COMMITTEE CONFERENCE

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for Certification of	)	Docket No.
the Los Esteros Critical Energy	)	03-AFC-02
Facility, Phase 2	)	
(Los Esteros 2)	)	
	)	
Presiding Member's Proposed	)	
Decision	)	
_____	)	

CALIFORNIA ENERGY COMMISSION

HEARING ROOM A

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

WEDNESDAY, NOVEMBER 2, 2005

10:02 a.m.

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

COMMITTEE MEMBERS PRESENT

Jackalyne Pfannenstiel, Presiding Member

Joseph Desmond, Associate Member

HEARING OFFICER, ADVISORS PRESENT

Gary Fay, Hearing Officer

Timothy Tutt, Advisor

STAFF AND CONSULTANTS PRESENT

Robert Eller, Project Manager

Richard Ratliff, Senior Staff Counsel

APPLICANT

Greggory L. Wheatland, Attorney
Ellison, Schneider and Harris, LLP
representing Calpine Corporation

Rick Tetzloff, Project Manager
Calpine Corporation

Barbara McBride
Calpine Corporation

Gary Rubenstein
Sierra Research

INTERVENOR

Robert Sarvey
Californians for Renewable Energy

I N D E X

	Page
Proceedings	1
Introductions	1
Opening Remarks	1
Presiding Member Pfannenstiel	1
Procedural Background	3
Written Comments	4
Applicant	4
CEC Staff	13
Intervenor CARE	17
Discussions	20
City of San Jose	20
Status of Bicycle Trail	20
Applicant	20
CEC Staff	23
Intervenor CARE	25
Zoning Inconsistency	27
Applicant	27
CEC Staff	28
Intervenor CARE	29
Closing Remarks	37
Adjournment	37
Reporter's Certificate	38

P R O C E E D I N G S

10:02 a.m.

PRESIDING MEMBER PFANNENSTIEL: This is the Commission Committee conference for Los Esteros Critical Energy Facility Phase 2. I'm Commissioner Jackie Pfannenstiel; I'm the Presiding Member of this Committee. To my right is Gary Fay, the Hearing Officer for the proceeding. And to his right is Commissioner Joe Desmond who is the other Member of the Los Esteros Committee.

This is an opportunity to take comment and discuss comments that have been received on the Presiding Member's Proposed Decision in this case.

So, with that, why don't I ask Mr. Fay to continue.

HEARING OFFICER FAY: Thank you, Commissioner. I'd just like to note that the notice of availability for the Presiding Member's Proposed Decision was sent out a month ago on October 7th, and it noticed today's hearing.

I'd like to just briefly take appearances. Mr. Wheatland.

MR. WHEATLAND: Yes, good morning. I'm

Gregg Wheatland, attorney for the applicant. With me this morning is Rick Tetzloff, Gary Rubenstein and Barbara McBride.

HEARING OFFICER FAY: Thank you. Mr. Ratliff.

MR. RATLIFF: Dick Ratliff for staff. With me is Bob Eller, the Project Manager.

HEARING OFFICER FAY: Thank you. What we'd like to do is initially ask the parties -- oh, and let me ask, is there anybody here representing CARE?

MR. SARVEY: Yeah, Bob Sarvey, representing CARE.

HEARING OFFICER FAY: Bob, --

MR. SARVEY: Hi, Gary.

HEARING OFFICER FAY: -- there you are. Thank you. So we have you, as well. Any other parties present?

I'd like to go through the parties and just get their reaction to the documents filed by the other parties. I don't have any documents filed by CARE, is that correct, Mr. Sarvey?

MR. SARVEY: No. We filed comments, timely comments, seven pages.

HEARING OFFICER FAY: Okay, I did not

receive copies of those.

MR. SARVEY: They were docketed, they're on the docket log.

HEARING OFFICER FAY: Really.

MR. SARVEY: Yeah. I haven't received any --

HEARING OFFICER FAY: Do you have any other copies of those?

MR. SARVEY: I only have one. I could go make one quickly, if you'd like, or --

HEARING OFFICER FAY: Did the applicant receive copies of that?

MR. WHEATLAND: Yes, we did.

HEARING OFFICER FAY: Okay.

MR. SARVEY: I haven't received any copies of staff's comments, either.

HEARING OFFICER FAY: I'm sorry for that confusion. So, copies or comments were filed by each of the three parties. We'd like, in turn, each party to comment on the written comments filed by the other parties.

And then later we will ask the applicant and staff to bring us up to date on the status of discussions with the City of San Jose. And there may be some other matters, as well.

So, Mr. Wheatland, could you give us your views on the comments filed by the staff and by CARE?

MR. WHEATLAND: Yes, thank you. Well, first of all, I'd like to say that the applicant strongly supports the Presiding Member's Proposed Decision. The Committee's proposed decision, we believe, accurately and fairly summarizes the evidence in all of the subject areas.

We have, in our comments, suggested some minor clarifications and corrections to the decision. We don't believe that any of the suggestions are substantive, and they are merely intended to clarify and correct to be consistent with the record and with the determinations that were made during the course of the evidentiary hearing.

We have also had a chance to review the staff's comments, and we are in concurrence with the staff comments, as well.

We did receive a copy of CARE's comments on the Presiding Member's Proposed Decision. And regarding those comments which focused primarily on the air issue, I'd like to ask Mr. Rubenstein to respond.

MR. RUBENSTEIN: Thank you, Mr. Wheatland. CARE did discuss two air quality comments; there was one incidental comment related to the bicycle path, as well, which, I think, Mr. Wheatland or Mr. Tetzloff will address in a minute.

The comments raised regarding air quality focused on two issues that the Committee explicitly addressed, the CO emission limit for the plant and the ammonia slip emission limit for the plant.

None of the issues in CARE's -- none of the arguments in CARE's comments raises any new issues. The exact same argument were made by at least one party, if not CARE, to the Bay Area Air Quality Management District to consider these issues.

Very briefly, with respect to CO, CARE is suggesting that the CO limit for the project should be 4 parts per million based on the determination that was made for the Pico Power Plant.

While we agree that the Pico Power Plant is similar in design, we show the same concern as the Bay Area District that there is not sufficient

data from this plant, which only started up this past June, to confirm that this combination of emission limits can, in fact, be met.

What we believe the District weighed in its determination, and what we believe the Committee should weigh, as well, is the fact that rather than relying on engineering analysis for this project, for Los Esteros, we actually tried to meet 2 parts per million and 4 ppm CO level at the same time, and found that in order to reduce NOx levels to a level sufficient to enable an SCR system to meet a 2 ppm NOx level.

That, in fact, drove the CO levels up to where we could not consistently meet a 4 ppm CO level. That was the basis for our position. The Bay Area District concurred with that. The Committee concurred with that in its Presiding Member's Proposed Decision. And we believe that that was the right judgment.

With respect to ammonia emissions, CARE raises arguments that have been raised before. The only new item that they mention is a report prepared by the Bay Area Air Quality Management District regarding a proposed particulate matter implementation schedule.

To the extent that the Committee believes this comment to be relevant, we ask that you take official notice of the entire Bay Area Air Quality Management District document that's referenced.

If you go through that document you will see that there are only four particulate control measures that the Bay Area District indicated that they would be adding to their program to address the state law that's referenced.

Two of those control measures relate to -- well, one relates to further reductions in NOx and VOC emissions from internal combustion engines. A second control measure relates to char broilers. And the remaining two measures relate to enhancing the effectiveness and efficiency of the District's Spare-the-Air program, and Don't-Light-Tonight programs focused on reducing wood stove use on winter evenings.

None of the measures the Bay Area District is pursing would go towards reducing ammonia emissions from SCR systems such as being proposed here. Consequently, I think that the report referenced by CARE actually works to counter their argument.

The Bay Area District has been very consistent in suggesting that they do not need to control ammonia emissions from these types of sources in order to further lower ambient PM10 or PM2.5 levels.

So, once again, I believe that the Committee's review of this issue, the Air District's review of this issue is correct, and urge that on this issue that the decision remain as proposed.

HEARING OFFICER FAY: Mr. Rubenstein, a followup question. You gave us a rough idea of what kind of new data would cause this agency to reconsider the approach to ammonia slip taken in this case. That is, some new study of what type would cause -- whether the District adopted it or not -- might be a basis for this agency to reexamine this issue in the future.

MR. RUBENSTEIN: I think the new data would be essentially the same type of study that the Bay Area District performed many years ago. And that's the same type of study that all the major air districts in California perform every couple of years.

And that's what's called a chemical mass

balance analysis of the PM10, PM2.5 air quality data in an attempt to link specific sources of emissions and precursor pollutants to the PM10 and PM2.5 levels that we actually breathe. There's not a direct relationship. It's a fairly complicated analysis which is why it's not done very often.

That type of analysis, though, combined with an analysis of relative concentrations of ammonia -- sulfates and nitrates would enable an assessment to be made or revised, as to whether ammonia emissions need to be reduced or be effective in reducing PM10 or PM2.5 concentrations.

So I think an updated study of that type is one that I think the Commission would want to look at before changing its position on this issue.

HEARING OFFICER FAY: Okay. Thank you. You say such a study is done by the Districts, and it's every several years?

MR. RUBENSTEIN: That's correct. Normally it's done in association with a PM10 or PM2.5 planning exercise.

HEARING OFFICER FAY: Okay, thank you.

Mr. Wheatland, a question for you.

On page 3 of your comments regarding worker safety, the last paragraph at the comment, just above the title Com8, you say due to apparent oversight the PMPD contains originally proposed conditions 4 and 5, rather than the condition agreed to by staff.

And in the transcript it discusses using the corrected language of condition 3 in lieu of 3 and 4. And I just wonder if you could clarify that confusion for us. And I'm referring to the transcript of June 30th of this year, page 41.

MR. WHEATLAND: I believe that the transcript reference may be incorrect. And I think that the intent was to take that condition 3 as previously approved by the Commission and substitute it for conditions 4 and 5 in the PMPD that are identified as 4 and 5 in the PMPD. I'll need to look here again just to confirm that, but I believe --

HEARING OFFICER FAY: Okay, there's an existing -- there are conditions 3, 4 and 5 in the PSA. Are you saying that the agreed-upon condition 3 should replace all three of those?

MR. WHEATLAND: Let me -- no. I believe

that -- let me look here just to be sure.

HEARING OFFICER FAY: Okay.

(Pause.)

MR. WHEATLAND: In the PSA the conditions 3, 4 and 5, condition 3 would remain. And conditions 4 and 5 would be deleted and replaced by this other condition 3 that was adopted by the Commission. So the number --

HEARING OFFICER FAY: Okay, which would then --

MR. WHEATLAND: -- we'll have to change the numbers --

HEARING OFFICER FAY: -- be condition 4.

MR. WHEATLAND: Yes.

HEARING OFFICER FAY: Okay, that clarified, thank you. Thank you for that clarification.

Okay, anything further then on comments of the other parties from Calpine's perspective?

MR. WHEATLAND: Well, just on the issue of the bike path. We've been advised that the City of San Jose sent a letter to Commissioner Pfannenstiel dated October 31, 2005 regarding the highway 237 bikeway. Has the Committee received a copy of that letter?

HEARING OFFICER FAY: No.

PRESIDING MEMBER PFANNENSTIEL: No.

MR. WHEATLAND: Well, what I'd suggest we could do then would be to -- maybe with the staff's assistance we could have some copies made and then we could come back to the bikeway issue once you have a copy of the City's letter.

HEARING OFFICER FAY: Okay. What was the date of the letter, again?

MR. WHEATLAND: October 31, 2005.

PRESIDING MEMBER PFANNENSTIEL: Has the staff seen that?

MR. WHEATLAND: And we just got it, so if we can have copies made I think that'll --

HEARING OFFICER FAY: Okay, that --

MR. RATLIFF: We don't have it.

HEARING OFFICER FAY: Yeah, we -- you have copies with you?

MR. WHEATLAND: We have one. Perhaps the staff can help us.

HEARING OFFICER FAY: Can anybody on staff help us make some copies of that so it could be distributed, and we'll come back to that. Thank you for calling our attention to that.

Okay, anything further, then, before we

move --

MR. WHEATLAND: No.

HEARING OFFICER FAY: -- to the staff?

MR. WHEATLAND: At this time there's nothing further.

HEARING OFFICER FAY: All right. Comments from the staff?

MR. RATLIFF: Staff is generally supportive of the decision, and has offered very brief comments on it that are mostly of an editorial nature, corrections and changes.

The one area of exception, of course, is in the area of -- under air quality, of ammonia slip, where staff believes that an additional condition should be adopted by the Commission.

Staff is not re-arguing that point today because we believe we presented it very fully a the evidentiary hearing. And the issue is discussed fully in the decision.

So although that continues to be our position, we are not re-arguing it to you today. And did not intend to do so unless you ask us to do so.

I also have handed to me an additional change to the decision to the condition 1 under

land use, Land-1, which would add to the end of that condition, the following phrase: 90 days following the receipt of the request and forward a copy of the transmittal letter to the CPM." That supplements the applicant's proposed condition.

HEARING OFFICER FAY: And this is at the end of the condition or the verification?

MR. RATLIFF: At the very end of the condition -- oh, I'm sorry, the verification.

HEARING OFFICER FAY: At the end of the verification, okay. And are you going to be submitting that in writing?

MR. RATLIFF: We will, yes.

HEARING OFFICER FAY: I'm sorry that I was diverted during your comment on the ammonia slip. Did you say there was an additional condition that you wanted regarding that?

MR. RATLIFF: No.

MR. WHEATLAND: And the addition to the Land-1, the staff has reviewed with us. And the applicant would agree to that revision.

HEARING OFFICER FAY: Okay.

Mr. Sarvey, any reaction to the staff's recommendation?

MR. SARVEY: On Land-1?

HEARING OFFICER FAY: Um-hum.

MR. SARVEY: Nothing on Land-1, no.

HEARING OFFICER FAY: Okay. No problem. All right. Anything further from the staff?

MR. RATLIFF: Only that we understand that the City of San Jose has basically indicated that it is not the agency which will be the recipient of funds to repair the bike trail. And I think that's the letter that's been referred to by applicant this morning.

And that being the case, staff is in agreement that the funds should be offered to whichever agency is willing to repair the bike trail.

HEARING OFFICER FAY: I guess the only question that comes to mind is, is the applicant's proposal of naming three agencies realistically broad enough? Or does that cover the foreseeable possibilities at this time?

MR. RATLIFF: We don't know of any other possibilities in terms of local agencies who might repair the bike trail.

HEARING OFFICER FAY: Okay. And do you have any reactions to CARE's comments?

MR. RATLIFF: Well, I think we did react

to them. To the extent that CARE's comments are in agreement with the staff position on ammonia slip, again, we have, as I said earlier, we continue to advocate that the Commission adopt a limitation of ammonia slip. We just have not chosen to re-argue it in our comments to you today.

HEARING OFFICER FAY: Did you hear Mr. Rubenstein's comment about -- answer to my question about what kind of information or study would be needed for the Commission to look at this issue differently. And he said it would be a comprehensive study that linked ammonia to particulate formation.

Does staff have any -- staff obviously has a different view of that, but thinking in the future, for future cases in the Bay Area, frankly I don't know what would change unless there was new evidence from the point of view of the Commission.

MR. RATLIFF: Yes. Given our inability to persuade you on that point in this proceeding, we would be very supportive of the Bay District doing further studies and further analysis regarding the presence of ammonia and nitrogen in

the Bay Area.

I mean we have reference to a ten-year-old study which the District believes is dispositive of the matter. But we would like to see further study in this area. And we will be talking with the Bay District to suggest that to them.

HEARING OFFICER FAY: Okay, great. Anything further then from the staff?

MR. RATLIFF: I'm sorry?

HEARING OFFICER FAY: Any further comments from the staff on the comments filed by the other parties?

MR. RATLIFF: No.

HEARING OFFICER FAY: All right. Mr. Sarvey, for CARE?

MR. SARVEY: Yeah. Well, I'm happy to hear that staff agrees with my comments on the ammonia emissions. So there's two parties that feel the same way in this proceeding.

And as far as applicant's position I'm assuming, and I'd like to ask the applicant again, are they asserting that the area is not as ammonia rich and that's the reason there's no secondary particulate issues. Is that the applicant's

position?

HEARING OFFICER FAY: Yeah, I think the record is replete on that. But, Mr. Rubenstein could answer your question briefly.

MR. RUBENSTEIN: Yes.

MR. SARVEY: Okay.

HEARING OFFICER FAY: Okay, yeah.

MR. SARVEY: Well, in my comments, which I know the Committee hasn't had an opportunity to review, but I did submit them timely, there is a study in the record. And it's the biological mitigation study.

And it clearly states that ammonia concentrations do vary, even in the study area. And it also says that ammonia concentrations are anywhere from zero to, I believe it was 5 ppb. So I think you have a study here already in the record that you can rely on to limit the ammonia slip.

The study that the PMPD cites as the only relevant scientifically based study in the record is not in the record. And that's the study that the applicant keeps referring to and the Bay Area keeps referring to that says that -- it's the ten-year-old study that staff is a little bit

concerned about.

And it's not in the record. So I think the PMPD needs to note, change that that the relevant scientific study that they're relying on in the record is not in the record. So, I think that's an important distinction.

And then as far as the CO, I know, again, the Committee has not had an opportunity to see my comments, but we requested that the Committee take judicial notice of the Pico Power Plant decision. And there's no explanation whether they have or they haven't.

But, the Pico Power Plant decision does establish BACT as 4 ppm for CO. So I took the liberty to do a public records request on the conditions, the quarterly report for the Pico Power Plant. It took me ten days and about $55 to accumulate this, but there's -- it pretty much is something that the Committee could easily access without the hoops that I had to jump through.

And, you know, I recommend the Committee take a look at these results from the Silicon Valley power plant, because they are the current BACT for this type of facility. And I don't see anyway that you could argue that they're not,

considering the Commission decision 02-AFC-3 that requires a 4 ppm CO for this exact same equipment. So I don't see how the PMPD can make that statement.

The only other issue, of course, is the bike path issue, and I don't know if you want to talk about that now or if you want to put that off till later.

HEARING OFFICER FAY: Well, we have the letter from San Jose, the City of San Jose. So, Mr. Wheatland, do you want to summarize what they sent?

MR. WHEATLAND: Yes. By way of background, more than a year ago the applicant began discussions with the City of San Jose to make arrangements for the repair of the bike path.

At that time both the applicant and the City understood that the bikeway was intended to be a permanent facility, and that it was located within a City of San Jose right-of-way.

We went through the process of negotiating a funding agreement with them. The City sent out appraisers or estimators to determine the cost of the repairs. And we completed that process of determining the amount

that Calpine, or that the Los Esteros would fully contribute to repair the bike path to its previous condition.

But recently the City has determined that it is not, in fact, located on a City right-of-way. And in this letter the City is informing the Commission, as it has informed Calpine verbally that the City is not able to participate in the repair or maintenance of the bikeway.

And the City has informed us that they now believe that the bikeway is actually owned in fee by the Water Pollution Control Plant, which is a special district that is operated by several different agencies.

And so they are directing us now at this time to begin discussions with the Water Pollution Control Plant, rather than the City of San Jose.

And I think that, in essence, summarizes the letter.

HEARING OFFICER FAY: And what have you done to follow up on that?

MR. WHEATLAND: Well, that was a bit frustrating, I must admit, because in determining -- in contacting the Water Pollution Control Plant, we found that that plant is -- or

district is overseen by several cities, but the administration of the operations on behalf of the special district are undertaken by the City of San Jose, itself.

So we've sort of come full circle in finding that the City is not able to participate, yet it seems still to play some role that we don't yet fully understand with respect to the administration of the plant.

So, it was because of this conundrum that we are faced with, being ready and willing to contribute funds to whoever will accept responsibility for the facility, that we've proposed a condition that would essentially give those funds to whichever agency would step forward and say, yes, they are responsible.

We've also, I must mention we've also had conversations with Caltrans. But again, Caltrans, with respect to the responsibility for this bike path, is also very cloudy.

HEARING OFFICER FAY: Okay, thank you. And the staff has looked this over and decided, I mean with the slight addition that they made, that that would address it as best we can at this time, is that correct?

MR. RATLIFF: We don't know what else to do. I mean we think Calpine has done what they can by making the money available. Until some agency, whether it's the City as the City, or the City acting as the operator of the Water Pollution Control Plant, is willing to accept the money and use it to repair the bike trail we don't know what else to do.

But we hope that we can continue to have these discussions even after the termination of this proceeding to try to get the City to do something to repair the bike trail.

HEARING OFFICER FAY: Well, it would be part of the compliance program. So that hopefully the effort will be ongoing. And according to their letter, the City of San Jose is interested in having the bike path function.

PRESIDING MEMBER PFANNENSTIEL: Excuse me, Gary. As I read the letter, though, they were saying that the path that was damaged on the north side was, in fact, not going to be repaired because that was never intended to be the path that was used. In fact, it was the path on the south that they intended to be a permanent bike trail, which is also closed, though I guess not

related to this.

And so I guess I wasn't sure, in just skimming this letter in the minute I've had up here, that the intention was ever to use the money to fix the bike trail on the north side. Is that, Mr. Wheatland, what you're reading the letter as?

MR. WHEATLAND: Well, until recently it was the understanding that the bike path that was adjacent to the plant was always intended -- was a permanent facility and was intended to be repaired.

It's only recently that the City has informed us that they now understand that to be a temporary facility, and that the permanent bike path may, in fact, be built on the opposite side of the freeway.

But it was just recently that they've informed us of that. Our discussions with them over the past year were based on the understanding that it would be a permanent facility.

MR. TETZLOFF: If I could add something to that. The way the proposed condition for Land-1 that we proposed actually doesn't specify whether it has to be the north side or the south side. So, it can be used for either one.

MR. WHEATLAND: Yeah, that's a very good point. We've intentionally drafted this condition not to restrict the funds just to the north side. So if the agencies, in fact, determine that a path on the south side is more appropriate and wish to direct the funds to that purpose, our condition would permit that to happen.

PRESIDING MEMBER PFANNENSTIEL: Let me ask Mr. Sarvey, do you have any suggestions on -- I think you brought this to our attention, and I think been diligent in keeping us aware of this issue. And I think you've heard what the applicant has gone through, and you know, you understand the conditions that we put on this.

Any suggestions on where to go?

MR. SARVEY: Well, I had a suggestion previously, and that was to condition the relicensing of this project on the repair of that path. And I believe that Calpine's making an effort, but I think motivation is lacking.

And somebody needs to step up and take care of this. And, you know, we've been going through a bureaucratic nightmare; we're getting shuffled back and forth. You know, I don't know the parties, but I mean, frustration is all we

have.

And, you know, I know the --

PRESIDING MEMBER PFANNENSTIEL: Well, we have frustration. We also have some money that's been put up. And so I guess we are seeking the way through the bureaucratic maze on this.

All right, I guess there's no easy answer. We'll have to keep working with the City.

MR. SARVEY: Well, my suggestion would be maybe the Commission, themselves, should take responsibility for this and get this done. Because obviously Calpine doesn't have the pull in San Jose, with Caltrans, whatever, but I'm sure that the Commission would.

I mean the Commission has ultimately authority over all the siting of these plants. And if damage occurred during the siting of the plant, the Commission is ultimately responsible. And the Commission should take responsibility to get the thing repaired in a timely manner.

Obviously this has been over three years now. And I brought the Commission's attention to this almost a year ago, so we're very disappointed.

PRESIDING MEMBER PFANNENSTIEL: Thank

you.

HEARING OFFICER FAY: Okay. I'd like to move now to the question of the zoning inconsistency that was cited in the FSA, and that the Committee used as a basis for not recommending approval at this time due to a noncompliance in LORS.

Can you bring us up to date, Mr. Wheatland, and tell us what the plan is moving into the future?

MR. WHEATLAND: I wish I could, but I'm not really in a position to speak for the City of San Jose. And I understand that they're not on the phone call here today.

The applicant has submitted to the City of San Jose an application for rezoning. That was submitted earlier this summer. And if the City had processed it in the normal course of business, as they would other applications for rezoning, the City would have, by this date, advised the Commission with regard to their determination on that issue. And the Commission could have acted on that as part of its final decision.

But here has been a disagreement between the City and the Commission, I believe, as to the

appropriate environmental documents to be used in that process.

And so, as a result of that difference, the application for rezoning has not moved forward.

HEARING OFFICER FAY: Are you involved in negotiations with the City, and do you have any sense of timeline on this?

MR. RATLIFF: Mr. Fay, if I may, because there is this nonconformity issue, the staff is statutorily obliged to make efforts to see if it's possible to conform local zoning with the project.

We will therefore meet with the City in the near future to discuss what the best approach for doing that would be.

And after we do so we'll report back to the Commission what the results of those meetings have been. We've had mainly correspondence-only discussions in the past, and we're going to meet face-to-face now and see if we can agree on an approach.

The City has indicated a willingness to conform the zoning. It's just a matter of how it's to be done. We thought it was going to be done prior to this meeting. We were told that at

evidentiary hearings it would be accomplished by the end of, I believe by the end of August. And yet, no action has been taken.

I think the City is considering what is the best mechanism for conforming its zoning. So we want to be involved in those discussions with them. And we will report back to you after we've had them.

I would expect that to be sometime in late November.

HEARING OFFICER FAY: In November, --

MR. RATLIFF: Yes.

HEARING OFFICER FAY: -- did you say?

MR. RATLIFF: Yes.

HEARING OFFICER FAY: Okay. We're in November now, so that would be within 30 days?

MR. RATLIFF: Yes.

HEARING OFFICER FAY: Okay. Mr. Sarvey.

MR. SARVEY: Yeah, I've been in contact with the City several times, and they have some concerns about the environmental review. And there's some issues they don't feel have been covered by the PMPD.

But I was told by the City authorities that this would go before the Planning Commission

on either November 16th or December 7th.

PRESIDING MEMBER PFANNENSTIEL: I have in front of me a letter that the City sent to Eileen Ichien of the Chief Counsel's Office here at the Energy Commission on September 12th. And it said there that they anticipate that the process would be completed, rezoning process I assume they're referring to, would be completed within 16 to 20 weeks, which would be January or February of next year.

So is this later information? I'm trying to put that -- I mean they agree that they would use the PMPD presumably for this process. And that they would finish it.

Is there later information than that that says that it might happen next month or this month?

MR. SARVEY: The information that I have just in conversations with the City was they're mostly concerned about nitrogen deposition. And they don't feel it's been fully mitigated.

And as I said before, the City officials said this is probably going to go before the Planning Commission on the 16th of this month or December 7th. That's as of about five days ago.

HEARING OFFICER FAY: Okay, the letter the Commissioner cited is from the City Attorney's Office. And who had you spoken with?

MR. SARVEY: Rich Buikema.

HEARING OFFICER FAY: In the Planning Office?

MR. SARVEY: In the Planning Office.

HEARING OFFICER FAY: Okay. Well, there may be a different understanding between the two offices --

MR. SARVEY: Oh, yeah, absolutely. I'm just relating what my conversation --

MR. RATLIFF: Well, what the City has told us, as you see, is that they feel they cannot proceed without their own environmental document. So that is one of the things that we need to discuss with them.

If that is the approach, it will take certainly months for them to accomplish the rezoning.

PRESIDING MEMBER PFANNENSTIEL: Mr. Wheatland, if it turns out that the reference in this letter is what guides the City, and therefore it's January or February of 2006, how does the applicant feel about that kind of delay?

MR. WHEATLAND: Well, while we, of course, would like to have a license as soon as possible, we also want to have a license that, you know, that works out the differences between the Commission and the City.

And so if that kind of process and that timeframe is acceptable to the Commission and the City, then it would be acceptable to the applicant, as well.

PRESIDING MEMBER PFANNENSTIEL: It doesn't delay your plans for breaking ground?

MR. WHEATLAND: No, it would not.

PRESIDING MEMBER PFANNENSTIEL: Do you have a date for breaking ground?

MR. TETZLOFF: Not at this point. We're still actively pursuing lining up a contract for the phase 2, but we don't have one at this point.

PRESIDING MEMBER PFANNENSTIEL: So it does not seem like pushing this for another several months is in any way in your -- in the way of your schedule, your anticipated schedule?

MR. TETZLOFF: No, it's not.

HEARING OFFICER FAY: I think in light of this open-ended situation, rather than make any call at this time that might harm any of the

parties or the relationships with San Jose, we'd just like the staff and the applicant to submit a report to the Committee every 30 days, you know, docketed and proof to the parties.

It could be as brief as indicating no change. But we just want to keep tabs on the process. If you have a meeting with the City of San Jose, please tell us that you did and what came about. So that we can keep tabs on how this is going.

Any other suggestions on how the Committee might deal with this, under the circumstances?

MR. RATLIFF: I guess we would only offer that we think we need to have the discussions first. From staff's point of view it's important that whatever the City does, that it issues its zoning approval consistent with the Energy Commission's decision.

HEARING OFFICER FAY: Okay. Well, we'll say, starting today, that every 30 days we want something from the two parties on how this is progressing. They can file it jointly if they want, that's fine. I just want to have both parties responsible.

The staff is following up on its charge to meet and confer when there's a nonconformity. But it's the applicant's proposal, so I think that's the best way to leave it.

I don't think the Committee wants this to be open-ended indefinitely, though, so we certainly want the parties to move towards some resolution on this. I assume the applicant wants to do that if they ever want to build this project.

(Pause.)

HEARING OFFICER FAY: Okay, I think we have what we need from the parties. We appreciate them for their filings. And, CARE, I apologize that I was not able to get my hands on your filing in a timely way. You obviously did file it correctly. And we'll try to find out where the breakdown was. But your comments will be taken into account.

I anticipate that, while the Committee will be waiting to hear from the parties on how we resolve this, that ultimately, assuming there is a resolution, there would be a revised PMPD because it would change the bottomline recommendation.

And if the City does conform the zoning

to the project, then that's really the only hurdle left for the Committee's recommendation. And then a revised PMPD would recommend approval if that change is made. And then it could go forward to the Commission. But until that happens I think we're sort of in abeyance.

Any further comments or questions?

MR. WHEATLAND: Yes, just to confirm that with the exception of the issue of the zoning conformity with the City of San Jose, am I correct in understanding that the record of this proceeding is closed with respect to all other outstanding issues?

HEARING OFFICER FAY: There's a little question about that, Mr. Wheatland. You filed a letter from PG&E that is not in the record, except for the administrative record in that you did file it.

And you recommend that a finding be changed on that basis. We can't base a finding if it's not based on evidence in the record. So there is that particular point. And, frankly, I think the Committee can deal with that in another manner; just remove the inconsistency and perhaps discuss this matter in the text. It's not -- I

don't think it's critical. We do want to have the information correct.

Other than that I don't see any reason. But we are holding the record open for the land use document from San Jose that would confirm the language.

Mr. Ratliff, any reaction on the closing of the record but for the land use question, the zoning question?

MR. RATLIFF: I think the applicant suggested that the Committee may want to take official notice of the BAAQMD document concerning ammonia, the presence of ammonia and nitrogen in the Bay Area.

I don't know that that's necessary, but if you do so, you would want to leave the record open for that. And you would want to have that document identified and provided to you. So, apart from that, we have no other comments.

HEARING OFFICER FAY: And Mr. Sarvey has asked again that we take notice of the Pico decision.

Mr. Wheatland, can you provide the Committee a copy of that study?

MR. WHEATLAND: Yes, we will. And we

have no objection to official notice of the Pico decision because the Commission can always notice its own decisions.

HEARING OFFICER FAY: Yeah, that is not a matter in controversy. Don't think that if there was some significance to not taking official notice, that we respect our own decisions very much.

Anything further, then?

Mr. Ratliff, anything further?

MR. RATLIFF: No.

HEARING OFFICER FAY: Okay. Mr. Wheatland?

MR. WHEATLAND: No, thank you.

HEARING OFFICER FAY: Mr. Sarvey?

MR. SARVEY: Nothing further.

HEARING OFFICER FAY: Okay. I thank you all for coming. I appreciate your efforts in being here today and clarifying some of these things for us.

And so within 30 days we will hear from the staff and applicant on the continuing status.

Thank you. We're adjourned.

(Whereupon, at 10:48 a.m., the Committee Conference was adjourned.)

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 Committee 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 13th day of November, 2005.