satisfied with this proposal?

9 MR. RATLIFF: Yes.

10 MS. LUCKHARDT: Yes, that's correct.

11 PRESIDING MEMBER KEESE: Applicant is
12 satisfied; staff is satisfied?

13 DR. GREENBERG: Yes, Commissioner.

14 PRESIDING MEMBER KEESE: One intervenor
15 left. We're wearing them down. Have you seen
16 the --

17 HEARING OFFICER WILLIAMS: We can
18 certainly --

19 PRESIDING MEMBER KEESE: We can take
20 your input --

21 HEARING OFFICER WILLIAMS: Unless you
22 have maybe some specific questions for the
23 applicant's experts, I'm not sure how late they're
24 sticking around.

25 (Laughter.)

1 HEARING OFFICER WILLIAMS: There is an
2 important event tonight, by the way.

3 MS. LUCKHARDT: There is. There
4 absolutely is an important event tonight.

5 (Laughter.)

6 PRESIDING MEMBER KEESE: Not for Bay
7 Area residents.

8 Do you want to take some time to look at
9 that? We have one other issue to take up, but you
10 may have an interest in that, also.

11 MS. BAKKER: I have a question on this
12 thing. I just want to be sure we have air quality
13 1 and it's amended by underlining, the things that
14 are new, or striking out things that are being
15 eliminated.

16 But you said, did you not, that air
17 quality-5 is all new?

18 MR. RUBENSTEIN: Yes.

19 MS. BAKKER: And air qualities 2 through
20 4 stay the way they are?

21 MR. RUBENSTEIN: That's correct.

22 MS. BAKKER: Okay.

23 MR. BEHYMER: This is effectively a
24 change to the amendment to the staff assessment.

25 MS. BAKKER: Right. Good. Thank you.

1 HEARING OFFICER WILLIAMS: Okay, with
2 that clarification I think, staff, maybe we ought
3 to allow you to call your witness who's been
4 waiting so patiently. And then we can return to
5 joint exhibit 1.

6 MR. RATLIFF: The staff witness is Chris
7 Huntley.

8 MS. LUCKHARDT: Do I need to keep my air
9 quality witness any longer?

10 HEARING OFFICER WILLIAMS: Staff, how
11 long do you think this is going to take?

12 MR. RATLIFF: It will only take us five
13 minutes.

14 HEARING OFFICER WILLIAMS: Can you stick
15 around just a few minutes?

16 MR. RATLIFF: I think Mr. Huntley does
17 need to be sworn in.

18 Whereupon,

19 CHRIS HUNTLEY
20 was called as a witness herein, and after first
21 having been duly sworn, was examined and testified
22 as follows:

23 DIRECT EXAMINATION

24 BY MR. RATLIFF:

25 Q Mr. Huntley, can you tell us your

1 position at the Energy Commission?

2 A I'm a compliance project manager.

3 Q And as a compliance project manager do
4 you have experience looking at other projects and
5 construction schedules?

6 A Yes, sir. I was responsible for five of
7 the emergency peaker projects that were
8 constructed under expedited schedules during 2001.

9 Q Did you write the testimony called Power
10 Plant Construction Schedule which was filed I
11 guess last Wednesday?

12 A Yes.

13 Q And is that testimony true and correct
14 to the best of your knowledge and belief?

15 A Yes, it is.

16 Q Would you summarize it briefly?

17 A Basically staff believes that if Calpine
18 is going to work on an expedited schedule it's
19 completely possible and quite likely that they
20 will be online within a six-month construction
21 period.

22 And to that effect we believe that staff
23 should support the six-month schedule.

24 Q Is that conclusion based on your
25 experience with other projects which have managed

1 to attain that schedule?

2 A Yes, it is.

3 Q Okay, and that's included in your
4 testimony as written?

5 A Yes, it is.

6 Q Thank you. Does that complete your
7 summary?

8 A Yes, it does.

9 MR. RATLIFF: The witness is available
10 for cross-examination.

11 MS. LUCKHARDT: I have no questions.

12 MR. BRECHER: No questions.

13 CROSS-EXAMINATION

14 BY MS. SCHILBERG:

15 Q I just wanted to take a look at your
16 table 1. Having limited access to data on this
17 topic, I just accessed the Commission's website.
18 You're aware of the data on the Commission's
19 website --

20 A Yes.

21 Q -- about the power -- I'll just refresh
22 your memory with this extract from the website.

23 MS. SCHILBERG: This can be passed
24 around.

25 (Pause.)

1 BY MS. SCHILBERG:

2 Q So as I see it, Calpine King City,
3 according to the website, was approved in May of
4 2001 and it's online 14th of January 2002. That I
5 calculate is about eight months. You have five
6 months down here.

7 A Yes, what these dates reflect is the
8 date the Commission has approved, not the actual
9 start of construction dates. Many of these
10 projects began construction -- or were approved,
11 there was a period of delay, and then actual
12 construction started at a later time.

13 And in fact, in Gilroy, as in King City,
14 actual construction on our front was limited to
15 the pouring of permanent foundations.

16 So, there was a demolition of structures
17 and things like that. So, the numbers that we put
18 here do reflect the actual construction times once
19 they started.

20 Q So, do you have any reason to believe
21 that there might be any kinds of delay of a
22 similar sort for this project, for Los Esteros?

23 A What these -- well, to answer your
24 question first, there certainly could be a delay.
25 Both King City and Gilroy experienced short-term

1 delays when they encountered cultural remains.

2 However, none of those delays resulted in
3 more than a couple days in a real isolated area.

4 What's also not accurately reflected
5 here on the peaker table is they did not work 24
6 hours a day from the get-go. Once they had poured
7 permanent foundations and began laying duct work
8 and doing electrical work and mechanical, then
9 they went to 24 hours a day.

10 At this point in time Calpine has
11 indicated that they're going to work 24-hour
12 schedule pretty much from the start. So that, I
13 believe, gives them even a little more leeway in
14 accomplishing their tasks.

15 MS. SCHILBERG: I have no further
16 questions.

17 HEARING OFFICER WILLIAMS: Thank you.

18 MS. LUCKHARDT: Would you like Mr.
19 Stewart to give you his impressions on
20 construction time and the work that has been
21 completed by Calpine to this point to allow them
22 to start construction?

23 PRESIDING MEMBER KEESE: That would be
24 fine. Yes, the issue of construction by December
25 31st is before us, so I think whatever you can

1 give us would be helpful.

2 MR. STEWART: Okay. Calpine has planned
3 for and fully intends to build this project within
4 six months, and have it online by the end of the
5 year.

6 Activities that have already taken place
7 that helped this site be ready for immediate
8 construction include under order by City of San
9 Jose last year, due to public health and safety
10 concerns, we demolished all of the old buildings
11 onsite. They had become havens for rave parties,
12 of all things. So all of that was taken care of
13 at that time and the site was remediated.

14 In addition, presence and absence
15 testing on the project site has already been
16 conducted and completed, and a finding of no
17 significant remains was made.

18 BY MS. LUCKHARDT:

19 Q Would you talk briefly to engineering,
20 equipment availability?

21 A Yes. All of the equipment has already
22 been ordered. Much of it is located in either
23 manufacturers' yards awaiting shipment, or is in
24 transit ready to be located. We have some at our
25 contractor's storage yard.

1 The engineering, as was mentioned a
2 couple times earlier, is over 95 percent complete;
3 so we're going in with a complete package. Most
4 of the packages that require CBO review have been
5 submitted and have been returned.

6 Q And then as far as staff's proposed
7 conditions of certification, could you speak to
8 the ones that are required prior to breaking
9 ground?

10 A I believe that most all of the
11 conditions that are required prior to breaking
12 ground, with the exception of this one that was
13 just passed out this afternoon, are either in
14 final review or complete and approved.

15 PRESIDING MEMBER KEESE: One clarifying
16 question. You were saying construction within six
17 months. Are you -- I trust you're not saying we
18 will wrap it up on December 31st. Do you have a
19 timeline when -- an optimistic timeline?
20 Understanding that December 31st is a deadline at
21 the end?

22 MR. STEWART: We're looking to
23 commission the units in the space of three weeks
24 in December.

25 PRESIDING MEMBER KEESE: Okay.

1 Mr. Boyd.

2 COMMISSIONER BOYD: I don't have any
3 questions. Maybe just kind of a comment. You
4 know, I stepped into the middle of this project
5 literally in March with a first hearing. And
6 contrary to a lot of the language I've seen in
7 some of the filings about failures of the
8 Commission, or not fulfilling obligations or
9 unconscionable delays, I frankly think it has
10 taken the action of this Committee in the hearing
11 today, and the materials that have been submitted
12 for today's hearing to finally clear the air on
13 the construction timetable.

14 Personally, as one who has served on the
15 Governor's generation team since January of 2001,
16 I've kicked a lot of tires, seen a lot of power
17 plants. I know what can be done. And so I
18 frankly think the job can be done in the time
19 period they're committing to, now that we have
20 cleared the air as to what type of construction
21 process was intended, what schedule was intended.

22 It certainly wasn't clear to me at the
23 March 11th hearing; or in the record that had been
24 provided to that date.

25 The materials provided at this hearing,

1 the testimony at this hearing have shown me
2 personally that the issue has been fairly well
3 cleared up. So I'm fairly well satisfied.

4 But I really did think it took the
5 action of this Committee in the questions it asked
6 and the orders that it put forward to clear the
7 air. So I appreciate the hard work that
8 everybody's done.

9 PRESIDING MEMBER KEESE: Thank you.
10 This is an issue on which we really didn't have a
11 witness. Do you have any comments on the issue of
12 whether they can complete it by the end of the
13 year?

14 MS. SCHILBERG: Well, I could have a few
15 questions, possibly.

16 PRESIDING MEMBER KEESE: All right.

17 CROSS-EXAMINATION

18 BY MS. SCHILBERG:

19 Q I take it then that you don't have --
20 you have financing in order to build and construct
21 this plant? That you have financing --

22 A For phase one, yes.

23 Q Phase one being the --

24 A Simple cycle.

25 Q The simple cycle. So you have financing

1 taken care of for phase one?

2 A Um-hum.

3 Q I notice that you just canceled plans
4 for the Hayward plant. Did the cancellation of
5 those plans have anything that might adversely
6 impact the construction of this plant?

7 A I'm not prepared to talk to any actions
8 on the Hayward plant at all.

9 Q When you say commission for three weeks
10 in December, I know that there is a testing period
11 before the plant actually is online. Could you
12 describe what you mean by commission?

13 A Commissioning process is a family of
14 activities that include the checking out of the
15 various systems that were installed, and doing
16 testing, actual testing to see that those
17 particular systems work.

18 You would have individual subsets such
19 as your gas compressors, your pumps. You'd wring
20 out all of your wiring. All of these things would
21 be part of a startup and commissioning process.
22 And then you would run your gas turbine to see
23 that you got your lube/oil system up and
24 operational. And all of these things are included
25 in the commissioning process.

1 Q So, that would be for several weeks in
2 December. So you expect that you would actually
3 be able to give electricity to the grid on what
4 date?

5 A No, I said it concludes in December.
6 And the units will be commissioned one after the
7 other over likely a three-week span. But the
8 actual commissioning will begin much earlier than
9 that.

10 Q So they will feed electricity to the
11 grid during --

12 A This year.

13 Q -- during the month of December?

14 A Yes, ma'am.

15 MS. SCHILBERG: Those are all my
16 questions, thank you.

17 PRESIDING MEMBER KEESE: Thank you.
18 We're going to take one minute here.

19 (Pause.)

20 PRESIDING MEMBER KEESE: The last
21 remaining issue that we have before us is our
22 AQSC1, AQSC5. My --

23 MR. RATLIFF: I need to move that last
24 piece of testimony --

25 PRESIDING MEMBER KEESE: Pardon?

1 MR. RATLIFF: I need to move that last
2 piece of testimony into the record.

3 PRESIDING MEMBER KEESE: Okay, you can
4 move that last piece of testimony. My staff has
5 reviewed the language. I gather staff and
6 applicant have reviewed the language.

7 At this time it seems to reflect what
8 our understanding is. So we have reviewed it up
9 here. I know, Ms. Schilberg, you're getting it
10 the same time we are, and you're trying to
11 participate in everything we're doing, too.

12 MS. SCHILBERG: Could someone explain, I
13 thought there were supposed to be upwind and
14 downwind --

15 PRESIDING MEMBER KEESE: There are,
16 because I saw that in here.

17 MS. SCHILBERG: But there -- so we've
18 gotten rid of --

19 PRESIDING MEMBER KEESE: That's on
20 number 2 of SC5.

21 MS. SCHILBERG: All right, but there is
22 no benchmark like 5 was before, is that true?

23 DR. GREENBERG: That is true. Staff,
24 technical staff will develop some benchmarks and
25 thresholds in technical guidance for the fugitive

1 dust mitigation manager to follow in interpreting
2 the data.

3 PRESIDING MEMBER KEESE: But there are
4 three --

5 MR. BEHYMER: Staff felt that the use of
6 three different parameters in order to insure no
7 measurable PM10 offsite of the construction was a
8 more dependable measure than simply using a
9 monitor and a single number. It's a little more
10 flexible, and staff feels that the manager, the
11 fugitive dust mitigation manager we've identified,
12 will have some flexibility to react to activities
13 on the site on a moment-to-moment basis.

14 MS. SCHILBERG: So let me just get clear
15 for the record then the goal of these two is that
16 there would be no net PM10 construction emissions,
17 is that correct?

18 DR. GREENBERG: Correct.

19 MR. BEHYMER: That is staff's goal and
20 that's what we will instruct the FDMM to insure.

21 MS. SCHILBERG: So where we were talking
22 about 37 before, what this has gained us is close
23 to zero, right?

24 DR. GREENBERG: Yes, as close to zero as
25 practicable, as well as measurable. But the

1 thrust of this is for the mitigation manager to be
2 able to use three methods and not just one method.

3 And the three methods outlined are
4 measurements of soil moisture, which, of course,
5 affects the ability of soil to be generated into
6 dust, airborne dust.

7 Visual observations, as well as then the
8 third would be the actual PM10 monitoring program.

9 The manager will use all three, and not
10 just rely on one, in order to make a determination
11 of the effectiveness of the mitigation program.

12 MR. RUBENSTEIN: Mr. Chairman, if I
13 might. I --

14 PRESIDING MEMBER KEESE: Yes.

15 MR. RUBENSTEIN: I think the staff
16 witnesses may have misspoke. The question that
17 was asked was whether these conditions would
18 insure that there's no net increase of PM10
19 emissions. And you both answered yes.

20 I think what you meant to say is there
21 is no net increase in PM10 impacts. Because
22 clearly there will be PM10 emissions associated
23 with these activities. And these conditions won't
24 eliminate those emissions.

25 DR. GREENBERG: Yeah, we're looking at

1 the delta, again, --

2 MR. RUBENSTEIN: Right.

3 DR. GREENBERG: -- the difference
4 between upwind and downwind. And that's what we
5 meant.

6 MR. BEHYMER: And correct, impacts, not
7 emissions.

8 DR. GREENBERG: Sorry if that was
9 unclear.

10 MS. SCHILBERG: So please explain that
11 for me, the difference between impacts and --
12 you're talking about impacts in terms of public
13 health impacts, or -- please explain what you've
14 just said.

15 MR. RUBENSTEIN: Well, the emissions
16 occur simply when the dust goes into the air, even
17 if it falls right back down at the same location.
18 So there are still emissions.

19 What the staff was referring to in terms
20 of their objectives for this condition is making
21 sure that there is no net, or no measurable
22 increase in PM10 concentrations, meaning ambient
23 levels of PM10 crossing the property line.

24 MR. BEHYMER: I concur.

25 DR. GREENBERG: I concur.

1 PRESIDING MEMBER KEESE: Thank you.
2 City of San Jose, you've been diligent and working
3 at your desks, we can tell, but any other
4 comments?

5 Are they there?

6 (Parties speaking simultaneously.)

7 PRESIDING MEMBER KEESE: All right.

8 HEARING OFFICER WILLIAMS: I believe
9 we've admitted all the exhibits. Just give the
10 parties one last opportunity.

11 MS. LUCKHARDT: I guess --

12 HEARING OFFICER WILLIAMS: Staff, your
13 exhibits, I know that we've -- I want to reiterate
14 that we've actually received those.

15 And for applicant I know we've been
16 doing it as we've gone along, so I don't think
17 that there's a problem.

18 I believe that that --

19 PRESIDING MEMBER KEESE: The Committee
20 intends to, and with your help, the help of
21 everybody here today, I believe, it's still our
22 intention to have a PMPD out by the end of this
23 month. We will rule on the issues that have been
24 brought before us as soon as possible. So we will
25 have an order to you as soon as possible.

1 And we will, either in that order, or
2 when the PMPD comes out, give you the time
3 schedule for the remainder of this process.

4 Thank you.

5 MS. LUCKHARDT: That would be wonderful.

6 I would just like to add, just from a
7 procedural standpoint, do we need to accept
8 comments, T.H.E.P.U.B.L.I.C., Mr. Garbett, in, as
9 public comment?

10 PRESIDING MEMBER KEESE: That's probably
11 a good -- since I see our Public Adviser has
12 left--

13 MS. LUCKHARDT: Not that I'm interested
14 in being his advocate, just that I don't want to
15 fail to --

16 PRESIDING MEMBER KEESE: Yes, --

17 HEARING OFFICER WILLIAMS: Our Public
18 Adviser has --

19 PRESIDING MEMBER KEESE: -- yes, we'll
20 accept those, although the Public Adviser --

21 MS. LUCKHARDT: As public comment?

22 PRESIDING MEMBER KEESE: -- indicated
23 that she would docket them.

24 HEARING OFFICER WILLIAMS: Yes.

25 MS. LUCKHARDT: Okay.

1 PRESIDING MEMBER KEESE: So, yes.

2 They will be docketed.

3 Thank you, all.

4 HEARING OFFICER WILLIAMS: Thank you.

5 MS. LUCKHARDT: So then the record is
6 closed on all?

7 HEARING OFFICER WILLIAMS: Oh, that's
8 actually a good point. We're going to leave the
9 record open for the limited purpose of the
10 Milpitas agreement. But only for that purpose.
11 To receive the settlement materials from Milpitas.

12 So we're not officially closing it, but
13 it's only open for that limited purpose.

14 MS. LUCKHARDT: Thank you.

15 HEARING OFFICER WILLIAMS: Thank you.

16 (Whereupon, at 5:47 p.m., the hearing
17 was adjourned.)

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CERTIFICATE OF REPORTERS

We, PETER PETTY and VALORIE PHILLIPS, Electronic Reporters, do hereby certify that we are disinterested persons herein; that we recorded the foregoing California Energy Commission Hearing; that it was thereafter transcribed into typewriting.

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

IN WITNESS WHEREOF, we have hereunto set our hand this 22nd day of May, 2002.

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