PREHEARING CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of: )
the Los Esteros Critical Energy ) 03-AFC-02
Facility Phase 2 (LOS ESTEROS 2) )

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

MONDAY, NOVEMBER 22, 2004
1:13 p.m.

Reported by:
Peter Petty
Contract No. 170-04-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345
COMMITTEE MEMBERS PRESENT
William J. Keese, Chairman, Presiding Member
Jackalyne Pfannenstiel, Commissioner

HEARING OFFICER, ADVISORS PRESENT
Ed Bouillon, Hearing Officer
Rick Buckingham, Advisor to Chairman Keese
Timothy Tutt, Advisor to Commissioner Pfannenstiel

STAFF AND CONSULTANTS PRESENT
Robert Worl, Project Manager
Dick Ratliff, Senior Staff Counsel

PUBLIC ADVISER
J. Mike Monasmith

APPLICANT
Christopher Ellison, Attorney
Ellison, Schneider and Harris, LLP
representing Calpine Corporation

Rick Tetzloff, Project Manager
Calpine Corporation

Steven A. DeYoung, Principal
DeYoung Environmental Consulting

ALSO PRESENT
Robert Sarvey
Californians for Renewable Energy

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PRESIDING MEMBER KEESE: We're here on the application for certification for the Los Esteros Critical Energy Facility Phase II. And we're actually looking at Phase I.

I'm Bill Keese, Chair of this Committee. And on my left is Rick Buckingham, my Advisor. Jackie Pfannenstiel is on this Committee, also. And to her right is Tim Tutt, her Advisor. And Mr. Ed Bouillon is going to conduct this hearing.

Mr. Bouillon.

HEARING OFFICER BOUILLON: Thank you, Chairman Keese. My name's Ed Bouillon; I'm a Hearing Adviser, and I'll be the Referee today and at the evidentiary hearings.

First of all, this is a duly noticed prehearing conference for proposed recertification of the Los Esteros Critical Energy Facility; CEC docket number 03-AFC-2. The Committee is chaired by the Presiding Member, William J. Keese. And all Committee Members are present.

The Commission's Public Adviser, Margret Kim, is not present, but her assistant, Mike Monasmith, is. And I don't see any members of the
public here, but if anybody needs any help with anything talk to Mr. Monasmith.

I think we'll first introduce the parties. First, the applicant.

MR. ELLISON: Chris Ellison, Ellison, Schneider and Harris, attorneys for the applicant.

HEARING OFFICER BOUILLON: Would you introduce the members of your party that are here today.

MR. TETZLOFF: Rick Tetzloff from Calpine. And behind me is Steve DeYoung, environmental manager.

HEARING OFFICER BOUILLON: Thank you. And on behalf of staff.

MR. RATLIFF: Dick Ratliff, counsel for staff. And Bob Worl, the project manager is with me.

HEARING OFFICER BOUILLON: And Mr. Monasmith is in the back. And we have a person here on behalf of CARE. Would you please come up to one of the microphones and introduce yourself.

MR. SARVEY: Robert Sarvey on behalf of CARE.

HEARING OFFICER BOUILLON: I don't see any representative here from the only one who's
intervened to date, which is CURE. They have not
filed a prehearing statement and I therefore did
not expect to see them.

A few housekeeping matters before we
begin. This morning I received a copy of a
petition to intervene on behalf of CARE, which the
Committee may or may not have seen.

And I believe in the notice of
prehearing conference the Committee directed that
any petition to intervene should be filed prior to
November 22nd. As I understand it, the petition
to intervene was filed today. That little
abnormality aside, I'd like to deal with the
petition as filed, and ask both the applicant and
the staff if they have any comments on the
petition on way or the other. First, the
applicant.

First, indicate whether or not you
received a copy of it, and if so, when you did.

MR. ELLISON: I have received a copy of
it about two hours ago. I have had a chance to
read it. Calpine will waive it's ten-day wait to
respond to it, and we are prepared to respond to
it now.

We also have received and are informed
by CARE's prehearing conference statement which I also received about two hours ago.

And in looking at the two documents together, while it is Calpine's policy generally to not object to interventions in these sorts of proceedings, here we believe an exception is warranted for two reasons.

One of them is the history of this intervenor, which I'm not going to recount for you, I think you're quite familiar with it. But, I will simply say that this intervenor has a history at this Commission and in Calpine proceedings of intervening late, seeking to delay proceedings and raising issues which are found later to be frivolous.

And we see evidence of that to be repeated in this proceeding when we look at the issues that are raised in the prehearing conference statement.

First of all, the timing of the intervention is, as you pointed out this morning, late. CARE has not participated in any of the workshops or any of the proceedings that have gone on in this proceeding up until now.

Has not availed itself of any
opportunities for discovery, nor has made itself available to Calpine for discovery.

With that background let me just walk quickly through the issues that are raised in the prehearing conference statement.

First, with respect to air quality, CARE makes the statement, quote, "CARE supports staff's analysis in the FSA requiring full mitigation of the project's PM10 and PM2.5 emissions." And then it goes on, "Staff and applicant have agreed that those emissions are fully mitigated. There is no dispute between staff and applicant with respect to that."

I believe staff will confirm that. So, to the extent that CARE's intervention is based upon that dispute, there is no real issue there.

With respect to the ammonia emissions, which is the second issue raised under air quality, there is no difference in the ammonia emissions between the Phase I project being recertified here and the ammonia emissions that the Commission has previously certified. And I would urge the Commission to require CARE to make some showing that there's some new fact that calls upon the Commission to re-examine its earlier
finding with respect to that.

Secondly, by denying Calpine any right
to discovery we have no idea what sort of
environmental program they're talking about here.
And, once again, there's a real potential for
delay.

With respect to the environmental
justice issue, this issue is predicated again upon
a misunderstanding that the particulate matter
emissions from the project are not fully
mitigated. Specifically CARE states, "The project
area has a minority population greater than 50
percent, and the applicant has been operating the
project without full PM10 mitigation, as
identified by staff in the FSA. Mitigation should
be provided to the minority community to address
the operation of the facility without full
mitigation in the community."

As I mentioned earlier, staff and
applicant agree that there is full mitigation for
PM10. So this is also a non-issue.

And then the last issue that CARE raises
is under the topic energy resources. CARE makes
the statement, "The projects should have a
reduction in hours because the three-year
conversion requirement has been eliminated. A peaker project should not be licensed for 8760 hours per year without a sunset provision or a limitation on operating hours."

Here CARE cites no environmental impact, nor does CARE cite any law, ordinance, regulation or standard that supports this proposed policy. And I submit to you there is none.

So, once again, this is a non-issue. This is an issue that finds no support in law or policy.

So the bottomline is that on their face of this petition all three of these issues are frivolous and have no merit. To delay the proceeding in any way to pursue these sorts of issues, given the history of this intervenor, we think is inappropriate.

And so on that basis we object to the intervention. Having said that, in the alternative, if the Commission chooses to allow this intervenor, to grant the petition for intervention, at a minimum we would ask the Commission to require this intervenor to take this proceeding as they find it. To not prejudice any other party or this proceeding by their failure to
appear any earlier in the proceeding.

And what I mean specifically by that is, first of all, I think they should be required to identify any witnesses that they have, that they might intend to present, today, as all the other parties are. There's some reference that CARE has not identified witnesses yet, but may do so in the future. And so our first request would be that CARE be required to identify any witnesses today.

Secondly, that the proceeding not be delayed in any way as a result of this intervention, and that CARE be required to proceed in accordance with the schedule that would have occurred in any event.

And lastly, we would request that CARE be held strictly to the cross-examination timeframes proposed in their prehearing conference statement and to the topics that they identify in their prehearing conference statement.

So, to sum up, Calpine does object to the intervention on the bases that I described earlier. In the alternative, if the Commission chooses to allow CARE to intervene, we would ask that their delay in appearing in this proceeding not prejudice any of the other parties or the
proceeding, itself. Thank you.

HEARING OFFICER BOUILLON: Mr. Ratliff.

MR. RATLIFF: Yes, thank you, Mr. Bouillon. I think perhaps one of the things that we ought to do first is to clarify whether CARE's petition to intervene is to the Phase II portion of the project or Phase I.

I notice that on the cover they say it's Phase II rather than -- what we call Phase I is the relicensing portion of the proceeding, which is what this prehearing conference is about.

I understood their petition to intervene to be actually for the other license application, which is the Phase II intervention. If we could at least have that clarification I think it might be helpful in terms of understanding what it is that CARE is intervening in.

The staff is not going to object to the participation in either of these proceedings, but we would also, I think, join with the applicant in urging the Committee that at least for the Phase I portion of the proceeding there should be no delay in that proceeding by virtue of an intervention, if it is, in fact, Phase I that CARE intends to intervene in.
HEARING OFFICER BOUILLON: I understood their petition to intervene to be to Phase I of Los Esteros II, the way we've been referring to it. And I see by the nod of your head that CARE agrees with that statement.

Would you please respond to the comments that have been made, and add anything you --

MR. SARVEY: Sure, thank you. First of all, CARE filed this petition Sunday night. It was received today by most parties, but we did file it Sunday night.

And as far as being involved in here to have time delays and such, that's not our purpose here.

We support staff's position in air quality and we wanted to make sure that Calpine continued on with their mitigation program rather than surrender SO2 ERCs, which we have found out that they have done.

As far as energy resources, they're not being a precedent, we disagree with that. I personally participated in the MID proceeding, energy resources was a large topic. We feel it's inappropriate to run a peaker plant 8760 hours. We'd like to see some restrictions placed on that.
We feel it provides a burden to the entire state to use natural gas in this manner. And that's the basis of our intervention. We don't intend to prolong anything. We don't intend to be a nuisance in this to Calpine or to the Energy Commission.

HEARING OFFICER BOUILLON: Thank you.

Before we go any further, Mr. Ellison, would you give us about maybe two or three to five minutes about what your application, in total, is about, the conversion to a combined cycle; and how the two, Phase I and Phase II, are being separated out and why.

MR. TETZLOFF: I'll actually try and take that. Again, my name is Rick Tetzloff with Calpine.

The AFC was originally filed as a joint application for both the Phase I relicensing and the licensing for Phase II.

Again, Phase I is existing project which would extend its license beyond the initial three-year period. The Phase II license would be to convert the existing plant into a combined cycle project with a five-year window in which to start construction for that.
The Phase II would increase the capacity of the project up to about 320 megawatts. The current facility is 180 megawatts.

The decision to break the two processes up happened probably a month or two ago when we were, you know, looking at the long-range schedule and seeing that the existing license runs out in July of next year. And it would be really tight if we kept the two processes together in order to have a decision for Phase I that we could depend on to occur before then.

And one of the other issues was that there are several requests for proposals being issued by utilities that we need to have some certainty as to what's going to happen with Los Esteros so we know how to respond to those requests. Whether we want to bid it as a combined cycle project or as an existing project.

So that was the idea behind the splitting the two up.

HEARING OFFICER BOUILLON: Thank you.

The Committee, I believe, prefers to take the matter of the petition to intervene under submission, and we will issue a written order as required by the regulations as soon as possible.
But assuming, I think it is the feeling of the Committee that whether or not the petition is granted, that the intervenor will be required to take the hearings as they find them.

And in turning to the schedule, the prehearing conference statements that have been filed indicate a desire to have evidentiary hearings the week of December 6th. And I have looked at the scheduling for these chambers and found that, in fact, December the 6th is available. And the Commissioners are available then, also, to my understanding. And, if possible, we would like to hold the evidentiary hearings on that date.

I'd like to ask CARE if -- I know you don't have any witnesses, but whether or not your petition is granted, would you be prepared to cross-examine staff witnesses, as indicated in your prehearing conference statement, on that date?

MR. SARVEY: Yes, we will.

HEARING OFFICER BOUILLON: And do you have any objection to the hearings being held in Sacramento?

MR. SARVEY: None at all.
HEARING OFFICER BOUILLON: I'll ask the parties then would you prefer morning or afternoon? I would suggest morning, if the petition is granted, just to be on the safe side we then at least would have all day. Is that acceptable to the Committee?

PRESIDING MEMBER KEESE: What --

HEARING OFFICER BOUILLON: December the 6th.

PRESIDING MEMBER KEESE: Yes, that is acceptable. What? 10:00 a.m.?

HEARING OFFICER BOUILLON: Yes.

MR. ELLISON: That's fine.

MR. RATLIFF: That's acceptable to us either way.

PRESIDING MEMBER KEESE: That's okay; that works. That happens to be the only day that we have available.

HEARING OFFICER BOUILLON: It has also been the intention of the parties, staff and the applicant, with no objection apparently by CURE, to submit all of the testimony by way of affidavit and/or declaration. And to provide live witnesses only as required by the Committee or as needed for cross-examination.
I think just to keep things in a cohesive format that we should have some sort of live testimony, a summary of live testimony on project description by the applicant. Just in capsule form. And then the Committee can ask any questions it wishes with regard to what's going on with the project.

And additionally I think you should be prepared for both staff and the applicant to have witnesses present on the areas indicated by CARE, air quality, environmental justice and energy resources, have your people here unless CARE would indicate to you privately that they have no cross-examination for one or more of the witnesses as indicated in their prehearing conference statement.

Because I understand Mr. Ellison to say there may be problems with the air quality and mitigation that have been resolved, that may satisfy CARE. I don't know. So I would ask the applicant to get together with CARE about whether those witnesses are needed. But absent that, to have them present.

I'm sure we're all aware that whether or not the petition is granted, CARE would have a
right to cross-examine any witnesses that are
presented. And having indicated that they have
questions for those three areas, I think they
should be provided.

And with regard to the filing of
testimony, it's my understanding that the staff's
testimony is all contained in the staff assessment
filed October the 13th, is that correct? Have you
filed --

MR. WORL: November 15th was the FSA.

November 15 was the filing date for the final
staff assessment.

HEARING OFFICER BOUILLON: And all of
the staff's testimony is included in there, is
that correct?

MR. WORL: To date. We may have need
for errata on one or two subtexts of one or two
conditions of certification. They're not
substantial, but we wanted to make the record
accurate and clear.

HEARING OFFICER BOUILLON: Okay. And
how long will it take you to prepare that?

MR. WORL: Five minutes.

(Laughter.)

HEARING OFFICER BOUILLON: All right, so
you could file that by about 2:00 then?

MR. WORL: Yes. Probably could.

(Laughter.)

HEARING OFFICER BOUILLON: And on behalf of the applicant you've indicated in your prehearing conference statement your witnesses and the topics on which they would testify. Is all your testimony already prepared?

MR. ELLISON: We can file it tomorrow.

HEARING OFFICER BOUILLON: Tomorrow. And that's -- all right, why don't we plan on doing that. We'll make the order so that all testimony will be on file tomorrow, with the possible exception, if I might inquire of CARE, prehearing conference statement said you do not yet have any witnesses, but that you might have one.

It's kind of hard to deal with in the abstract, given the time limits that we have here. If you do decide to hire an expert, I think you're going to have to petition the Commission for authority to file testimony after tomorrow. I don't see how you could possibly file it today. But we'll deal with that when we come to it.

MR. SARVEY: So the deadline is
tomorrow, then?

HEARING OFFICER BOUILLON: Excuse me?

MR. SARVEY: The deadline for testimony would be tomorrow, then?

HEARING OFFICER BOUILLON: I'm sorry, I couldn't hear you.

MR. SARVEY: The deadline for testimony would be tomorrow, then?

HEARING OFFICER BOUILLON: Yes.

MR. SARVEY: Okay, thank you.

HEARING OFFICER BOUILLON: And at the hearing we will ask the parties to stipulate as to those issues on which there is no dispute, and waive cross-examination on those topics.

And then we will proceed on those topics by way of sworn declarations. And then we'll turn to the matter of live testimony which will be set out in the order.

Is there any other items you think we have to cover? Let me ask you this: Given the time limits set forth in CARE's prehearing conference statement, which adds up to somewhere in the neighborhood of an hour, I think, -- about an hour, do you think we can finish this in the morning?
MR. RATLIFF: I would expect that we could.

HEARING OFFICER BOUILLON: Mr. Ellison.

MR. ELLISON: Assuming that CARE does not produce a witness of their own, and that all we're talking about is our cross-examination of staff and CARE's cross-examination of staff and applicant, I think we can finish in that timeframe.

HEARING OFFICER BOUILLON: Thank you. Any other matters you think we need to cover this afternoon?

Chairman Keese, do you have anything?

PRESIDING MEMBER KEESE: No.

HEARING OFFICER BOUILLON: Commissioner Pfannenstiel?

COMMISSIONER PFANNENSTIEL: No.

HEARING OFFICER BOUILLON: Would you like to adjourn the meeting?

PRESIDING MEMBER KEESE: This meeting's adjourned.

(Whereupon, at 1:37 p.m., the Prehearing Conference was adjourned.)

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PETERS SHORTHAND REPORTING CORPORATION  (916) 362-2345
CERTIFICATE OF REPORTER

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 29th day of November, 2004.

PETERS SHORTHAND REPORTING CORPORATION  (916) 362-2345