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PREHEARING CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
Application for)
Certification for) Docket No.
Mariposa Energy) 09-AFC
Project)
_____)

BYRON-BETHANY IRRIGATION DISTRICT
BYRON, CALIFORNIA
MONDAY, FEBRUARY 7, 2011
10:25 A.M.

TIFFANY C. KRAFT, CSR
CERTIFIED SHORTHAND REPORTER
LICENSE NUMBER 12277

1 APPEARANCES

2 COMMITTEE MEMBERS PRESENT

3 Karen Douglas, Associate Member

4 HEARING OFFICER AND ADVISERS

5 Kenneth Celli, Hearing Officer

6 Galen Lamei, Adviser

7 Paul Feist, Advisor

8
9
10 STAFF AND CONSULTANTS PRESENT

11 Kerry Willis, Counsel

12 Craig Hoffman, Project Manager

13 Jennifer Jennings, Public Affairs

14 Lynn Sadler, Public Affairs

15 APPLICANT

16 Gregorry Wheatland
17 Samantha Pottenger
Ellison, Schneider & Harris

18 Chris Curry, Mariposa Energy, LLC

19
20
21 LOCAL GOVERNMENT

22 Celeste Farron, Mountain House Community Services District

23 Iris Obregon, representing Assemblywoman Joan Buchanan

24
25

1 APPEARANCES

2

3 INTERVENORS

4 Rajesh Dighe

5 Jim Lamb, Mountain House Community Services District

6 Edward Mainland, Sierra Club California

7 Robert Sarvey

8 Rob Simpson

9 Jass Singh

10 Andrew Wilson, CalPilots

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1 PROCEEDINGS

2 COMMITTEE MEMBER DOUGLAS: Welcome to the
3 Mariposa Energy Project Prehearing Conference.

4 My name is Commissioner Karen Douglas. I'm the
5 Presiding Member of this siting member and the newly
6 appointed presiding member. So I know some of you who
7 might have been to the site visit and the initial
8 informational hearing had another Commissioner present at
9 that.

10 To my immediate right is my advisor, Galen Lamei.
11 And to the far right is my advisor Paul Feist. And then
12 to my left is Hearing Officer Ken Celli.

13 And then I also should note that as the Governor
14 makes additional appointments to the Energy Commission, we
15 may have another appointment to this Siting Committee
16 before the evidentiary hearing. So that would be a
17 possibility. Just so you know that.

18 Public advisor is in the room. Actually, we have
19 two people from the public advisor's office, Jennifer
20 Jennings and Lynn Sadler. So they are there to answer
21 questions especially from members of the public to
22 facilitate access to information, to help you understand
23 the process. If you have any questions at the hearing or
24 afterwards, I know they'll be happy to help you.

25 The applicant, if you could introduce yourself,

1 please.

2 MR. WHEATLAND: Good morning. I'm Greg Wheatland
3 with the firm of Ellis, Schneider & Harris, counsel for
4 the applicant.

5 With me to my left is Samantha Pottenger, an
6 associate with our firm. And to my right is Chris Curry,
7 the senior project director for the Mariposa Energy
8 Project.

9 COMMITTEE MEMBER DOUGLAS: Thank you, Mr.
10 Wheatland.

11 And staff, please.

12 STAFF COUNSEL WILLIS: Good morning,
13 Commissioner.

14 Mr. Celli, my name is Kerry Willis, Senior Staff
15 Counsel of the Energy Commission. And with me is Craig
16 Hoffman, our Project Manager.

17 COMMITTEE MEMBER DOUGLAS: Thank you, Ms. Willis.

18 And advisors now. I'll just go down -- let me
19 ask the -- I mean the intervenors. Let me ask the
20 intervenors to introduce themselves. If you could start
21 on the my right, your left.

22 MR. LAMB: I'm Jim lamb. I'm representing the
23 Board of Directors for the Mountain House Community
24 Services District.

25 HEARING OFFICER CELLI: Could you say that one

1 more time?

2 MR. LAMB: Jim Lamb. Morgan Grover is the one
3 who's usually listed on there, but I usually attend this.

4 COMMITTEE MEMBER DOUGLAS: Thank you, Mr. Lamb.

5 MR. MAINLAND: Good morning. My name is Ed
6 Mainland. I'm representing Sierra Club California. I am
7 co-chair of the Energy Climate Committee of the State
8 Sierra CLUB. My colleague Alan Carlton, an attorney, will
9 be following this case for Sierra Club, but unfortunately
10 he can't attend this morning.

11 HEARING OFFICER CELLI: Thank you, Mr. Mainland.

12 MR. SARVEY: Bob Sarvey, intervenor.

13 MR. DIGHE: Rajesh Dighe (inaudible).

14 MR. WILSON: Andy Wilson, California Pilots
15 Association, also known as CalPilots.

16 COMMITTEE MEMBER DOUGLAS: All right. Let's see.
17 Are any other -- I guess one other intervenor might be
18 here, Mr. Singh? Jass Singh, are you here?

19 MS. JENNINGS: I believe he's having a work
20 conference call right now. He'll be joining.

21 COMMITTEE MEMBER DOUGLAS: Thank you,
22 Ms. Jennings.

23 HEARING OFFICER CELLI: Did you hear from Mr.
24 Simpson, Ms. Jennings?

25 MS. JENNINGS: I did not.

1 HEARING OFFICER CELLI: Is Mr. Simpson here?

2 MS. JENNINGS: He is not.

3 HEARING OFFICER CELLI: Mr. Simpson, are you on
4 the phone?

5 All right. We're still checking to see if Mr.
6 Simpson is on the phone. We're opening the lines one at a
7 time.

8 Mr. Simpson, please speak up.

9 HEARING OFFICER CELLI: There is a participant on
10 the phone, JDH, who just hung up. So JDH, we need you to
11 call because we can't hear you now.

12 COMMITTEE MEMBER DOUGLAS: That would have been
13 Mr. Simpson. While we are working on the phones, sounds
14 like we don't have Mr. Simpson.

15 We're off the record.

16 (Off record.)

17 COMMITTEE MEMBER DOUGLAS: We're on the record.
18 And we were introducing intervenors. Mr. Simpson, if you
19 could --

20 MR. SIMPSON: Good morning. I'm Rob Simpson.
21 Apparently, there's also a North Bruns Road.

22 COMMITTEE MEMBER DOUGLAS: We're glad that you
23 made it and you're right on time.

24 Are there any elected officials, State, county,
25 or local jurisdictions in the room? If you could tell us

1 your office.

2 MR. LAMB: Jim Lamb, Mountain House Community
3 Services District, Board of Directors.

4 COMMITTEE MEMBER DOUGLAS: Thank you.

5 HEARING OFFICER CELLI: Everyone, we'll need you
6 to come to the podium to speak on the microphone so that
7 you will be in the transcript. Everything will be taken
8 down. And we want to be sure that you make the record.

9 MS. OBREGON: Iris Obregon, District
10 Representative for Assemblymember Joan Buchanan.

11 COMMITTEE MEMBER DOUGLAS: Thank you.

12 And could everybody hear her?

13 I'm sorry. Could you please repeat that? I
14 think we need to speak closer to the mike and louder.

15 MS. OBREGON: Iris Obregon, District
16 Representative for Assemblymember Joan Buchanan.

17 COMMITTEE MEMBER DOUGLAS: Thank you. That came
18 through loud and clear.

19 Any other officers or representatives of elected
20 officers in this room? If not, let me ask are there any
21 representatives of federal government agencies, Bay Area
22 Air Quality Management District here or on the phone?

23 Any Alameda, Contra Costa, or San Joaquin County
24 departments? Oh, excuse me. Please.

25 MS. FARRON: I just wanted to note there are two

1 other Board of Directors here present with Mr. Lamb,
2 Bernice Tingle, and myself, Celeste Farron from Mountain
3 House. Thank you.

4 HEARING OFFICER CELLI: Was it?

5 MS. FARRON: F, as in Frank, a-r-r-o-n.

6 HEARING OFFICER CELLI: And Bernice Tingle was
7 her last --

8 MS. FARRON: Tingle.

9 HEARING OFFICER CELLI: Thank you.

10 COMMITTEE MEMBER DOUGLAS: All right. Any county
11 officials or representatives of any county departments or
12 agencies from either Alameda, Contra Costa, or San Joaquin
13 Counties?

14 All right. Any departments of city of Byron or
15 Water Boards here in the room today?

16 And finally, anyone on the phone line who fit in
17 those categories that didn't get through?

18 HEARING OFFICER CELLI: The record should reflect
19 we have Sarah Keeler, Paul Kramer, Matthew Dowell -- Paul
20 Kramer and Matthew Dowell are with the Energy Commission.
21 Maggie Reed is with the Energy Commission. Gary Fay is
22 with the Energy Commission.

23 We have two unidentified callers. If you would
24 please state your name, then we'll know you're on the
25 phone.

1 COMMITTEE MEMBER DOUGLAS: You're not required to
2 state your name, but if you would like to.

3 HEARING OFFICER CELLI: I'm mostly interested in
4 whether Mr. Singh is on the phone. Is there any other
5 intervenor?

6 COMMITTEE MEMBER DOUGLAS: No.

7 HEARING OFFICER CELLI: You don't have to
8 participate. You don't have to say who you are, but it's
9 always nice to know.

10 COMMITTEE MEMBER DOUGLAS: All right. We're
11 through introductions. I'll turn this over to Hearing
12 Officer Celli.

13 HEARING OFFICER CELLI: Thank you, Commissioner
14 Douglas.

15 Can you all hear me okay? The back? You need
16 more? Is this better? Thank you.

17 Good morning, everyone. The Committee noticed
18 today's prehearing conference in the revised notice of
19 preconference evidentiary hearings issued on January 28th,
20 2011, which followed the original notice issued December
21 23rd, 2010. As explained in the notices, the basic
22 purposes of the prehearing conference today are:

- 23 1. To assess the parties' readiness for
24 hearings;
- 25 2. To clarify areas of agreement or dispute.

1 3. To identify witnesses and exhibits.

2 4. To determine upon which areas parties desire
3 to cross-examine the other parties' witnesses.

4 And 5. To discuss associated procedural
5 benefits.

6 To achieve these purposes, we require that any
7 party seeking to participate at this conference or who
8 seeks to present evidence or cross-examine witnesses at
9 future evidentiary hearings file a prehearing conference
10 statement by January 25th, 2011. I'm happy to say that
11 all parties filed prehearing conference statements, and I
12 thank you very much for that. Everybody has come to the
13 party ready to play.

14 The staff published its staff assessment on
15 November 8th, 2010. This staff assessment serves as
16 staff's testimony on cultural resources, waste management,
17 facility design, geology, and paleontology, power plant
18 efficiency, power plants reliability, and general
19 conditions. The staff assessment, or what we call the SA,
20 has been marked for identification as Exhibit 300.

21 Staff published its supplemental staff assessment
22 which we call the SSA on December 16th, 2010. This serves
23 as staff's testimony on the remaining topic areas. The
24 SSA has been marked for identification as Exhibit 301.

25 Staff also filed the Bay Area Air Quality

1 Management District's November 24th, 2010, Final
2 Determination of Compliance, or what we call the FDOC and
3 that has been marked as Exhibit 302.

4 Timely testimony was filed by applicant, which is
5 mostly the AFC. When we talk about an AFC, we're talking
6 about an Application For Certification. So mostly
7 documents, testimony, and exhibits. And they filed that
8 on December 21st, 2010, which has also been marked for
9 identification as Exhibits 1 through 67.

10 Intervenor Robert Sarvey's testimony was filed
11 January 7th, 2011. Exhibits marked for identification is
12 400 to 402 and exhibits marked for identification as 403
13 through 408 and 410 through 414 were filed on January
14 21st, 2011.

15 Intervenor Mountain House Community Services
16 District filed no testimony.

17 Intervenor Rajesh Dighe's exhibit marked for
18 identification 600 -- Exhibit 600 which was marked for
19 identification was filed on January 10th, 2010. And
20 exhibits marked for identification as 601 through 609 were
21 filed on January 25th, 2011.

22 Intervenor CalPilots exhibits marked for
23 identification as Exhibit 700 was filed on January 7th,
24 2010. But exhibits marked for identification as 701
25 through 703 were filed on January 21st, 2011.

1 Intervenor Jass Singh's exhibits marked for
2 identification as Exhibit 800 -- 800 was filed on January
3 10th, 2010. And Exhibits 801 and 803 were filed on
4 January 25th, 2011.

5 Intervenor Sierra Club California's exhibits
6 marked for identification as Exhibits 900 and 901 were
7 filed on January 25th, 2011.

8 And Intervenor Rob Simpson's exhibits marked for
9 identification as Exhibit 1,000 was filed on January 25th,
10 2011.

11 All parties are required to burn a CD or DVD
12 containing their exhibits and bring it to the evidentiary
13 hearing for the Committee's use. So please make a note of
14 that. When we start the evidentiary hearing, that's on
15 February 24th, if you would just come up with your disks
16 and hand it to us on the dias before we begin, we would
17 greatly appreciate it.

18 Now, today's -- I just got word that it's very
19 difficult to hear us on the Web Ex. So I'm afraid that
20 that's a function of the telephones. And we're going to
21 try to get someone in here to turn up the volume on the
22 telephone. So just so you know, people listening on the
23 Web Ex, the sound here in the room is pretty good. And
24 everybody seems to be hearing me very well. And I can
25 tell the microphones are working well in the room. So

1 we're going to have to deal with this as a telephone
2 issue.

3 Getting back to procedure. Today's agenda -- I
4 also wanted to alert everybody I brought agenda -- there
5 are agendas in the back of the room and there are also
6 exhibit lists in the back of the room. So if you didn't
7 pick one up, go ahead and pick one up now.

8 The agenda is divided into six parts. First, we
9 will discuss the applicant's motion to strike rebuttal
10 testimony. Second, we will discuss matters contained in
11 the prehearing conference statements and other issues
12 raised by the parties. Third, we will discuss the exhibit
13 lists. Next, we will discuss the witness lists. And
14 after that, we will discuss the briefing schedule. And
15 finally, we will provide an opportunity for public
16 comment.

17 I just would like to see how many people are here
18 that would like to make a public comment. Members of the
19 public, can I just see raised hands? Okay. I see none.
20 I hope that more people will come later. And if they do,
21 I just want you to be aware that we will take comment at
22 the close of the prehearing conference, which hopefully
23 won't take more than a couple hours.

24 We're off the record.

25 (Off record.)

1 HEARING OFFICER CELLI: Sorry for the
2 interruption, folks.

3 So the reason I answered the phone is because I
4 will be getting phone calls from time to time from the
5 technical people listening in on Web Ex to tell me that I
6 need to speak louder or do this or that. So I'm not going
7 to interrupt the hearing just to take personal phone
8 calls.

9 UNIDENTIFIED SPEAKER: I can hear.

10 HEARING OFFICER CELLI: Okay. That sounds good.

11 We're going to talk first about the applicant's
12 motion to strike.

13 Hello? I don't know who that is.

14 I'm going to mute the callers for the moment and
15 continue on.

16 Okay. On January 25th, 2011, the applicant,
17 Mariposa Energy Project, LLC, which we will refer to as
18 either the applicant or Mariposa, filed a motion to strike
19 the following: CalPilots rebuttal testimony marked for
20 identification as 701 through 703 that was filed on
21 January 21st, 2011.

22 The following exhibits submitted by Mr. Sarvey,
23 Exhibit 403, 405 -- so the motion seeks to strike exhibits
24 403, 405, 406, 407, 408, 412, and 413 of Mr. Sarvey's
25 exhibits.

1 The motion seeks to strike Exhibits 900 and 901
2 from the Sierra Club of California.

3 And it seeks to strike Exhibit 1,000 from Rob
4 Simpson.

5 There are three bases for the motions. The first
6 basis -- and I'm speaking now from having read the motion.
7 This is the applicant's point of view I'm sharing with
8 you. This isn't the Committee's words. This is the
9 applicant's words.

10 But their bases for the motion are: First, that
11 the documents are not properly rebuttal testimony because
12 they do not specifically rebut any timely filed opening
13 testimony. Instead, these documents are additional direct
14 testimony which should have been filed no later than
15 January 7th, 2011. Allowing these documents into evidence
16 at this late date in the proceeding would be highly
17 prejudicial because the applicant and other parties would
18 not have an opportunity to respond to this new evidence.
19 That's basis number one.

20 Basis number two, some of these documents are not
21 relevant to the application for certification, or what we
22 call the AFC, for the Mariposa Energy Project and raised
23 issues that are outside the purview of the California
24 Energy Commission.

25 And basis number three is that some of these

1 documents are not sponsored by qualified witnesses.
2 Before discussing the particular exhibits that the
3 applicant seeks to strike, the Committee finds generally
4 that it insists that parties follow its order and
5 directives and disapproves of parties sandbagging their
6 opponents by waiting to file what is properly classified
7 as direct testimony at a later date set for filing
8 rebuttal testimony. Never the less, the Committee needs
9 to be informed by a complete record that contains enough
10 evidence to allow it to reach the best decision in the
11 case.

12 Accordingly, the Committee may allow certain
13 evidence that the Committee believes contains sufficient
14 probative value, even if it were filed late because the
15 parties are now on notice of the existence of the evidence
16 and may still respond to it at or before the evidentiary
17 hearing or by filing and serving rebuttal testimony before
18 the hearing.

19 The record should reflect that a Committee
20 decision on admissibility of evidence are made on a case
21 by case basis and are not precedence, nor are they binding
22 on subsequent cases. Rulings on admissibility will be
23 made at the evidentiary hearing or parties may raise
24 objections when the evidence is offered into evidence,
25 however, to place parties on notice the Committee makes

1 the following tentative rulings on the applicant's motion
2 to strike.

3 So I'm just going to go -- hello? Can you hear
4 me? We need a sound man. Is that any better? If I pull
5 away, can you still hear me?

6 MS. FARRON: You can be heard, but you sound like
7 a tin can.

8 HEARING OFFICER CELLI: I know. It echoes back
9 to us up here as well. I'm sorry. We're turning off our
10 Blackberries. We're going to go to radio silence, which
11 means I can't get calls from the sound people at Web Ex.
12 But I can already hear that you're getting better quality
13 sound; right? No? If it doesn't matter, I'll put my
14 Blackberry there.

15 MR. SIMPSON: It sounds very authoritative with
16 the echo.

17 COMMITTEE MEMBER DOUGLAS: Is my mike working
18 well? Is my mike echoing? It was off earlier.

19 HEARING OFFICER CELLI: Can you here me now?
20 Okay.

21 Exhibit 701 -- so here's our tentative ruling.
22 Exhibit 701 through 703 will be admitted as long as the
23 applicant is afforded an opportunity to rebut and
24 cross-examine the authors of these documents. I'm talking
25 about Exhibit 701 and 703 from CalPilot. The Committee

1 will allow the applicant to file rebuttal testimony by
2 February 14th. I just want you to be aware that February
3 14th we'll allow the rebuttal. Whether the authors or the
4 proponents of these exhibits is a qualified expert is a
5 question of fact to be decided upon the evidence received
6 at the evidentiary hearing. But we will give you until
7 next Monday, February 14th to file rebuttal to that
8 testimony.

9 Exhibits 403 and 412 will be admitted, and the
10 applicant and staff are placed on notice they will be
11 given an opportunity to rebut this air quality evidence at
12 the evidentiary hearing. This is Mr. Sarvey's Exhibit 403
13 to 412. The Committee will allow the applicant to file
14 rebuttal testimony by February 14th, 2011 to exhibits 403
15 and 412.

16 Exhibit 405 and anything 400 series will be Mr.
17 Sarvey's exhibits. Exhibits 405 and 413 will be excluded
18 from evidence because the testimony lacks foundation as
19 expert testimony and the safety of the gas pipeline beyond
20 the first point of interconnection would be Mariposa
21 Energy Commission.

22 This was something that we'd actually like to
23 discuss with you because we were not clear how you
24 intended this testimony, Mr. Sarvey. I'm talking now
25 about the gas pipeline. This is Exhibit 405 and 413. And

1 we weren't sure what you were talking about had any
2 relevance to --

3 (Off record.)

4 HEARING OFFICER CELLI: What I'm going to do is
5 walk through the tentative ruling list, and then we're
6 going to re-visit those issues that we wanted to get more
7 information on. So tentatively Exhibits 405 and 413 would
8 be excluded from evidence because the testimony lacks
9 foundation as expert testimony and the safety of the
10 gas -- did my mike just die?

11 COMMITTEE MEMBER DOUGLAS: We're back.

12 HEARING OFFICER CELLI: Peter, I wonder if just
13 when that happened, did we lose the record? Or were you
14 continuing to roll?

15 MR. PETTY: I'm independent of the room.

16 HEARING OFFICER CELLI: I'm sorry for these
17 interruptions, folks. Whenever you put electronics in the
18 mix, these things are bound to happen.

19 So 405 and 413 excluded based on lack of expert
20 testimony and lack of jurisdiction.

21 Exhibit 406 will be admitted as long as the
22 applicant is afforded an opportunity to cross-examine the
23 author of the document at the evidentiary hearing if they
24 wish. The Committee will allow the applicant to file
25 rebuttal testimony by February 14th, 2011, on Exhibit 406.

1 407 would be excluded from evidence because the
2 testimony lacks foundation as expert testimony.

3 Exhibit 408 will be excluded from evidence
4 because the testimony lacks foundation as expert testimony
5 and is irrelevant because the issue of the need for a
6 power plant was legislatively removed from the Energy
7 Commission's jurisdiction when it was repealed in 1999.

8 Exhibit 900, which is Sierra Club's, will be
9 excluded from evidence because the testimony lacks
10 foundation as expert testimony and is irrelevant because
11 the issue of the need for a power plant was legislatively
12 removed from the Energy Commission's jurisdiction when it
13 was repealed in 1999.

14 Exhibit 901 will be admitted and the applicant
15 and staff are placed on notice they will be given the
16 opportunity to rebut this air quality GHG evidence at the
17 evidentiary hearing. The Committee will allow the
18 applicant to file rebuttal testimony by February 14th,
19 2011.

20 Exhibit 1,000, which is Mr. Simpson's exhibit,
21 will be admitted and applicant and staff are placed on
22 notice that they will be given an opportunity to rebut and
23 cross-examine the author of the documents, if necessary.
24 Also, the Committee will allow the applicant to file
25 rebuttal testimony on February 14th, 2011.

1 Before we get to any questions on this, let me
2 turn first to Mr. Wheatland. Did you have a question on
3 this tentative order?

4 MR. WHEATLAND: No, I have no question on the
5 tentative ruling. I understand the February 14th date and
6 we appreciate the Committee's consideration of allowing us
7 to rebut this new testimony.

8 HEARING OFFICER CELLI: Mr. Sarvey, the bulk of
9 these are your exhibits. The question the Committee had
10 had to do with Exhibits 405 to 413 having to do with
11 hazardous materials. And it wasn't clear -- we weren't
12 sure because you understand that the jurisdiction extends
13 to the first point of interconnection. And presumably a
14 new power plant is going to put in brand-new pipe and it's
15 going to be approved. We didn't understand what your
16 contention was with regard to the pipelines. We want to
17 see what the power plant's effect is. We didn't
18 understand your position.

19 MR. SARVEY: Cycling of the power plant
20 (inaudible) at line 002 I provided enough information in
21 my testimony. If someone needs more, I have results for
22 that line. I was involved as an intervenor in California
23 Public Utilities Code 070306 and that's (inaudible).
24 There's two reasons why the Energy Commission is
25 responsible for this line.

1 So number one, you hooked up another project it's
2 going to be (inaudible). Both these plants are going to
3 be cycling. To meet high demand, they're supposed to be
4 intermittent renewable resources. The Energy Commission
5 has a responsibility to make sure their actions do not in
6 any way effect the community. And I've provided you
7 information on exactly how degraded that line is. Both
8 these projects should be cycling to create a cumulative
9 impact if you approve the second project. And I can't see
10 anyone at the Energy Commission not responsible for health
11 and safety of the citizens of Mountain House and Tracy and
12 everybody who's on this particular line.

13 There's only I think three high (inaudible) areas
14 (inaudible). So I can't see any way the Energy Commission
15 can wash their hands of their responsibility to make sure
16 that this line is not effected by the continuous cycling
17 of these process. There's a substantial amount of natural
18 gas moving through these lines. As far as our witnesses
19 say -- I wouldn't say I'm an expert on the PG&E gas
20 system, but I would say I'm an expert on line 002.

21 COMMITTEE MEMBER DOUGLAS: Mr. Sarvey, are you
22 saying that the cycling because from these two power
23 plants, should they both be built, would somehow effect
24 the line? Or are you arguing --

25 MR. SARVEY: The cycling is known to put

1 additional stress on the line. In this particular case,
2 the line is degraded. It's been found out to have results
3 that had as much as 63 percent -- 63 percent wall offs.
4 And in light of what happens in San Bruno, the Energy
5 Commission would really want to take a close look at this.
6 This is not your ordinary line. This line has definitely
7 had some -- it's been uncovered. It had to resurface it,
8 recover it, bubble tape wrap coding. It's not even up to
9 safety standards right now. So I think the Energy
10 Commission has a duty to look at this to make sure it's
11 safe for the people -- for the next 30 years that are
12 around it now.

13 HEARING OFFICER CELLI: Yeah, applicant, did you
14 have any response?

15 MR. WHEATLAND: Well, obviously, the safety of
16 the gas system of PG&E is a concern to the people of
17 California. But Mr. Sarvey is an experienced intervenor
18 and he's well aware that for the last 35 years the
19 jurisdiction with respect to the gas transmission system
20 has clearly been allocated to the California Public
21 Utilities Commission. It's true that the Energy
22 Commission has jurisdiction up to the first point of
23 interconnection. But if there are any concerns about the
24 safety of the system beyond that point, it is the
25 California Public Utilities Commission and federal

1 agencies and only those agencies that can take actions
2 with respect to ensuring public safety.

3 PG&E is aware that this project will interconnect
4 and the Public Utilities Commission is aware that this
5 project will interconnect. And if Mr. Sarvey has any
6 concerns, his concerns probably should be directed to
7 those agencies.

8 HEARING OFFICER CELLI: Thank you.

9 We're going to go off the record for a moment.

10 (Off record.)

11 MR. SIMPSON: Will we have an opportunity to
12 speak on this?

13 HEARING OFFICER CELLI: Actually, this is -- if
14 you'll hang back, we'll give you a chance. I'm looking to
15 staff right now.

16 Ms. Willis, we're interested in hearing what
17 staff's position is on what is the effect of the MEP on
18 these allegedly degraded pipelines?

19 STAFF COUNSEL WILLIS: Well, we agree with the
20 applicant that this is actually under the PUC's
21 jurisdiction.

22 But I did want to add that Mr. Sarvey -- one of
23 the excluded exhibits was 407, worker safety, that also
24 involved the gas pipeline. But before that first one
25 interconnects and we did want to offer even though the

1 testimony has been excluded to offer a condition probably
2 hopefully we can get it written before the evidentiary
3 hearing that would be on gas close that might prohibit
4 that. So that would at least address some of his concerns
5 on worker safety.

6 HEARING OFFICER CELLI: That was Exhibit 407.

7 STAFF COUNSEL WILLIS: Right. That's what I just
8 said, Exhibit 407.

9 HEARING OFFICER CELLI: But we're talking about
10 405 to 413.

11 STAFF COUNSEL WILLIS: And we agree. We agree
12 it's outside of the Energy Commission's jurisdiction.
13 It's properly before the California Public Utilities
14 Commission.

15 HEARING OFFICER CELLI: What about the allegation
16 that the existence of the MEP effects the pressure or
17 somehow effects --

18 STAFF COUNSEL WILLIS: I am sorry. I'm not
19 qualified to answer that.

20 COMMITTEE MEMBER DOUGLAS: Let me ask a question.
21 I think what Hearing Officer Celli is getting at --
22 would it be your position that even if we accepted Mr.
23 Sarvey's premise that this power plant would or could
24 effect the pipeline that we would still have no
25 jurisdiction to review the potential impacts of the

1 project on the pipeline?

2 STAFF COUNSEL WILLIS: That was staff's position.

3 HEARING OFFICER CELLI: Now, I am also going to
4 ask first Mr. Dighe because you were also another
5 proponent of these exhibits, did you have a comment at
6 this time?

7 Let me just say for all of the intervenors, you
8 have two mikes before you. You have the black mikes that
9 look like mine which are to amplify your voice in the
10 room. And then you have the smaller microphones that are
11 hooked up to the tape recorder so that we can get a
12 transcript of what's being talked about today. So you
13 need to speak into the black microphone, please.

14 MR. DIGHE: Hello. So my concern was for
15 Mountain House and the residents of Mountain House. The
16 reason being if the pipeline is compromised by any chance,
17 it's definitely a concern because there is a big
18 residential community close by. I think I would really
19 recommend what has to be done as a part of the review
20 process. I did hear and understand it's not in the
21 jurisdiction, but in what way it can be reviewed properly
22 I think it should be. I recommend that. That's my
23 suggestion. Thanks.

24 HEARING OFFICER CELLI: Mr. Simpson.

25 MR. SIMPSON: Yes, please.

1 I think we can all acknowledge that pipeline
2 safety consideration have been inadequate to this point.
3 And before we all just throw our hands up and say this is
4 not our job, without some showing that the PUC has
5 properly considered this, I would hope it would be the
6 Energy Commission's duty to at least remand this back to
7 the PUC for further consideration.

8 HEARING OFFICER CELLI: Actually, since we don't
9 really have jurisdiction over the PUC, the PUC is aware
10 they have jurisdiction over the pipelines. I take it Mr.
11 Sarvey can enlighten us on this that there's some
12 complaint in the process now regarding line 200.

13 MR. SARVEY: Line 002. There is no current
14 complaint on it. The complaint existed because of a new
15 soccer field that they wanted to locate on the property.
16 And right at the present time, that's settled, but there
17 may be another complaint because of the Ellis subdivision.
18 I don't know. I'm not filing one. But it's possible it
19 may be.

20 But at this point, nobody is looking at the
21 combined effect of these two power plants cycling on this
22 degraded line. So I don't see that the PUC would be --
23 they'd say that wasn't their jurisdiction as well. So I
24 think you're caught in a jurisdictional issue here.

25 HEARING OFFICER CELLI: Did you want to say

1 something, Commissioner?

2 COMMITTEE MEMBER DOUGLAS: I had a follow-up
3 question for Ms. Willis. And if applicant would like to
4 take a stab at it, you would be welcome to.

5 I am trying to understand legal premise -- the
6 legal position that would say that if we accept the
7 premise that there could be an impact on the pipeline, we
8 do not look at it because it's not in our jurisdiction.
9 I'm trying to understand that in context of other
10 substantive areas such as bio impacts, air quality impacts
11 and so on where we do a coordinated review with other
12 agencies. We talk to other agencies. But staff also has
13 tended to take a position that it might look at
14 information with some independence and possibly suggest an
15 additional condition, for example, in those areas. I
16 don't know if you can help me now or if that's something
17 that you might want to produce after having a little time
18 to work on it.

19 MR. WHEATLAND: Well, I'd like to address it
20 briefly.

21 When the Warren-Alquist Act was created and the
22 California Energy Commission was created, it was given
23 basically preemptory permit authority over all State and
24 local agencies with respect to the siting of this project,
25 but with one very important exception that was clearly

1 called out in the Warren-Alquist Act. And there is a
2 specific exemption that was negotiated in the formation of
3 this Commission. And that exception is that with respect
4 to the electric transmission system and the gas
5 transmission system that the jurisdiction of the
6 California Energy Commission would end at the first point
7 of interconnection and that with respect to the overall
8 gas transmission system and overall electric transmission
9 system, especially those that are operated by public
10 utilities that are regulated by the Public Utilities
11 Commission, that the CPUC would retain jurisdiction with
12 respect to those activities.

13 The Legislature was very clear that the Energy
14 Commission would not be regulating the PG&E gas
15 transmission system or electric transmission system with
16 respect to issues involving health and safety. So I think
17 that that is the difference here with respect to --
18 comparison to issues we might look at with respect to air
19 quality or biology or noise.

20 COMMITTEE MEMBER DOUGLAS: Thank you, Mr.
21 Wheatland.

22 STAFF COUNSEL WILLIS: Just to add, we had
23 several workshops actually in this room. Mr. Sarvey never
24 brought up this issue until his rebuttal -- or I guess it
25 was on the rebuttal testimony. So it was the first time

1 we'd ever even really heard this was something that was of
2 concern. Otherwise, we might have addressed it more
3 thoroughly in our supplemental staff assessment.

4 We do agree with the position Mr. Wheatland just
5 expressed. But also you know, the concern is that PG&E is
6 looking at their entire system at this point and
7 starting -- reworking that system at least from what I
8 understand over the next several years, which is not
9 something that we have any control over or jurisdiction.

10 COMMITTEE MEMBER DOUGLAS: Thank you.

11 I do understand that this is new -- these are new
12 assertions that ideally wouldn't come in rebuttal system.
13 What we're hearing from parties on is the question of
14 jurisdiction and the question of whether in our tentative
15 ruling the Hearing Officer read out was that we did not
16 have jurisdiction. But we want to hear this issue
17 thoroughly. And if it were air quality or if it were
18 another issue, we would almost certainly look at it.

19 So let me ask if we can hear from or parties --
20 would other parties like to speak on this?

21 HEARING OFFICER CELLI: Let me take it down the
22 line. Mr. Wilson, CalPilots, any comment? Go ahead. I
23 have no idea what that noise was.

24 MR. WILSON: Andy Wilson, California Pilots.

25 We are in an unusual point here based on the San

1 Bruno incident or accident. It's even questionable if
2 PG&E even has documentation on that pipeline. So -- and
3 referring to the Warren-Alquist Act and what staff
4 attorney is saying, I think staff at least has to make
5 some comment on this and address it. How much of a
6 comment and what their legal position can be, that seems
7 to be still in question.

8 HEARING OFFICER CELLI: Thank you.

9 Mr. Dighe.

10 MR. DIGHE: Two comments. I did request for more
11 public workshops. I just want to make sure that that
12 doesn't get noticed --

13 HEARING OFFICER CELLI: I'm sorry, folks. It
14 appears that something -- a glitch occurred with the phone
15 line.

16 Thanks for taking care of that.

17 I want to make a point right now that Mr. Dighe
18 just raised. We are going to allow the parties to
19 workshop today immediately following the prehearing
20 conference because we're going to notice -- let me go off
21 the record and see if we can fix this.

22 (Off record.)

23 COMMITTEE MEMBER DOUGLAS: We're on the record.
24 It looks like we've got all of our intervenors at the
25 table. We were joined by our last intervenor; is that

1 correct? Mr. Singh. We'll note for the record Mr. Singh
2 is here.

3 And we are talking about the exhibit that Mr.
4 Sarvey sponsored on the pipeline. And as we have been
5 discussing this issue up here, we are still having
6 difficulty reconciling the carve out that applicant
7 mentions in the Warren-Alquist Act for the pipeline and
8 transmission system short of the first point of
9 connection, of course, and the CEQA obligation to analyze
10 the whole of the project.

11 And so we are talking about a couple of things
12 here. We are talking about the possibility of a workshop,
13 and I understand that staff may not feel as though that
14 can be noticed on time. So we'll let staff speak to that.
15 We're talking about the possibility of a workshop and
16 we're talking about the possibility of asking for
17 briefing.

18 And there are two issues that are of key
19 importance as I see it on briefing. One is does the
20 project potentially impact the pipeline. That's the
21 question of fact. But the question of -- and if we find
22 jurisdiction, that would be a question of fact for the
23 evidentiary hearing. But before that, there's the issue
24 of jurisdiction, which as applicant pointed out is
25 different or potentially different in the situation. So

1 let me ask staff what you think of the possibility of a
2 workshop.

3 STAFF COUNSEL WILLIS: That would be today?

4 COMMITTEE MEMBER DOUGLAS: We were thinking it
5 would be today because we have interested members of the
6 public here. But potentially we could notice it sometime
7 prior to the evidentiary hearing. It would, however,
8 awkwardly potentially be before we made a determination of
9 jurisdiction unless we could -- we could potentially get
10 briefs in and make a ruling before an evidentiary hearing
11 or before a workshop.

12 STAFF COUNSEL WILLIS: We wouldn't object to a
13 workshop properly noticed before the evidentiary hearing
14 or briefing. Either/or could be fine or both. We would
15 object to having the workshop today because we don't think
16 that's properly noticed. It's one thing to continue a
17 workshop from one day to another. But to continue a
18 prehearing conference and turn it into a workshop,
19 unfortunately we do not have any technical staff with us
20 or available to really be productive today.

21 COMMITTEE MEMBER DOUGLAS: I understand the issue
22 of preparation would be a problem or potential problem.
23 Let me ask applicant to respond to the question of either
24 briefing and/or a workshop in some order before the
25 evidentiary hearing.

1 MR. WHEATLAND: Well, the applicant believes that
2 a workshop would certainly be more productive if the
3 parties were prepared and had -- is it on now? Well, I'll
4 try to speak close to it but --

5 COMMITTEE MEMBER DOUGLAS: I'm sorry, Mr.
6 Wheatland. Maybe we can ask you to go to the podium or
7 pass the microphone down so that people on the phone can
8 hear.

9 MR. WHEATLAND: All right. Now -- is it working
10 for anybody?

11 MR. SIMPSON: Mine went off, too.

12 MR. WHEATLAND: I'll try this one. This one
13 works.

14 We think a workshop would be more productive if
15 parties had a chance to prepare and brought experts. We
16 don't have those here today.

17 But let me go back to this question about CEQA,
18 because when you talk about CEQA and the obligation to
19 look at the project as a whole, CEQA, in order to have
20 CEQA, you have to first identify a physical change in the
21 environment. And when we're talking about whether or not
22 this project would, in fact, impact the pressure in a gas
23 line, that's not a CEQA question. Now, you might be able
24 to get there eventually if you first look at the question
25 of how it effects the pressure and then speculate as to

1 whether that pressure will effect the safety of lines that
2 have been constructed and potentially have an impact on
3 public safety.

4 But the first question is whether it effects the
5 pressure of the line at all. That's not a CEQA question.
6 And Mr. Sarvey has come into this proceeding at the very
7 last minute even though we've been going on for a year and
8 provided unqualified speculation that the project when it
9 is operating will effect the pressures on that line. And
10 then he further speculates those pressures would be
11 changed to such a significant effect it would have impact
12 on the downstream pipeline that PG&E operates. I don't
13 think you can get there with what he has offered into this
14 record.

15 Even if you accept it, all of the statements as
16 true, the logical conclusion is that any change in the
17 pressure on the line will effect matters that the Public
18 Utilities Commission regulates. And I would suggest that
19 before you have a workshop that someone -- that the
20 Hearing Officer or the Commissioner contact your
21 counterpart at the Public Utilities Commission to
22 determine whether, in fact, the things Mr. Sarvey is
23 saying is true. He's saying the PUC is not going to look
24 at it. I don't believe that's true. He's saying the PUC
25 doesn't have jurisdiction and they'll ignore it. I don't

1 believe that's true.

2 I think you really -- before you engage in
3 activities that are clearly delegated by the law to
4 another agency or engage in workshops, I think it would be
5 important to talk to the public utilities Commission.

6 COMMITTEE MEMBER DOUGLAS: All right. So I think
7 what we heard from the applicant is I'm going to
8 re-interpret your words to some degree of a desire that we
9 make a ruling on jurisdiction before we -- and that may
10 involve talking to Public Utilities Commission before we
11 schedule a workshop on this item.

12 Let me ask -- and I know I'm skipping to
13 intervenors for a moment. I'm going to give you a chance.

14 But let me just ask parties and Mr. Sarvey in
15 terms of briefing, we've asked for rebuttal testimony on
16 the 14th. Is briefing this item this narrow issue of
17 jurisdiction feasible by then or would you need for him --

18 STAFF COUNSEL WILLIS: That should be -- that
19 should be enough time.

20 COMMITTEE MEMBER DOUGLAS: For the record, staff
21 said that's enough time.

22 MR. SARVEY: Yes, I think so.

23 COMMITTEE MEMBER DOUGLAS: Mr. Sarvey, is that
24 feasible for you by the 14th?

25 MR. SARVEY: Yes.

1 COMMITTEE MEMBER DOUGLAS: All right. Let me ask
2 the other intervenors, so our tentative ruling stands but
3 obviously pending briefing. Let me ask the other parties
4 if the 14th on this item to make a determination of
5 jurisdiction -- or the receive briefs actually for the
6 Commission is feasible. Are any of you who would read
7 this item able or constrained from doing that?

8 MR. SIMPSON: Can we get a microphone?

9 COMMITTEE MEMBER DOUGLAS: For expediency, why
10 don't you speak and I'll repeat it. I hate to do this
11 but --

12 MR. SIMPSON: I'd like to understand, earlier you
13 said the decision you made wasn't precedent setting. Is
14 this a precedent setting decision?

15 COMMITTEE MEMBER DOUGLAS: This is not a
16 precedential decision.

17 HEARING OFFICER CELLI: No.

18 MR. SIMPSON: How would I ordinarily tell the
19 difference between a precedent setting and not precedent
20 setting?

21 HEARING OFFICER CELLI: It would say so it has to
22 be designated as such by the Commission. It would say so
23 in the decision.

24 MR. SIMPSON: Okay. So --

25 COMMITTEE MEMBER DOUGLAS: I think, Mr. Simpson,

1 to be explicit, the Commission is not anticipating this
2 would be a precedential decision. But the decision on
3 whether to make a decision precedential is usually
4 proposed by the Committee and made by the full Commission
5 when it makes a decision. So I'm saying as Presiding
6 Member of the Committee that I don't anticipate making
7 this decision precedential or asking the Commission to
8 vote to make a decision on this project precedential.

9 MR. SIMPSON: Okay. So we don't really know in
10 this room what's precedent setting and what's not?

11 COMMITTEE MEMBER DOUGLAS: Typically, our
12 decisions on admissibility of evidence are not.

13 MR. SIMPSON: Okay. You know, the contention
14 that Mr. -- I was going to wait until you were done.

15 COMMITTEE MEMBER DOUGLAS: We were discussing
16 precedential decisions. The only one I'm aware of since
17 I've been on the Commission is the Avenal decision.
18 That's the only one.

19 MR. SIMPSON: Right. I wasn't aware when I
20 participated in Avenal that was precedent setting either.

21 But the question of whether Mr. Sarvey should
22 have raised this before the San Bruno effect or not I
23 think should be off the table. There's new evidence.

24 HEARING OFFICER CELLI: It is off the table.
25 That's not the question.

1 COMMITTEE MEMBER DOUGLAS: We've asked for a
2 question to be briefed, which is the question before us.
3 We're not arguing this should have been raised. We want
4 the evidence to the extent that we would determine the
5 question of jurisdiction, that's it for it.

6 MR. SIMPSON: So not jurisdiction over the Clean
7 Air Act and all the other things that we take jurisdiction
8 over? Just over --

9 COMMITTEE MEMBER DOUGLAS: We don't take
10 jurisdiction over Clean Air Act. But what we're asking
11 for briefing on is the question of whether the Energy
12 Commission should analyze the potential impacts of a
13 proposed power plant on the gas system that it
14 interconnects with. So does the Energy Commission have
15 jurisdiction? No. Should we analyze it? That's the
16 question.

17 MR. SIMPSON: So I would like -- if the question
18 is the date February 14th okay, I would like more time
19 than that to respond the that question.

20 COMMITTEE MEMBER DOUGLAS: So we've heard from
21 applicant, staff, and the proponent of the motion that
22 February 14th would work.

23 HEARING OFFICER CELLI: Since this wasn't an
24 issue that was raised by you, Mr. Simpson, in your
25 prehearing conference, that's not necessarily an issue you

1 would need to brief. But we would accept your brief
2 February 14th. It's something you may want to do.

3 MR. SIMPSON: Is there the opportunity to have
4 other experts testify on this? Or it's just our brief
5 that's going to be we are not an expert so it doesn't mean
6 anything?

7 HEARING OFFICER CELLI: It's your brief and I'll
8 tell you this: If your brief actually creates -- gives
9 fact sufficient to cause this Committee to believe that
10 there might be jurisdiction, then we would hear it at the
11 evidentiary hearing. And then you would put on your
12 witnesses at the evidentiary hearing. But this is a
13 threshold question we need answered.

14 COMMITTEE MEMBER DOUGLAS: This is a threshold
15 question for legal argument.

16 HEARING OFFICER CELLI: Mr. Wheatland.

17 MR. WHEATLAND: I understood what was being
18 briefed was the admissibility of Mr. Sarvey's testimony
19 and whether that would be allowed into the record. I
20 didn't understand that the question is whether the
21 Committee is going to reopen the evidentiary record to
22 accept additional testimony on this issue.

23 HEARING OFFICER CELLI: The record isn't -- first
24 of all, let's be clear. The evidentiary record opens at
25 the evidentiary hearing. So right now, this is a

1 prehearing conference and we're talking about what is or
2 is not going to come in. And we have a threshold question
3 as to whether there are CEQA impacts or whether there are
4 any impacts that would extend the jurisdiction to the
5 pipelines that are beyond the first point of
6 interconnection because of impacts resulting from the MEP.

7 COMMITTEE MEMBER DOUGLAS: Arguably resulting
8 from the project. That's right. And so it's a threshold
9 question of whether we would consider that issue be
10 briefed.

11 HEARING OFFICER CELLI: So that's all that's
12 going to be briefed at this time. Based on that decision,
13 we're going to make a ruling on the admissibility of Mr.
14 Sarvey's evidence.

15 Yes, Mr. Dighe.

16 MR. DIGHE: So I just want to emphasize that it's
17 definitely related -- hello?

18 HEARING OFFICER CELLI: Kelly, if you can hear
19 us, we need some assistance. The microphones aren't
20 working other than the dias.

21 So go ahead.

22 MR. DIGHE: So I just want to emphasize that it's
23 obvious it's definitely finally getting connected to the
24 safety of the project. And I want to so comment about the
25 explosion which happened in San Bruno as well (inaudible)

1 which had a big impact of earthquake-like effects to the
2 neighboring communities. So I just want to make sure that
3 on February 14th we really understand that this effect of
4 the pipeline is not going to compromise the safety of the
5 residential communities and we know for sure what CPUC
6 what has to be done. This project is going -- and what
7 happens after that you will be comforted for the safety of
8 the residents.

9 HEARING OFFICER CELLI: Thank you.

10 COMMITTEE MEMBER DOUGLAS: We had another
11 comment. Go ahead.

12 HEARING OFFICER CELLI: Mr. Singh, would you pick
13 up the microphone?

14 COMMITTEE MEMBER DOUGLAS: Mr. Singh and then Mr.
15 Mainland, please.

16 MR. SINGH: I just want to comment to the lawyer
17 or attorney here that for more than one year (inaudible)
18 if you look at the events that has happened, the San
19 Bruno, it happened October 1st I believe -- September --
20 we move forward in our life the due diligence of safety
21 needs to be done. (inaudible) so what Paul is mentioning
22 is the need to take care of the safety is very important
23 for the resident, especially for Mountain House. And this
24 is not on the rocky mountain we're building (inaudible)
25 and there is a creek there. Now, the creek goes up there

1 because (inaudible) safety there. (inaudible) impact on
2 the creek (inaudible) and Mountain House. (inaudible) and
3 safety to the Mountain House (inaudible).

4 HEARING OFFICER CELLI: I want to be clear that
5 everybody in the room acknowledges that the pipelines need
6 to be safe. The only question is whether this is a
7 question that can be dealt with by the California Energy
8 Commission as opposed to the California Public Utilities
9 Commission, because expressly, the PUC has jurisdiction
10 over all the pipeline. And we -- our jurisdiction extends
11 to the first point of interconnection which is when the
12 new pipelines that are laid by the new power plant connect
13 to the existing power plant and then our jurisdiction
14 would stop. So the pipelines that are being loaded are
15 presumably going to be brand-new, nice pipeline.

16 The question -- only question is is the existence
17 of that new conduit for the pipeline and the presence of
18 the Mariposa Energy Project going to impact the existing
19 power plants negatively? Will there be an adverse impact?
20 And we -- the question is whether that's even a question
21 we can get to jurisdictionally. So that is what the
22 parties are going to be briefing on February 14th is their
23 arguments in favor or against whether we have jurisdiction
24 to even look at the question.

25 MR. SINGH: So let me ask one question. What if

1 a disaster happens? I understand your jurisdiction is
2 here and the house is on fire. So don't you think we
3 cross the lines to save the house on fire? Even
4 (inaudible) make the decision that what should we do. We
5 have jurisdiction, events that are happening, can we
6 modify our jurisdiction and can we compel the other
7 parties (inaudible) --

8 HEARING OFFICER CELLI: Here's what would happen.
9 If there was an explosion, the fire department, the
10 hazardous materials people would go out and deal with it.

11 Right now, if your driver's license expired, you
12 don't come to the California Energy Commission to renew
13 your license. You have to go to the Department of Motor
14 Vehicles, because we have exclusive jurisdiction over your
15 privilege to drive. We have exclusive jurisdiction over
16 power plants and that is a limited jurisdiction. And so
17 what we're talking about is a legalistic question about
18 how far does our jurisdiction extend. And that's what
19 we're asking the briefing on. So we're not asking --
20 we're not going to make a decision right now. We're just
21 explaining so it's clear to the parties what we expect to
22 hear from Mr. Sarvey. And if you want to file a brief
23 yourself, you can file one --

24 MR. SINGH: Let me tell you one thing. On the
25 driver's license, if my driver's license expires and I'm

1 working for you, for CPUC, right, and there is a liability
2 with CPUC, I can tell you that first CPUC has to deal with
3 me as employee of CPUC, right, to deal with my driver's
4 license expiration. It's a problem that I should have
5 looked into it. But when the liability figures in, every
6 department gets involved. So that's what my point is.

7 HEARING OFFICER CELLI: I'm not sure I agree with
8 that. But --

9 COMMITTEE MEMBER DOUGLAS: We appreciate your
10 concern. We heard you.

11 MR. SINGH: I suggest that we should look into it
12 and it should be on the agenda, the safety (inaudible) in
13 a workshop (inaudible).

14 COMMITTEE MEMBER DOUGLAS: Thank you.

15 HEARING OFFICER CELLI: As we were -- Mr.
16 Wheatland, if you can hold your thought, I'm moving to the
17 north here. We heard from Mr. Dighe and Mr. Singh. I
18 want to hear from Mr. Sarvey. Go ahead.

19 MR. SARVEY: Yeah. There's one more component of
20 this, which probably didn't spell out very well in my
21 testimony. --

22 HEARING OFFICER COTE: One moment. Can you hear
23 Mr. Sarvey in the back of the room?

24 COMMITTEE MEMBER DOUGLAS: We see heads shaking.
25 Mr. Sarvey.

1 HEARING OFFICER CELLI: Please see if you can't
2 get a microphone that works.

3 MR. SARVEY: With this, they discovered that this
4 particular line had wall loss. They shut the pressure
5 down in that line to like 530 PSI. That's not going to be
6 enough to support this power plant or Tracy combined cycle
7 should that event happen. So that's another component of
8 that -- you have to make sure that you prevent an event
9 for liability purposes that this project does not shut
10 down because it's an inadequate pipeline. So I think that
11 would be part of the argument and part of the briefing.
12 Thank you.

13 HEARING OFFICER CELLI: Thank you.

14 Mr. Mainland.

15 MR. MAINLAND: The San Bruno fireball and the
16 disaster makes this a public policy issue a very strong
17 concern.

18 My suggestion would be in light of that,
19 regardless of the jurisdictional issue, regardless of
20 CPUC's predominance on this issue, from a public policy
21 and a public interest standpoint, I think CEC would be
22 doing the public a service by either addressing a possible
23 hazard informal evidentiary hearing, entering a workshop.
24 And the purpose of that would be not that you have any
25 right to regulate in the CPUC's position, but you would be

1 gathering information which would then be
2 transmitted/conveyed to the CPUC. It will be evidentiary
3 hearings of some value because it would be formal. It
4 would be sworn. It would be worth much more than what the
5 CPUC might be able to gather from its own devices, which
6 according to what we're hearing we're not at all assured
7 that the CPUC is paying attention to this particular local
8 problem. Thank you.

9 HEARING OFFICER CELLI: Thank you.

10 Mr. Grover, any comment? I'm sorry. Mr. Lamb.
11 I know that you represent Mountain House.

12 MR. LAMB: My only concern would be back to the
13 point of interconnect that Mr. Sarvey's assertions are
14 true, if there is a 62 percent degradation of the quality
15 of the pipe, is the pipe where the interconnects been made
16 been surveyed? Is there reason to believe that if they
17 tap that pipe that it won't cause a problem at the
18 interconnect? So if I concede there's no jurisdiction,
19 and you say this got up to the interconnect, has there
20 been any study to show it's safe to tap this pipe given
21 this sounds like fairly new evidence to this Commission
22 that that pipe is degraded. That's my only question.

23 HEARING OFFICER CELLI: Mr. Wheatland, you're
24 last.

25 MR. WHEATLAND: Well, I was going to suggest we

1 brief the issue. But in addition, we'd like to be able
2 to -- in the unlikely event the Commission were to find
3 jurisdiction on this issue, just to move things along,
4 we'd like to be able to file rebuttal testimony on this
5 issue on February 14th so that if, indeed, you do decide
6 to hear this issue in any form, we would have testimony in
7 record.

8 Mr. Sarvey's testimony has a statement here that
9 says, "pipeline pressure fluctuations from the cycling of
10 these projects will cause additional stress to line 002."
11 He made the same statement here this morning. I think
12 that it's the contention that's at issue. His testimony
13 doesn't contain any citation or authority or explanation
14 as to how he reaches that conclusion. But we'd like to
15 file by February 14th testimony and rebuttal to that
16 statement.

17 HEARING OFFICER CELLI: Thank you.

18 Now, let me just go off line for one second.
19 We're going to go off the record for a second and then
20 come back on.

21 (Off record)

22 COMMITTEE MEMBER DOUGLAS: We've heard now from
23 both parties on the issue of the briefing. I think that
24 the parties know what to brief, and we'll expect the
25 briefs by February 14th.

1 I'm still lingering on the idea of a workshop, in
2 part because I agree with Mr. Mainland that it would be
3 beneficial to the community to learn more about any
4 potential impacts and learn more about the foundation
5 pouring asserted impacts, even if we were to find that we
6 did not have jurisdiction to consider the issue at all in
7 the application before us.

8 So I'd like to ask staff what time frame seems
9 reasonable to you to notice a workshop on the gas pipeline
10 issue and both point of interconnection and any assertions
11 that might be made about impacts to the broader system.

12 STAFF COUNSEL WILLIS: Well, considering that the
13 hearings are on the week of the 24th and 25th, there is a
14 holiday on the 21st, I'm thinking I guess sometime during
15 the week of maybe right after -- right after the briefs
16 would be due, maybe. We'd have to talk with staff to make
17 sure we have staff available. That's the key point for us
18 is just to make sure that the right people are there.

19 COMMITTEE MEMBER DOUGLAS: Thank you. We'll let
20 staff work with other parties and set a date. But I do
21 think a workshop on this issue would be beneficial to the
22 community and from the standpoint of that very least
23 helping educate the community and provide a forum for the
24 parties to exchange their views would be helpful to this
25 process, even if we were to find the issue is not

1 jurisdictional.

2 So Hearing Officer, I'll turn it back to you to
3 other items. We have tentative rulings on other items and
4 maybe we should get some more input about that.

5 HEARING OFFICER CELLI: Thank you.

6 Ms. Willis, I wanted to ask about Exhibit 407.
7 You said that you had language that would prohibit gas
8 flows.

9 STAFF COUNSEL WILLIS: Actually, I said that we
10 would be proposing language. As a matter of fact, we just
11 talked with Mr. Sarvey about that after (inaudible). But
12 unfortunately this is a problem when parties file what
13 really is evidence testimony during rebuttal and we don't
14 have an opportunity to respond. And in this particular
15 case, that was the case.

16 But talking with our staff, Mr. Tyler, he did say
17 they would go ahead and prepare a condition that probably
18 will become a standard condition with future projects.
19 But we'd like to -- if at all possible, we'd like to be
20 able to get the condition out prior to the hearing so that
21 everybody has a chance to just kind of mull it over before
22 we go to hearing. Because there might be some language
23 tweaking or something that happens that people propose.

24 HEARING OFFICER CELLI: Thank you.

25 Mr. Sarvey, because I didn't want to take up too

1 much time on this, I just wanted to know if you were
2 satisfied with that or did you want to make the case for
3 Exhibit 407? I wasn't to be clear what I'm saying, it
4 sounds like staff is proposing to prohibit gas flows.

5 MR. SARVEY: I'm very, very satisfied with that
6 portion of my testimony being accepted. But I don't see
7 any reason to preclude the rest of the testimony. I don't
8 understand the basis of it.

9 HEARING OFFICER CELLI: The basis -- understood.
10 So I just wanted to know whether you were willing to
11 withdraw it based on what staff was saying

12 MR. SARVEY: Oh, no. No. The testimony is very
13 valid testimony. This is something that's been going on
14 since 2001 beginning with the (inaudible) energy project.
15 This particular fire department covers -- this station
16 covers --

17 HEARING OFFICER CELLI: 407 is the one having to
18 do with the gas flows only.

19 MR. SARVEY: Okay.

20 HEARING OFFICER CELLI: The --

21 MR. SARVEY: The 407 has to do with the fire
22 department. That's worker safety and fire protection.
23 And my testimony has more than just the gas flow part of
24 it. It also has the safety shoe (inaudible) recommending
25 to save the applicant's money here. And it also has a

1 contractor safety program that I'm recommending. And it
2 also is in response or rebuttal to what staff would like
3 in the supplemental staff assessment when they said that
4 explosions in hazardous incidents at power plants were
5 rare. I think I pretty much covered that in my testimony.
6 But it's not a rare occasion at all. In fact, on January
7 14th, they had an explosion at the whole main power plant
8 which cost \$20 million. And that's a CEC certified
9 project, the exact same testimony staff rebutted in this
10 proceeding and it's obviously inadequate.

11 HEARING OFFICER CELLI: And that's in the context
12 of these gas flows?

13 MR. SARVEY: No. That's in the context of worker
14 safety and fire protection having adequate fire response
15 to this project, making sure that the fire departments
16 themselves are receiving compensation adequate enough to
17 offset this impact. Both these fire departments
18 essentially live on square usage fees. It's obviously not
19 adequate enough for the city of Tracy. We just had to
20 provide a half-cent sales tax to support our fire
21 department.

22 So I'm saying this power plant is in the far
23 reaches of both fire department service areas. Both these
24 fire departments need to be reimbursed for this impact.
25 This is a huge impact.

1 HEARING OFFICER CELLI: In general, don't the
2 fire departments actually come in and provide information
3 or they actually talk to staff and applicant?

4 MR. WHEATLAND: Yes, they do. And in this case,
5 both fire departments have indicated that they're
6 satisfied with the proposed Conditions of Certification.

7 MR. SARVEY: I'll turn that over to Mr. Lamb
8 because Tracy Fire has clearly sent a letter that they
9 need to be compensated and we haven't heard anything from
10 Alameda Fire.

11 HEARING OFFICER CELLI: Okay. So don't we have a
12 standard condition that usually says that the safety plan
13 has to be submitted to the CPM? That's standard. And
14 staff is nodding their head yes. Worker 7 slip resistant
15 shoe program, that's the kind of thing that I would hope
16 people should be able to work out in a workshop.

17 MR. SARVEY: I can work it out in the workshop
18 but I still want my testimony --

19 HEARING OFFICER CELLI: Okay. I understand. But
20 it seems to me at this late date when we're going to have
21 an evidentiary hearing, we're going to talk about the 95
22 hours of testimony that people want to put in, which is
23 not going to happen. We just don't have time to talk
24 about slip resistance shoes, which it seems obvious it's
25 going to be an industrial area and you have slip resistant

1 shoes.

2 MR. SARVEY: I agree.

3 HEARING OFFICER CELLI: So let's hold that in
4 abeyance. I'm going to talk with the Committee for a
5 second and then we'll come back on this issue. We're
6 talking about Exhibit 407. Be right back.

7 (Off record.)

8 HEARING OFFICER CELLI: This is the risk you run
9 when you go off the record for a moment. We're back on
10 the record. We're addressing the issue of Exhibit 407.
11 Can you hear me back there, Mr. Sarvey?

12 The tentative ruling is that the Committee at
13 this time will not -- will say that the testimony exhibit
14 407 will not be excluded at this time. We will re-visit
15 the issue at the evidentiary hearing. And I want to
16 briefly impress upon all of the parties that everything in
17 Exhibit 407 is the kind of thing that the parties should
18 work out in a workshop and we, the Committee, shouldn't be
19 bothered with this sort of minutia. This is something
20 that's all common sensical.

21 I'm going to ask the parties, staff to put
22 together a workshop as soon as practicable and all the
23 parties participate in it so that you can work together
24 and there's middle ground on all of these things. And I'm
25 sure you can find that middle ground. So that's the

1 request of the Committee to please work together and get
2 to the issues that really need to be discussed, because
3 there are several in this case.

4 So thank you. I'm going to move on.

5 STAFF COUNSEL WILLIS: Excuse me, Mr. Celli. I
6 was just reminded today is the 7th. So in order for us to
7 notice a ten-day workshop, probably if we get the notice
8 out today is going to be the week of the evidentiary
9 hearing.

10 HEARING OFFICER CELLI: The Committee would grant
11 a shorter time. So that would enable the staff to have
12 less lead time on the notice.

13 STAFF COUNSEL WILLIS: Thank you. If we can get
14 that in writing, we'd appreciate that.

15 HEARING OFFICER CELLI: Don't you trust me?

16 Didn't I already do an order shortening time in
17 this case? Or was that Paul?

18 COMMITTEE MEMBER DOUGLAS: So on the issue of
19 worker safety, obviously it's an important issue. It's an
20 issue that's been handled so many power plant
21 applications, we have standard ways of addressing many of
22 the potential concerns or really all of the potential
23 concerns that arise. And so I'd like to ask staff and the
24 applicant to look at what has been suggested here and see
25 if there are suggestions that make sense or may be already

1 are standard practice and are required, but it's possible
2 that Mr. Sarvey doesn't know that.

3 We typically do not reject testimony out of hand
4 on basis of lack of expertise. But we typically would
5 give testimony much less weight if it's based on lack of
6 expertise. And the amount of weight we could give it
7 could go pretty near zero if we were to believe there was
8 not foundation. And Mr. Sarvey is trying to speak to the
9 interest of and with the voice of the fire departments.
10 That's not terribly credible to my ears. If the fire
11 departments are concerned, it would be of great benefit to
12 get them to speak for themselves. And that would be much
13 more helpful to us.

14 So, Mr. Lamb, you're raising your hand.

15 MR. LAMB: I think there was an item entered into
16 the docket that had a letter from the Tracy Rural Fire
17 Department that suggested that this could be a funding
18 issue for us. I'm not sure -- I don't know if you're from
19 around here or not. But where the site is located, it's
20 just inside Alameda County, but on the other side of the
21 Altamont hills. So technically, Alameda County is the
22 responder responsible for dealing with issues at the power
23 plant. But as a practical matter, they will probably
24 never be the first responder because Mountain House fire
25 station is only five miles away as opposed to 20 miles

1 away.

2 So there is an assistance agreement where Alameda
3 will assist San Joaquin and San Joaquin will assist
4 Alameda. And that presumes that on occasion they'll help
5 each other out in this case 100 percent of the time. The
6 response will come from the Mountain House fire station
7 and from the community services district point of view, we
8 100 percent fund that fire station. So it's not even a
9 regional issue for us. We pay for any services that go
10 out of that fire station. So in essence, Mountain House
11 will be footing the bill for this issue. So for us,
12 whether it's mediated or not.

13 Now, we did meet with the applicant early on in
14 the process and I suggested maybe if we could have that
15 fee for service sort of thing. And they said, well, we'd
16 sign onto that, but it never went further than that.
17 There was never anything inked.

18 So I would like to see that there's some sort of
19 acknowledgement that any response to that project is going
20 to fall squarely on the shoulders of the Mountain House
21 Community Services District and there should be some sort
22 of remediation. So I think that's our biggest concern.
23 And you said you'd like to hear from the fire fighters
24 directly. They did submit something into the docket. We
25 have a comment.

1 MR. LAMB: We don't have something from Alameda
2 as far as I know. I hasn't seen anything come by through
3 them. But that's probably our of all the issues that we
4 have, that's our biggest concern that the impact CSD has
5 uncontested intervenor. And we can probably work out an
6 agreement. But as far as I know right now, this
7 Commission is not saying that we have to come to an
8 agreement. I think I'd like to see that.

9 Thank you.

10 HEARING OFFICER CELLI: Any response, staff or --
11 actually, Mr. Wheatland, you're grabbing the microphone.

12 MR. WHEATLAND: Yes. Well, Mr. Lamb's comments
13 really surprise me, because his prehearing conference
14 statement says items that remain disputed: None. Topics
15 areas upon which they wish to cross-examine witnesses:
16 None. List of exhibits: None. Modifications to the
17 proposed condition of certification: None.

18 So their statement to the Committee just a few
19 days ago was that they had no issues or concerns. And for
20 him to suggest now at the prehearing conference this is an
21 issue of concern is really quite surprising.

22 The point of this is is that Mr. Sarvey knows
23 he's been litigating this issue with many cases over many
24 years. He chose not to raise any of these issues in his
25 opening testimony, although he had an opportunity to do

1 so. And now at the last minute he comes in with some
2 testimony that --

3 HEARING OFFICER CELLI: I'm going to have Mr.
4 Singh and Mr. Sarvey, before you launch into this, this is
5 an area that I don't know that we really need to spend any
6 time on. Obviously, it's an issue. What I really want to
7 say is that since there will be a workshop, that would be
8 something that needs to be workshopped. This is again
9 something that parties should come to us with some
10 proposed language. You're going to probably haggle over
11 that language, but it seems to me this is such a routine
12 thing, that fire response.

13 MR. WHEATLAND: It is routine. And it's been
14 fully addressed in the staff assessment and it's been
15 addressed in the applicant's testimony. And we have had
16 conversations with the Alameda and Tracy fire departments
17 and none of these concerns have been raised until Mr. Lamb
18 raises these here today.

19 MR. LAMB: That's not true. They're part of the
20 record.

21 HEARING OFFICER CELLI: Well, we did receive a
22 comment letter that's about this. I remember reading it.

23 MR. WHEATLAND: There is a comment, but it isn't
24 one that obligates the applicant or the project to provide
25 additional funding to Tracy Fire. There is a mutual aid

1 agreement in effect with Alameda County. It has
2 provisions and terms of how those counties will interact
3 in the rare event that they're called to this facility.
4 And there is certainly -- until these parties come in at
5 the last minute, there's no issue of contention.

6 MR. LAMB: I would contend that it wasn't last
7 minute. We were talking about this with the applicant up
8 to a year ago.

9 COMMITTEE MEMBER DOUGLAS: Mr. Lamb has said
10 that -- asserted they had been talking for about a year.

11 HEARING OFFICER CELLI: I'm sorry to say, but it
12 seems to me that's something that perhaps the parties
13 could re-visit one more time at the workshop and get
14 clarity. Because it sounds to me like there's confusion
15 between Tracy, Mountain House, the applicant who's
16 reporting to who. Because it's all about mutual aid and
17 their agreements that are really outside of the purview of
18 the AFC. So with that, I'd like to move on to the next
19 subject, which is topics not ready to proceed.

20 And Ms. Willis.

21 STAFF COUNSEL WILLIS: I'm sorry. Before we move
22 on, I notice you excluded the testimony regarding lead?
23 We did have David Vidaver prepare a response and that
24 doesn't have to be evidence. I didn't know if you wanted
25 us to file it and put it in a docket for informational

1 purposes, but it has been prepared. It just hasn't been
2 filed yet.

3 COMMITTEE MEMBER DOUGLAS: Is this information
4 that would be relevant in the greenhouse gas analysis or
5 is this information on the question?

6 STAFF COUNSEL WILLIS: I think it's just
7 basically in the issue and just clarifying some of the
8 points that were made in various testimonies that address
9 lead. And we objected to the testimony on these on the
10 basis it's not part of the jurisdiction, but we did want
11 to be able to respond if there was any questions from the
12 public or anything. It's up to you.

13 HEARING OFFICER CELLI: One moment. Clearly,
14 that is of interest to the public so we would ask that you
15 make that part of your February 14th filing. Thank you
16 for raising that.

17 Mr. Wheatland.

18 MR. WHEATLAND: I have one other issue that I'd
19 like to ask about with respect to exhibits that will be
20 received into evidence. And that's with respect to
21 Exhibit 701, 702 and 703. These are declarations that
22 were offered by CalPilots as an attachment to their
23 prehearing conference statement. So they weren't even
24 offered as rebuttal. But they were offered as attachments
25 to the prehearing conference statement. We would have no

1 objection to the receipt of these statements as public
2 comment, but if they are intended to be evidence of this
3 proceeding where witnesses would be sworn, we would object
4 to their admission.

5 HEARING OFFICER CELLI: Okay. Your objection is
6 noted. What we decided to do, the Committee decided to do
7 was to allow those documents in but give the applicant
8 additional time to respond, which was what the February
9 14th date was designed to do was to give you an
10 opportunity to rebut.

11 MR. WHEATLAND: Before you do, I wish to point
12 out that these didn't even come in as rebuttal. CalPilots
13 has experience in these proceedings. They do know the
14 rules. And this is not even rebuttal. This is an
15 attachment to a prehearing conference statement. And I
16 would just respectfully suggest to the Committee that in
17 order to protect the integrity of your hearing process if
18 you allow parties to come in even at this late date with
19 additional written testimony, you'll have a hard time in
20 the future drawing a line and saying this kind of conduct
21 cannot be permitted.

22 HEARING OFFICER CELLI: I understand that. You
23 know, really want to make an important point. And you
24 raised an important point, Mr. Wheatland. And the
25 Committee makes clear that the Committee disfavors late

1 filed documents. It disrupts our process. And it puts
2 the applicant and other parties at a disadvantage to enter
3 your documents late.

4 The countervailing concern is that the Committee
5 wants a full record, want to receive any information that
6 is useful and helps inform the decision. So in an attempt
7 to walk the balance between a late filed, but a couple of
8 days document and the need for certainty as to dates, I
9 think that this time since all of the documents are now in
10 and we will not be receiving any more in additional
11 evidence, the Committee has determined that in this case
12 in order to try to avoid any prejudice (inaudible) by the
13 applicant to extend the period of time by which the
14 applicant can file rebuttal.

15 And you're right, we are pushing the lines a
16 little bit here, but we think in fairness to all parties
17 we think the best way to deal with it is to give the
18 applicant an opportunity to rebut. But you were right and
19 we understand and we admonish the parties that there will
20 be no further late filings. So I want to thank you for
21 that point.

22 Is there anything else at this point, Mr. Wilson,
23 that you want to say?

24 MR. WILSON: The only thing I would emphasize --
25 Andy Wilson, CalPilots.

1 And I would emphasize that the applicant did have
2 an outreach program to the Tracy airport, not the Byron
3 airport. And there was never an outreach to the Byron
4 airport. The declarations are from those pilots that use
5 the airport that are businessmen that pay rent there. And
6 they need to be heard, especially since neither the
7 applicant nor staff has addressed these issues that we
8 brought to your attention.

9 HEARING OFFICER CELLI: Thank you.

10 So with that, the tentative ruling of those
11 documents is that they would be admitted into evidence.

12 Now, with that, ladies and gentlemen, I want to
13 move onto our next topic, which is the --

14 MR. SARVEY: Excuse me, we haven't spoke to
15 precluding my alternatives testimony or the alternatives
16 testimony of the Sierra Club. Is that being accepted now?

17 HEARING OFFICER CELLI: No. Actually, we -- I
18 thought we made it clear that needs was not a relevant --
19 why don't you come around, Mr. Mainland.

20 The question of need --

21 MR. SARVEY: Well, the entire application in the
22 alternative section is based on the need for intermittent
23 renewable generation, additional power in the Bay Area,
24 and the land use section they're proposing a conditional
25 use permit based on this project's needed for public

1 convenience and necessity. And I believe the need is an
2 integral portion of their testimony, we should be allowed
3 to address that. And my testimony does, in fact, address
4 that. And if you have a problem with my credentials,
5 that's another issue.

6 But I believe the testimony itself is square on.
7 You can't allow someone to make up an entire application
8 based on a contract nobody has seen in a situation where
9 they're saying no, we got to have this project because
10 otherwise we don't have anything to back up these
11 intermittent renewables, the Bay Area load center in east
12 more peak generation, none of these things are proven in
13 this application. Not one of them. So I mean, to that
14 extent, the testimony is extremely relevant. And if we
15 want to talk about my credentials, I'll willing to talk
16 about it as well. But I can't see anybody excluding this
17 testimony since staff and applicant's entire AFC and SFA
18 are pretty much based on a need for this project.

19 HEARING OFFICER CELLI: Thank you.

20 Mr. Mainland, let's hear from you.

21 MR. MAINLAND: I'd like on behalf of Sierra Club
22 to associate myself with Mr. Sarvey's statement and recall
23 that in his rebuttal testimony he points out that -- I'm
24 referring to I believe 408 if I'm not mistaken. He points
25 out that the legislation that you apparently base your

1 opinion to exclude the need doesn't really apply in this
2 particular case. Also that staff has in a sense raised --
3 in effect raised issues of need and so I think it's only
4 appropriate that Sierra Club and others be allowed to
5 address the underlying assumptions of this staff dealing
6 with it so that we can have a full airing of the
7 assumptions underlying.

8 HEARING OFFICER CELLI: Thank you.

9 Mr. Wheatland, let's hear --

10 MR. WHEATLAND: I just very briefly. What Mr.
11 Sarvey and the Sierra Club seek to do is to relitigate
12 issues that have already been decided by the California
13 Public Utilities Commission. When Mr. Sarvey talks about
14 convenience, public community is a necessity. That's a
15 determination made by the PUC, not the Energy Commission.
16 When he talks about a contract, he's talking about a power
17 purchase agreement that was approved by the PUC. And
18 their testimony simply seeks to relitigate the issues that
19 that agency has already determined.

20 HEARING OFFICER CELLI: Staff, did you wish to
21 weigh in?

22 STAFF COUNSEL WILLIS: I believe I already stated
23 that we would have objected to the need testimony by
24 Sierra Club and in part by Mr. Sarvey based on the fact
25 that it is not under the Energy Commission's purview and

1 hasn't been. I've been working for twelve years and we do
2 not do the need assessment because that was part of the
3 deregulation legislation.

4 HEARING OFFICER CELLI: Mr. Simpson, please.

5 MR. SIMPSON: What I read in the applicant and
6 Sarvey's testimony is the need associated with conditional
7 use permit that's being skipped on his property. There's
8 supposed to be a determination of need in that venue.
9 Then much like the override you would do here, if you were
10 to do an override, you would consider need. And if you're
11 overriding the county's conditional use permit, that
12 consideration has the public benefit need consideration.
13 It's the applicant that brought up need a number of times
14 in the application, so it seems appropriate that we had
15 the opportunity to examine that.

16 HEARING OFFICER CELLI: Your response, applicant?

17 MR. WHEATLAND: I'm looking at Mr. Sarvey's
18 testimony. Maybe Mr. Simpson could tell me where there is
19 a reference to a conditional use permit in here. I don't
20 see it. And what this testimony states is an assertion
21 that there's currently no need for the Mariposa Project in
22 recent analysis conducted by the CEC demonstrates the MEP
23 is not needed any time in the near future. That's a need
24 determination. I don't see any reference here at all to
25 the acquisitional use permit.

1 MR. SIMPSON: The conditional use permits and the
2 issues of need were raised in your testimony and of course
3 launched with the (inaudible).

4 MR. WHEATLAND: That's just not true. Look at
5 Mr. Sarvey's rebuttal testimony. It was not addressing
6 the CUP.

7 COMMITTEE MEMBER DOUGLAS: So we are conferencing
8 here, but the main issue is that legislation has
9 explicitly taken the question of need out of the Energy
10 Commission's hand. So one of the questions we are
11 directed not to ask is is the project needed.

12 Now, the question of alternatives, there are
13 alternative ways of achieving the project's goal. The
14 question of greenhouse gases, is there an impact and what
15 is the impact system wide, locally. Those are issues that
16 we certainly look at. But the Legislature directly took
17 the specific question of is there a need for the power out
18 of our process. So we will go off the record and
19 conference for just a moment.

20 (Off record)

21 COMMITTEE MEMBER DOUGLAS: We have discussed
22 this. And our finding here is that the majority of these
23 documents, all of the argument and all of the evidence
24 provided in the proposed testimony goes to a need. There
25 are statements of policy in the proposed testimony that

1 you were not precluded to make from making and framing
2 argument, whether you want to frame argument in regard to
3 renewable -- the State's renewable energy goals, the
4 State's greenhouse gas goals. There are statements of
5 policy in these documents or the proposed testimony that
6 they in fact be applicable. But in terms of the evidence
7 as provided, that evidence that's provided and put forward
8 goes to need, which is an issue that we do not make
9 findings on. So we will in this case stick with our
10 preliminary decision to exclude 408 and 900. I see we
11 have some comments.

12 MR. SARVEY: Yeah, I'd like to make some
13 comments.

14 First, I would object to that.

15 And second of all, my need testimony goes to more
16 than just the requirements of this project to satisfy
17 greenhouse gas issues. I raise some issues concerning
18 turban selection, and other things and I wonder if you're
19 precluding those arguments as well.

20 COMMITTEE MEMBER DOUGLAS: You are able to raise
21 that in the context of alternatives. If you're saying
22 that different turbans might make the project better or --

23 MR. SARVEY: Yeah, I've been saying that all
24 along as part of my testimony.

25 COMMITTEE MEMBER DOUGLAS: So we are not

1 precluding you from talking about better turbans.

2 MR. SARVEY: Are you precluding me from talking
3 about the need for this project by stating that the PUC
4 has announced that this project is needed? Is that the
5 rule? I just want -- what I just handed out, I'd like to
6 make that Exhibit 415. This is the comments from Rate
7 Payer Advocates. And I'll give you a little background on
8 that.

9 This project was determined it was needed for
10 public convenience and (inaudible) due to a settlement
11 agreement between the parties, which would be CARE, PG&E
12 and several others. And PG&E has broken that settlement
13 agreement. And that is the constitutional arm of the rate
14 payers, the rate payer advocates. And all you need to do
15 is read the last paragraph and right now this project --
16 this project's contract may be rescinded. So how does
17 that effect our determination? Is there going to be some
18 condition in there that if it's rescinded that we start
19 out? How are we going to work that?

20 COMMITTEE MEMBER DOUGLAS: Mr. Sarvey, the Energy
21 Commission, before the restructuring -- the Energy
22 Commission used to have long and detailed testimony --

23 MR. SARVEY: I understand that.

24 COMMITTEE MEMBER DOUGLAS: -- on need, and we no
25 longer do because of the legislation that explicitly

1 removed the question of need from our jurisdiction. So
2 that question and the question of whether the contract
3 might be rescinded or any allegations or suggestions
4 regarding their contract is not relevant to our process.
5 We're looking at the environmental impacts -- or potential
6 impacts.

7 MR. SARVEY: Well, I believe that the law states
8 that Merchant Power Alliance that are financing themselves
9 are not subject to CEC jurisdiction. But in fact, this is
10 a rate payer finance project. So I believe that's a
11 distinction right there.

12 COMMITTEE MEMBER DOUGLAS: All right. We've
13 heard your point.

14 MR. SARVEY: Okay. Thank you.

15 HEARING OFFICER CELLI: Can we move onto topics
16 not ready to proceed.

17 Mr. Mainland, you have a question?

18 If anyone sees Ms. Jennings -- I see her out
19 there. If you happen to see Kelly flying around, I hope
20 by now she knows we're having a microphone problem.

21 MR. SIMPSON: She thought we were going to break
22 and they were going to come fix it.

23 COMMITTEE MEMBER DOUGLAS: It's nearly lunchtime.

24 HEARING OFFICER CELLI: Are we going to take a
25 lunch break?

1 COMMITTEE MEMBER DOUGLAS: Oh, you're right.

2 We're not.

3 HEARING OFFICER CELLI: It's a prehearing
4 conference.

5 Go ahead, Mr. Mainland.

6 MR. MAINLAND: I'd like to object to your ruling
7 along with Mr. Sarvey, and I'd like to pose the question
8 that I do site that the Legislature has excluded to
9 consider need in a proceeding such as this, yet it's quite
10 clear that that legislative finding applied to -- as Mr.
11 Sarvey said, merchant investments and this is a project
12 being financed with rate payers' money. So I'd like you
13 to address now why you don't find this argument
14 compelling.

15 Also, with regard to Exhibit 900, in that
16 exhibit, what you're excluding, there is some
17 discussion -- considerable discussion actually -- of
18 alternatives. The alternatives are very much in line with
19 this idea of need. So what would be your advise as to how
20 we can continue to get into the evidence what Sierra Club
21 is introducing with regard to alternatives.

22 HEARING OFFICER CELLI: Thank you.

23 So let me make it clear that -- first of all, the
24 Committee doesn't dispense legal advise, but we have a
25 public advisor that does. And that's Jennifer Jennings.

1 And she can talk to you about the fine points. And all of
2 you who are non-lawyers here, that's a great resource to
3 have. Jennifer Jennings is an excellent attorney, a great
4 resource, and someone for you to talk to if you're going
5 to navigate these waters, because it's great to have a
6 lawyer on your side and she's a good one.

7 So my advise is to put in your evidence, put in
8 any evidence that you want with regard to alternatives and
9 not -- and completely avoid the question of need, because
10 need is irrelevant.

11 The other point I wanted to make is that -- I'm
12 going to get into this in a few minutes. We have such
13 limited time that you really have some major issues that
14 we really do need to tackle, that that is essentially a
15 red herring. It's an issue we can't get to because the
16 Legislature took it away from us. So need, although
17 common sensically seems to be something that you think
18 would be relevant, it's not relevant. It's legally
19 irrelevant.

20 MR. SARVEY: Then I move to strike all their
21 testimony related to this project if that's the case,
22 because that's the basis of their testimony. I move to
23 strike anything related to that contract in all their
24 testimony.

25 HEARING OFFICER CELLI: That's -- your motion is

1 noted. And your objection is preserved. So --

2 MR. SARVEY: Thank you.

3 HEARING OFFICER CELLI: Let me move on.

4 We're going to talk next about topics not ready
5 to proceed. I'm going to go through the list, because the
6 applicant and staff believe that all topics are ready and
7 there are no topics that are not ready to proceed. I'm
8 sorry, one moment. Jennifer Jennings.

9 MS. JENNINGS: Kelly said that they might be able
10 to fix the microphones if we take a break. Something has
11 been unplugged, here and we need to take a break for them
12 to repair the microphone issue. There is lunch out there.

13 COMMITTEE MEMBER DOUGLAS: Thank you. A half
14 hour break.

15 HEARING OFFICER CELLI: Thank you. It's now
16 1230. We're going to resume at 1:00 sharp. Thank you.

17 (Whereupon a lunch recess was taken
18 at 12:31 p.m.)

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AFTERNOON SESSION

1:07 p.m.

HEARING OFFICER CELLI: Please, go ahead.

MR. MAINLAND: My question to you refers to paragraph 1716.5, motions hearing decision. Any party may file a motion or petition with the presiding member regarding any aspect of the notice of application of proceedings, so on, so forth. That's what I'm referring to in the case of Exhibit 900.

HEARING OFFICER CELLI: You may file rebuttal tomorrow. That's your calculated -- assuming tomorrow is 15. So I hope to see your papers tomorrow then.

Welcome back, everyone. I hope you all had a good lunch.

Oh, yes, thank you. I want to make an important point to the intervenors that even if your exhibits are excluded, that doesn't preclude your exhibits from being public comment. And the law requires that public comment be addressed and considered in the PMPD. PMPD is Presiding Member's Proposed Decision, which is what all these evidentiary hearings and all these proceedings are lighting the way towards, because in the end we are going to issue a Presiding Member's Proposed Decision.

In each section, we talked about the comments that were received, the public comments. So even if your

1 exhibit doesn't come in or your comment, you can still
2 raise your comments and submit them -- I am sorry. Even
3 if your information doesn't come in as evidence, you may
4 still put in that information by way of comment.

5 COMMITTEE MEMBER DOUGLAS: The papers that you
6 submitted are comment.

7 HEARING OFFICER CELLI: Correct. Your papers can
8 come in as comments. Is that clear?

9 MR. SIMPSON: Can I ask for clarification?

10 HEARING OFFICER CELLI: Yes.

11 MR. SIMPSON: This is Rob Simpson.

12 The tentative ruling that came up before the
13 response to the motion, is that to be considered in a
14 response or how does that --

15 HEARING OFFICER CELLI: Yes. They considered the
16 tentative ruling of today on your motion or your papers.

17 MR. SIMPSON: So the ruling of today stands prior
18 to the motion -- or the response to the motion.

19 HEARING OFFICER CELLI: Yes.

20 MR. SIMPSON: Thank you.

21 HEARING OFFICER CELLI: Thanks for that
22 clarification.

23 Now we can move on and talk about topics not
24 ready to proceed.

25 The applicant and staff believe that all topics

1 are ready to proceed.

2 Mr. Sarvey believes that all topics are ready to
3 proceed, except biology.

4 The Mountain House Community Services District
5 didn't have -- in their view are ready to proceed.

6 Mr. Dighe also felt everything was ready to
7 proceed, except biology.

8 California Pilots felt everything was ready to
9 proceed.

10 Mr. Singh didn't comment, so I'm assuming that
11 everything is ready to proceed in their view.

12 And Sierra Club also agreed that everything was
13 ready to proceed, except biology.

14 And then Mr. Simpson, of course, said everything
15 was not ready to proceed.

16 I want to tackle the biology question first.
17 Staff states in the biology section -- staff concludes
18 that "impacts to biological resources affected by the
19 proposed project" -- I'm quoting -- "can be mitigated
20 below a level of significance by implementation of the
21 proposed Conditions of Certification in this supplemental
22 staff assessment."

23 Staff's analysis and proposed Conditions of
24 Certification were developed in coordination with the
25 USFWS and are expected to be consistent with terms and

1 conditions to be included in the file in the biological
2 opinion. Therefore, implementation of the conditions
3 pertaining to a federally listed species as well as the
4 position of the BO and implementation of the measures
5 therein would ensure compliance with the federal ESA.
6 However -- I just got a thumbs up.

7 However, because the BA has not yet been
8 determined to be adequate by the USFWS, modifications to
9 staff's impacts analysis and Conditions of Certification
10 made necessary if revisions to the recent draft BA during
11 the applicant's consultation with the USFWS resulted
12 changes that are contradictory to staff's analysis or
13 conditions. Staff will provide you (inaudible) to the FSA
14 or update the Committee at the evidentiary hearings of any
15 changes necessary to staff's testimony based on USFWS's
16 BO, biological opinion.

17 So first I'm going to ask staff, what is the
18 effect of the absence of the BA or BO on the PMPD, please?

19 STAFF COUNSEL WILLIS: Just to update you, staff
20 has been in constant contact with the US Fish and Wildlife
21 and we actually kind of took it up a notch and asked our
22 environmental office manager to contact someone at a
23 higher level at US Fish and Wildlife Service. This
24 project was put on a low priority for Fish and Wildlife
25 for review.

1 But having said that, our biologist has been in
2 contact with biologists so they're developing the
3 mitigation. So we are assuming at this point there will
4 not be any changes. But as we stated, we don't want to
5 state that for an absolute fact without having Fish and
6 Wildlife chime in at least on our mitigation proposals.
7 We were promised that US Fish and Wildlife Services would
8 be reviewing our section this week and the biological
9 assessment and we would get that information this week,
10 and we are really hoping that that happens.

11 My understanding -- and maybe Mr. Wheatland knows
12 differently -- is that the biological opinion would not be
13 out until sometime in March. But either way, whether we
14 have a biological assessment or biological opinion, this
15 is staff's testimony. They are willing to -- I know in
16 one of the tables there was some undetermined LORS
17 section. And they are more than willing to say in their
18 opinion that the project is in compliance with all LORS.
19 It's just not Fish and Wildlife's opinion. So it's up to
20 the Committee's decision on whether that is enough to
21 complete the PMPD. In our opinion, it is enough because
22 the applicant has to follow federal wildlife laws,
23 regardless of whatever we say that's part of their
24 requirement. So we still feel strongly we're ready to go
25 forward.

1 And also, in conjunction with that, staff is
2 objecting to any of the intervenors filing late testimony
3 at some point in time after two weeks after Fish and
4 Wildlife Service decides to make any statements either
5 directly at the hearing or at another point in time. And
6 we object to Dr. Shawn Smallwood testifying, because there
7 wasn't any pre-filed testimony. And what we put in our
8 section is basically open for comment and they chose not
9 to comment on that. And, therefore, we feel like they
10 waived that opportunity.

11 HEARING OFFICER CELLI: So what is the effect of
12 the absence of the BA and the BO with regard to, let's
13 say, the start of this project?

14 STAFF COUNSEL WILLIS: I'll turn that over to Mr.
15 Wheatland to answer that.

16 MR. WHEATLAND: Based on the way the Commission
17 has approached this issue for many years, there would be
18 no effect. And the reason for that is is the Energy
19 Commission is a State agency and issues a State permit
20 that will be preemptive of all State and local permits.
21 But the Commission does not have preemptive authority over
22 the federal government. That means that the applicant
23 must comply with all federal requirements as well as the
24 State requirements. There have been many cases in which
25 the biological opinion has not been issued prior to the

1 issuance of the Commission decisions and issued subsequent
2 to that time. When that opinion is issued, this project
3 will have to comply both to the federal requirements as
4 well as the State requirements. And if one is more
5 restrictive than the other, the applicant must comply with
6 our restrictive requirements.

7 But because this agency, the California Energy
8 Commission, does not have jurisdiction over federal
9 agencies and is not issuing its permit in lieu of the
10 federal permit, there's no effect in the fact that the
11 permit may not be completed by the time the Committee
12 issues its decision.

13 HEARING OFFICER CELLI: Mr. Sarvey, just so you
14 know, I generally call the parties in the order in which
15 you were granted your intervenor status.

16 So Mr. Sarvey, you were the first to intervene,
17 so you're the first person to raise the issue of biology.
18 I'd like to hear from you, sir.

19 MR. SARVEY: Yes, this is a constant problem with
20 CEC siting projects exclusive jurisdiction issue.

21 So in effect, if you ruled that this power plant
22 meets all laws, regulations and standards in your final
23 decision and then later Fish and Wildlife comes in with a
24 different opinion, you preclude my opportunity to
25 challenge the CEC decision in court. Because I only have

1 30 days from the date you ruled. That's why I strongly
2 object to any type of we'll work this out later, because
3 one, the CEC -- if my only avenue is something to the
4 Supreme Court, I'm not going to get a hearing on the
5 facts. I'm only going to get a hearing on whether you
6 properly pursued your authority.

7 So in other words, if you deny my constitutional
8 right to adjudicate the facts in this case, in this
9 proceeding -- and with all due respect to staff -- and I
10 respect highly of their biology -- they're not US Fish and
11 Wildlife. And US Fish and Wildlife rules if you have a
12 decision then very willing to go forward. But I'm not
13 going to pay my biologists to review staff and their
14 opinion later to review US Fish and Wildlife. I don't
15 have that kind of money. I don't have the money to hire
16 them in the first place.

17 But this is sad to consistently see CEC siting
18 cases. You pass a decision and say, well, later on the
19 PSD permit will come in. Or whatever, any type of permit.
20 And then I lose my opportunity to go to court and
21 adjudicate that. So that's my issue.

22 HEARING OFFICER CELLI: Okay. Good.

23 Before I start getting deeper into the question,
24 Mr. Dighe, did you have anything different than Mr.
25 Sarvey? I just want to acknowledge for the record that

1 your prehearing statement looked an awful lot like Mr.
2 Sarvey's, as did Mr. Singh. And I want to thank you Mr.
3 Sarvey as what I perceive to be a leadership role in
4 supporting new intervenors. So thank you for doing that.

5 MR. DIGHE: In the interest of time, I'm just
6 going to say that I was basically reading biological
7 opinion from Fish and Wildlife. And after I get their
8 opinion, which is probably going to be the base of my
9 research, I was -- that's the reason I said I would like
10 to get some time after hearing begins and then probably
11 have a chance to answer that.

12 HEARING OFFICER CELLI: Are you a biologist?

13 MR. DIGHE: No. Probably I would hire someone
14 who was.

15 HEARING OFFICER CELLI: Okay. Just you said "my
16 research," I thought you meant your personal --

17 MR. DIGHE: My research of finding a biologist.

18 HEARING OFFICER CELLI: And Sierra Club, you also
19 raised the issue of biology.

20 MR. MAINLAND: This has to do with intervenors'
21 rights and plain logic. So if, for example, you're going
22 to say that you're going to take a decision on this
23 project and you can just worry about biology later, why
24 wouldn't that go through, for example, in the applicant's
25 exhibits of A through T, et cetera, et cetera, just any of

1 those subjects could be put off until later and then you
2 take your decision and then the opportunity for comments
3 are moot (inaudible).

4 HEARING OFFICER CELLI: Mr. Simpson, did you want
5 to weigh in?

6 MR. SIMPSON: Yes, please. I think this speaks
7 to why I feel this is not ready to go to the next stage.
8 This feels like the Russell city iteration all over again.
9 You started in 2000, 2001. You licensed Russell city.
10 Fish and Wildlife said no, you can't put it there. So
11 you're going to redo the whole thing and piecemeal it back
12 together in 2000, 2007, 2008. And it's still not put back
13 together, because this perceived one stop shop for power
14 plant licensing when the real action goes on at the air
15 district or the Fish and Wildlife while all the eyes are
16 on this proceeding disjoints the process to a point that
17 we, the public, can't keep up.

18 I've learned that there is this procedure called
19 a preliminary staff assessment and a final staff
20 assessment. And in the Warren-Alquist Act, that's how
21 it's supposed to be. I don't see that stuff anymore. I
22 see a staff assessment, maybe a supplemental staff
23 assessment. But I don't understand what authority comes
24 to change either the name or the nature of these documents
25 from what the Warren-Alquist calls them.

1 HEARING OFFICER CELLI: So your concern is having
2 to do with the notice with regard to biology?

3 MR. SIMPSON: I kind of moved on from biology to
4 the whole --

5 HEARING OFFICER CELLI: Because I'm trying to
6 focus on biology.

7 MR. SIMPSON: Okay. Well, without saying what
8 Fish and Wildlife has to say about this project, it's hard
9 for us to participate in a biological portion of this
10 proceeding. What I'm hearing the biological opinion is
11 going to be here in March and this thing is not even
12 through the PUC, I don't know why we're proceeding to
13 evidentiary hearings before the record is not complete.
14 They should be part of your record and it should be moved
15 before we have -- close the evidentiary record.

16 HEARING OFFICER CELLI: Thank you.

17 MR. SIMPSON: Thank you.

18 HEARING OFFICER CELLI: Any other intervenor want
19 to weigh in on biology before I ask the undisputed status
20 of the -- the concern that we have with regard to the
21 absence of a BA or BO, I know we are cognizant of the fact
22 and it's federal law that staff can issue an opinion and
23 that's what would be binding and I'm trying to remember
24 what case it was -- I know in the past I've seen some
25 language somewhere -- maybe was one of the solars, where

1 they said in light of the absence of certain information
2 that whenever you had a discrepancy between the federal
3 and State, you would go with whichever was more stringent.
4 I remember they used the word "stringent." But I can't
5 remember the condition. And I can't remember if it was in
6 biology or not.

7 But I'm interested to know, staff or applicant,
8 whether we need to rush this thing through or whether we
9 should wait and see what the BA says. Staff?

10 STAFF COUNSEL WILLIS: According to our latest
11 conversation, we should be getting that information
12 shortly this week. This is the first time we've heard
13 from U.S. Fish and Wildlife Service that they would
14 actually put this in a priority position and look it over
15 this week. Staff has stated before this isn't something
16 that our biologists just came up with on their own. She's
17 been working hand in hand with U.S. Fish and Wildlife
18 Service. So to say that they haven't had any -- haven't
19 seen this document before is not true. They have been
20 working together. It's just that we haven't -- I guess
21 it's the biological assessment that (inaudible). And that
22 according to our biologist was down to a few minor details
23 before they were to approve that as well. So it's more of
24 a bureaucratic issue than a substantive issue, which I
25 think is a different -- a little bit of a different story.

1 HEARING OFFICER CELLI: Applicant, did you want
2 to say anything further on that?

3 MR. WHEATLAND: Just briefly. When the
4 Commission uses the term "making findings of conformance
5 with all applicable ors," that's a shorthand terminology
6 that's used that described the fact that what the
7 Commission is doing is findings of conformance with all
8 applicable State and local laws and regulations. In the
9 past, and in many cases that have come before this
10 Commission, if the federal agencies provide information in
11 the form of a biological opinion or a PSD prior to the
12 issuance of the Energy Commission's decision, that's
13 great.

14 The Commission considers that information and
15 finds it helpful in making this determination. But if
16 those determinations are not made, then the Commission
17 said, well, applicant, as a condition of certification,
18 you still have to get a PSD. You still have to get a
19 biological opinion.

20 But the Commission does not hold up the decision
21 to await the issuance of federal permits.

22 And Mr. Sarvey's example of the PSD is absolutely
23 perfect because the Commission does not wait for the PSD
24 permit. It issues the decision that the PSD permit will
25 be issued subsequently. The same applies to the

1 biological opinion.

2 HEARING OFFICER CELLI: One moment.

3 (Off record.)

4 HEARING OFFICER CELLI: Thank you. We're back on
5 the record.

6 Just to be clear, everybody is in possession of
7 our previous notice of schedule of how we're going to
8 proceed. And the current schedule has an evidentiary
9 hearing date of the 24th and the 25th of this month and we
10 are -- the Committee is going to keep that date and we're
11 going to move forward.

12 Having said that, in the event there is some new
13 information that comes out of the BA that necessitates
14 perhaps a continuance, then we would hear it at that time.
15 So for now, since we have no idea how quickly they're
16 going to come out with the BA, let's proceed with the
17 schedule as it is and then we will revisit the big
18 question if needed on the 24th.

19 MR. SINGH: I make a comment here.

20 HEARING OFFICER CELLI: This is Mr. Singh, yes.

21 MR. SINGH: And this is (inaudible) there was a
22 discussion on the need. So it's very important so far I
23 need to find out few things. One of the fundamentals that
24 we are all sitting here -- so there are fundamental
25 discovery, data, and the need in place first to move

1 forward. Talk about the need, PG&E or CPUC comes and they
2 say to the staff, well, we need electricity and we have
3 the requirement. But does staff assess that there is
4 really a need or not? And I will tell you few examples
5 based on that --

6 HEARING OFFICER CELLI: Before you do, Mr. Singh,
7 I wanted to not have to revisit ground we've already
8 covered.

9 MR. SINGH: I want to connect both the
10 (inaudible), the biology and the need.

11 HEARING OFFICER CELLI: Need is not an issue.
12 There just is no need issue. That's taken away from us.
13 We can't go there.

14 MR. SINGH: Can I take one minute, not more than
15 that, to address that?

16 HEARING OFFICER CELLI: Go ahead.

17 MR. SINGH: So if I go to the boss and I ask him,
18 okay, we need to fill this pot line. My boss sends back
19 the need and say give me a total as is why you have a
20 need. I would like to see those documentation from the
21 staff. If they have assessed it, there are two things
22 that happens in today's market since 2007, laws have been
23 changed based on the need. They go behind and see
24 somebody is smart navigating the market.

25 If you really look into it, you put a power

1 plant. You call the places on the lands and then you buy
2 those lands around it is one thing. And later on when the
3 decision comes yes or no, but you still need the money
4 behind that. So it's very important to look into the
5 facts that it need be (inaudible) because it goes back to
6 again Enron. Enron when they would say (inaudible) to
7 jack up their stock prices, right. So what I'm trying to
8 say here is the need is very important of that total
9 analysis being done of that.

10 In the same event, we believe it belongs for
11 biological requirement. We need to wait for Fish and
12 Wildlife so that we can -- and I can only say (inaudible)
13 this quite frankly (inaudible) hearing come before and
14 look for those evidence come, data comes because I've been
15 denied discovery, big time discovery. I want to see is
16 total cost of the power plant that is coming. So if I
17 want to address how my discovery can be answered and then
18 I can bring my building plans to bring the logic and in a
19 bond sense I'm not having a power plant or having a power
20 plant.

21 HEARING OFFICER CELLI: Okay. So I understand
22 your concerns.

23 I want to say something, and I want to be really
24 clear about this to all of the parties, because this is a
25 mature discussion we're about to have. When you intervene

1 in this case or any Energy Commission matter, you take the
2 case as you find it. What I mean by you take the case as
3 you find it, what it means is however long this case has
4 been progressing, the point at which you enter the game
5 and become an intervenor, we're not going to stop the game
6 and start all over and start the game all over again for
7 each intervenor that comes in. Instead, the procedures
8 move according to the original schedules to the best we
9 can and intervenors take the proceedings at the point at
10 which they enter them. We're not going to go back and
11 retrace our steps. We're not going to go back and do
12 things over.

13 If you enter as an intervenor beyond the
14 discovery period, which is 180 days under our regulations,
15 then you don't get discovery because you came in too late
16 for discovery.

17 I understand -- believe me, I live in a town
18 where there are many things that I would love to weigh in
19 on. I have particular issues that I want to bring to city
20 council, only to find out that the EIR already have it or
21 something -- I'm too late. This is common. And I'm sorry
22 about that. But this is the way of the world that we're
23 in. And how you came to be aware of these proceedings is
24 going to vary person to person to person. And you came in
25 when you came in and that's -- and you take the

1 proceedings as they were when you came in. And we're all
2 in that same boat.

3 Now, having said that, the other things you have
4 to accept besides the rules like you have the 180 days to
5 do discovery is that we're bound -- we're a creature of
6 law. This entire proceeding is a creature of statute and
7 law so that when the Legislature says we don't want you to
8 adjudicate need anymore, we don't do it anyway and blow
9 off the Legislature. We actually stop adjudicating need
10 because we're told to.

11 And that's the situation we have here now.
12 Everything you just said, Mr. Singh, makes sense to me on
13 a personal level. On a bureaucratic legalistic level
14 though, because we don't have a lot of time, we can't take
15 the time to deal with things like need when it's not an
16 issue. It's irrelevant. And that's not -- and that's a
17 legal call.

18 So I just want to be clear about that with you
19 and everyone here. We're going to do our best, really.
20 This Committee -- and you have a good one here -- they
21 want to hear from you. They want the evidence to come in.
22 And they want to have as full an understanding of what
23 everybody's position is that we can possibly get. And
24 that's what we're trying to do. And we're trying to do it
25 without spilling out in your scheduling any long -- this

1 thing could go on forever. And it really could. Some of
2 them really do go on forever. But we can't do that.
3 That's prejudicial to the parties. And this is a very
4 expensive process.

5 So that's why I just wanted to make the point
6 that we have to proceed according to the way it is,
7 according to the schedules that we have. And we accept
8 the proceedings the way we -- and we are going to and you
9 all are going to do our best to do the best we can with
10 what we've got.

11 So having said that, I just want to -- I need to
12 ask you all for some clarification now on what the issues
13 are that are in dispute, because even though everybody
14 said that biology was not ready -- and I understand that
15 the point is that biological opinion and biological
16 assessment from the USFWS is not ready and isn't here yet.
17 We're told that it's coming the next week or so, but we'll
18 believe that when we see it, because who knows. But what
19 nobody did tell them is whether it was a matter of
20 dispute. Just everybody said was I read it. Nobody told
21 me whether it was biology in dispute or not.

22 What you do have and what you are armed with is
23 staff's supplemental assessment. I believe was it in the
24 staff assessment or supplement? Biology --

25 STAFF COUNSEL WILLIS: We're entering the

1 supplemental staff assessment.

2 HEARING OFFICER CELLI: So biology was contained
3 within the supplemental staff assessment. And you have
4 what you do have. And you know what you know to the
5 extent it's contained in the staff's assessment. So my
6 question now is: Is there a dispute in biology? And I'm
7 going to start with you, Mr. Simpson, and we'll go down
8 the road this way.

9 MR. SINGH: So if I understand, if PG&E comes to
10 the CEC and says we have a need for the borrower, so CEC
11 does not do any analysis whether really the need is there
12 or not? Is that correct?

13 HEARING OFFICER CELLI: You have that right. You
14 have that right.

15 MR. SINGH: Well, that really kills the
16 fundamental of building any large -- because the need is
17 not analyzed, how do we know somebody is not managing the
18 market?

19 HEARING OFFICER CELLI: Well, the fact is that --
20 the question of need is jurisdictional with the Public
21 Utilities Commission. They do tackle that question. And
22 so we are excluded jurisdictionally from doing that, but
23 the Public Utilities Commission does deal with that.

24 Did you want to say something, Commissioner?

25 COMMITTEE MEMBER DOUGLAS: No.

1 HEARING OFFICER CELLI: Mr. Dighe.

2 MR. DIGHE: One comment on the data which was a
3 comment that you made. So I think I understand this time
4 for which you can file. But I just want to comment that I
5 did identify a case scenario where data responds
6 (inaudible) and that response actually includes data and
7 analysis which could potentially change. For example,
8 mitigation, right? So let's say -- if Mr. Jass Singh
9 would have asked for the mitigation which would happen as
10 a part of this project during the first 180 days, but the
11 process doesn't end thereafter. After 180 days or so
12 there of conversation going on between agencies, so how
13 does that actually -- if you can comment on that.

14 HEARING OFFICER CELLI: That's a good question.
15 Almost all of the regulations that we have language in it
16 that says something to the effect of unless the Presiding
17 Member orders otherwise, or words to that effect, and
18 Commissioner Douglas is our Presiding Member now.

19 You've been through a few of these actually. But
20 in the past, the Presiding Member would rule internally on
21 whether we would -- if there were a motion brought to
22 extend the period of time, the Presiding Member says
23 thumbs up or thumbs down, yea or nay. We're either going
24 to extend it or we won't. But usually those are brought
25 by motion and the motions contain facts that argue in

1 favor and any other parties will argue against and then
2 the Presiding Member will make a decision. Because I know
3 personally I participated in cases where we did extend it
4 because exactly what you're talking about, new facts come
5 in, couldn't have been known in the 180 days. They opened
6 it up. But it's case by case. They just made the call
7 with each motion.

8 So with that, does anyone actually claim that
9 there is a dispute in biology.

10 And I see, Mr. Sarvey, you're raising your hand.
11 Go ahead.

12 MR. SARVEY: Yes, I have several disputes in
13 biology.

14 First of all, the applicant needs a take permit
15 in order to build this project. In order to get a take
16 permit, they have to establish a biological preserve. And
17 I have issues with putting a biological preserve right
18 next to the impacts to the power plant. They're proposing
19 the biological preserve adjacent to the power plant. So
20 you created a biological reserve because the power plant
21 is impacting something and then you're placing the
22 mitigation right next to the power plant.

23 I have some other issues as well. I don't know
24 if you want to go into those now.

25 HEARING OFFICER CELLI: Just so I'm clear, we're

1 talking about mitigation lands?

2 MR. SARVEY: We're talking about they're going to
3 propose mitigation land. The mitigation land that staff
4 is currently talking about, the applicant is currently
5 talking about is right next to the power plant. Staff's
6 mitigation against the power plant impacts the property
7 it's on, but we're using the adjacent property to do the
8 mitigation. I've got a problem with that.

9 I also have a problem with the notion that --
10 this is a cross over between land use and biology. When
11 you put a noise source like the MEP and you're saying that
12 this property be fully used for agricultural purposes, I
13 don't know if you've ever seen cows near a large noise
14 source, they tend to go far away from it. So you're
15 saying you have 158 acres of agricultural land, but you're
16 putting a power plant on that's noisy and you're
17 precluding that use any time that power plant is
18 operating. So it's kind of a cross over. And I do have
19 some other issues with the mitigation involved. So yeah,
20 I do dispute biology.

21 HEARING OFFICER CELLI: Okay. And this is
22 important, because the discussion we're leading into is
23 how much time we're going to need. So that's exactly what
24 I'm asking.

25 Someone else on biology, Mr. Simpson, go ahead.

1 MR. SIMPSON: Thank you.

2 A couple of biological issues that I see is there
3 appears to be a nearby nature preserve. I don't see a
4 nitrogen deposition study. I read that, well, there's
5 fertilized crops in the area, it's not going to hurt
6 those. But I don't see any relationship to the impacts on
7 the wildlife preserve or the impact of extracting that
8 volume of water from the aqueduct. What biological
9 impacts does that have?

10 HEARING OFFICER CELLI: One of the things I have
11 to say is that I didn't really see any of this in
12 anybody's prehearing conference statement, which is where
13 I'm looking to see what are the issues we're going to be
14 dealing with. So this is the first I've heard about the
15 noise issue. And the mitigation issue, I remember reading
16 about the mitigation, but I don't remember anybody raising
17 an issue about it.

18 Nitrogen deposition, I don't think I saw that in
19 the prehearing conference statement.

20 MR. SIMPSON: It may have been in my respondent's
21 comments to the air district.

22 HEARING OFFICER CELLI: Okay.

23 MR. SIMPSON: I raised it as a fact that I don't
24 think it's ready to go forward because we don't even have
25 a determination from the US Fish and Wildlife whether

1 they're going to give a take permit, whether they're going
2 to assign that property next to it as mitigation. So I
3 suppose I could have raised the noise and cow issue, but I
4 didn't know quite where to raise that.

5 HEARING OFFICER CELLI: So in anticipation of
6 that, because I didn't know and I figured that you
7 probably would want to include that, it looks to me as
8 follows: The topics in dispute -- and I'm going to use
9 the longest list, because applicant and staff both seem to
10 think -- and these are assumptions that are made based on
11 your workshops and your communications. They were
12 agreeing it was air quality and GHG as a subset of air
13 quality, land use, socioeconomics, traffic, mainly
14 aviation, worker safety, EJ, and alternatives.

15 I have the word hazmat in my list, but I crossed
16 it out because if the only issue in hazmat has to do with
17 the pipelines of PG&E's pipelines, I don't know if we're
18 going to get to that issue. We're going to have to read
19 your briefs on that. So that one is up in the air.

20 But potentially let's just say that the Committee
21 determines that it's outside our jurisdiction and we're
22 not going to hear from hazmat, that's one issue that would
23 be off the table.

24 Mr. Sarvey has the longest list; air quality,
25 GHG, public health, land, alternatives, worker safety.

1 You again have hazmat there; EJ, that's environmental
2 justice, socioeconomics, water, traffic, and aviation and
3 visual. And that would be your list of what you think are
4 topics in dispute.

5 I have a question on I want to have a
6 conversation with you about it, because for instance, with
7 regard to the visual, you state that there is a LORS
8 violation in visual. And what it seems to me that if
9 there is a LORS violation -- and I'm really kind of
10 getting ahead of myself a little bit. But if you have a
11 LORS violation, there's something that would normally show
12 up in your brief after the evidentiary. Here's the LORS.
13 This is the section. And there is no -- and this is the
14 violation, because I'm really -- the reason I'm asking
15 about what these topics are that are in dispute is because
16 I'm trying to figure out how many witnesses do we need.
17 How much cross-examination do we need. And you don't
18 necessarily need a witness if it's clear on its face that
19 there is a LORS violation, what are you going to do? Call
20 someone and say are you in violation? I mean, you already
21 have that.

22 MR. SIMPSON: I don't think you can do that with
23 visual resources, because it's such a -- everybody's idea
24 of what is an eyesore differs. I don't think that's a
25 topic that you can use as an example.

1 But I got a power plant over at Tracy peaker
2 plant and supposedly it wasn't an eyesore because they
3 painted it lime green. It's still an eyesore. And
4 everyone in the community thinks it is. So that's why I
5 say staff has one opinion that a lime green power plant is
6 an eyesore, well, I disagree with that. And I'd like to
7 show them some pictures and see if they agree.

8 STAFF COUNSEL WILLIS: Mr. Celli?

9 HEARING OFFICER CELLI: Yes, please.

10 STAFF COUNSEL WILLIS: I guess my confusion,
11 because there wasn't anything more and this wasn't
12 discussed at any other workshop, I want to know what LORS
13 he thinks is being violated. I don't know where to begin
14 to prepare staff or who to bring without more information.

15 HEARING OFFICER CELLI: I'm working on the
16 prehearing conference statements. And then I start
17 actually charting who wants to talk about what and --

18 STAFF COUNSEL WILLIS: I'm not disputing that. I
19 charted it as well. And there's 30 minutes for no
20 simulation of visual plumes; project doesn't comply with
21 all LORS. I just don't know which LORS he doesn't think
22 the project is in compliance with. And I think the fact
23 if he can state that today, then that would make it easier
24 whether we bring someone or not to discuss this.

25 MR. SIMPSON: Sure. Visual plumes has been

1 addressed. All of the testimony is that it occurs at less
2 than 20 percent, therefore there's not an issue.

3 STAFF COUNSEL WILLIS: That's not in your
4 information.

5 MR. SARVEY: The testimony says there is a less
6 than 20 percent visual plume, so that tells me that maybe
7 we need to find out there is a visual plume, because
8 that's not what the testimony said.

9 As far as the LORS, the project is not allowed to
10 block the view of Brushy Peak. That's in Alameda County
11 LORS and ECAP. And my opinion is in fact it does and I
12 want to show some pictures that it does.

13 And additionally, I think from one of the
14 (inaudible) it's certainly a visual eyesore. And they say
15 that the nighttime lighting will not be a significant
16 impact if they turn the lights off at night. Well, I hope
17 for security purposes they're going to leave those lights
18 on every night. So that ties over to worker safety and
19 fire protection. These things I have questions on after.

20 HEARING OFFICER CELLI: That's reasonable. I'm
21 going to -- what I want to say for the record is that I
22 gave you the list Mr. Sarvey gave us.

23 Mountain House has no issues in dispute.

24 Mr. Dighe and Mr. -- did you have --

25 MR. LAMB: Only insofar as the comments I made

1 earlier. And I did talk to the applicant. That may be
2 resolved outside of the process. But I would like to
3 reserve ten minutes. We may not even need it if we come
4 to the same conclusion. But I want to check that before I
5 say no.

6 HEARING OFFICER CELLI: I appreciate that. But I
7 want to reflect back to the prehearing conference
8 statement the information I have said none.

9 MR. LAMB: I understand. And all I can say is I
10 apologize for not understanding the process, because
11 somebody told me and I don't remember what -- so I don't
12 want to say who -- said that I asked the specific question
13 that to somebody involved in the process and said we said
14 we have a concern about this. They made a response and I
15 said what's -- I go we can sit here and go back and forth
16 all day and not agree.

17 And I said at what point do you decide it and
18 they said at the hearing. So my assumption was it was
19 part of the record we had not agreed to anything so we'd
20 get our hearing at the hearing date. I didn't realize
21 that -- so this is just a matter of inexperience. You
22 earlier said you're experienced. I'm not. And neither is
23 our organization.

24 HEARING OFFICER CELLI: You know, if may borrow
25 Mr. Wilson from your world, what it's like for me is to be

1 an aircraft air traffic controller and my job is to see
2 who's coming in and make sure they land safely and get all
3 of their evidence in and know how many planes are coming
4 in, how long it's going to take them to land, that sort of
5 thing. That's what I'm trying to figure out.

6 MR. LAMB: So they've explained to me their
7 understanding of the problem. And if they're correct,
8 then I don't need ten minutes. If they're not correct,
9 then I'm giving you for the record that we might have
10 something that's unresolved.

11 HEARING OFFICER CELLI: And you may make that
12 request.

13 MR. LAMB: That's all I'm doing. So you said you
14 were looking for time. I'm telling you I might need ten
15 minutes. I probably won't.

16 HEARING OFFICER CELLI: And I appreciate that. I
17 do appreciate the heads up. And I want to just say that
18 I -- needless to say, we encourage you to work it out the
19 best that you can.

20 MR. LAMB: That's what I'm trying to do.

21 HEARING OFFICER CELLI: And also Mr. Wilson has
22 two issues; traffic as it relates to aviation and land.
23 And that's straightforward enough.

24 Mr. Dighe and Mr. Singh and Sierra Club have a
25 lot of overlapping issues. You have a lot of the same

1 issues. In fact, your prehearing statements all pretty
2 much look similar. And I'm hoping that -- because I'm not
3 going to enable the intervenors to call one witness and
4 have four intervenors ask that same one witness the same
5 questions over and over again four times. We need to be
6 efficient and move with the alacrity. And so I'm going to
7 encourage you to the extent that you can to work together
8 to see how we can consolidate.

9 I know Mr. Sarvey is big on air quality. He
10 should probably take the lead on air quality and confirm
11 with some of these other intervenors and see what their
12 concerns are and include their concerns in your concerns.

13 And likewise, Mr. Dighe or Mr. Singh, you might
14 want to -- socioeconomic, you might want to take the lead
15 on that.

16 So do you understand where I'm going with this?
17 We just do not have the time to hear all of this evidence
18 to the extent that each individual wants to. So I'm
19 looking for ways to accomplish that.

20 So my current --

21 STAFF COUNSEL WILLIS: Mr. Celli, before you move
22 on, I want to ask a few questions just for clarification.
23 With CalPilots, Mr. Wilson filed the testimony but lists
24 three other witnesses. Was there -- is it your testimony
25 that -- because each witness is supposed to have pre-filed

1 testimony. I was just kind of confused as to you didn't
2 list yourself as a witness.

3 HEARING OFFICER CELLI: I had that listing, if I
4 can find it.

5 STAFF COUNSEL WILLIS: I had Mr. Bonavito,
6 Howell, and Wagner, but I didn't have Mr. Wilson listed as
7 a witness. So I wasn't sure if you're going to actually
8 be testifying, because you didn't file testimony.

9 HEARING OFFICER CELLI: You know, I want to say
10 that raises a good point. This is a little sooner than I
11 wanted to raise it. But the fact is that by filing your
12 testimony, we don't need you to rehash your testimony.
13 Once we receive your testimony in writing, we have your
14 testimony. So I don't need you to get up here and take
15 the stand and give me your testimony again. So --

16 STAFF COUNSEL WILLIS: But there might be need
17 for the opportunity to cross if there is testimony that we
18 haven't --

19 HEARING OFFICER CELLI: That's right. But since
20 you're talking about direct testimony because Mr. Wilson,
21 your testimony would be direct if you were putting it in
22 along with Mr. Bonavito.

23 MR. WILSON: Bonavito.

24 HEARING OFFICER CELLI: Mr. Howell and Mr.
25 Wagner. Would you also include yourself in that list?

1 MR. WILSON: I could include myself, yes.

2 HEARING OFFICER CELLI: But since you filed
3 testimony --

4 MR. WILSON: Yes.

5 HEARING OFFICER CELLI: Really, it would be more
6 of a matter of him, Mr. Wilson, making himself available
7 for cross, because we have his testimony.

8 MR. WILSON: I would agree with that.

9 HEARING OFFICER CELLI: And I want to be clear
10 with everybody about that. We're not going to call
11 witnesses on direct to say what's your background. You're
12 going to give us that. We have everybody's resumes and so
13 forth. So really, we have direct testimony. You have
14 what's called rebuttal testimony. We already have
15 received your rebuttal testimony from everybody. So the
16 only thing we should be dealing with in the hearing is
17 what we call surrebuttal, which is the rebuttal to the
18 rebuttal. Okay. So I want to be clear. That would save
19 us an awful lot of time by proceeding that way.

20 STAFF COUNSEL WILLIS: And I want to say on the
21 same topic, CalPilots estimated 30 minutes for
22 cross-examination of I'm assuming staff's witness, which
23 is a reasonable amount of time. But then --

24 HEARING OFFICER CELLI: All a question of fact.

25 STAFF COUNSEL WILLIS: I haven't finished my

1 comment. But there is another hour and 45 minutes from
2 Mr. Sarvey and Mr. Dighe and Mr. Singh on -- and it just
3 says air traffic or fire and worker safety, and I don't
4 believe that they have really actually shown an interest
5 in those areas as much as obviously CalPilots. So I'm
6 just kind of trying to request that -- I did do
7 calculations and we had like 25 hours or something at
8 cross-examination.

9 HEARING OFFICER CELLI: I calculated it at 95.

10 STAFF COUNSEL WILLIS: Well, I didn't include Mr.
11 Simpson's because his was a ditto.

12 HEARING OFFICER CELLI: But I did. And I wanted
13 you all to know this that I actually laid out exactly the
14 amount of time that you all thought you wanted to have,
15 even though a lot of it is parallel and it's a ridiculous
16 amount of time, 95 hours.

17 STAFF COUNSEL WILLIS: I guess my request is if
18 the other intervenors have specific questions, maybe they
19 can funnel that through Mr. Wilson so that he can use that
20 time -- that our staff can be most effective in answering
21 his questions, because he is the established expert in
22 this area where the other intervenors have not made that
23 established.

24 HEARING OFFICER CELLI: Allow me to make a record
25 here about that. Forgive me for reading, folks, but I'm

1 going to say this on the record.

2 As to topics any party claims are incomplete or
3 are in dispute, we expect the parties to work together to
4 determine whether or not any of these topics can be moved
5 into the undisputed column before between now and the
6 evidentiary hearing. That would be at your workshop,
7 hopefully. The parties are welcome to conduct a workshop
8 today. We had talked about that, parties can meet and
9 confer here today. And at the workshop as noticed by
10 staff.

11 Now, we will be in the hearing room at BBID,
12 which is where we are today on February 24th and 25th.
13 The evidentiary hearing starts at 10:00 and we will go
14 until about 9:00 p.m. or later depending on how the
15 commissioners feels about it. After taking in the
16 undisputed evidence and accounting for breaks,
17 interruption and public comment, we will have about five
18 hours of productive hearing time per day, realistically.
19 Ten hours is about ten percent of the amount of time the
20 parties estimated was needed to examine witnesses. That's
21 95 hours that you were all asking to collectively. The
22 total -- we do not have 95 hours. Ten hours is about ten
23 percent of the amount of time the parties estimated was
24 needed to examine witnesses. There are nine parties,
25 including the applicant, staff, my seven intervenors. If

1 each of the parties are given ten minutes to ask questions
2 on direct or cross-examinations, and this is not including
3 redirect or re-cross or off the record conferences at the
4 Committee, each topic will take an hour and a half. I'm
5 talking visual, noise, things of a low priority. So 90
6 minutes times ten minutes each.

7 Now, if I cut you down to half of that time, five
8 minutes, I'm talking about five minutes total to do your
9 direct or cross-examination, whichever you're doing,
10 that's 45 minutes. That's still a huge chunk of time.

11 Now, by my calculation, we have eleven topics in
12 dispute. And I will give you that list in a minute. But
13 eleven topics at 90 minutes each is 16 hours and a five --
14 16-and-a-half hours. And we don't have 16-and-a-half
15 hours. If I cut you down to five minutes of questioning
16 per topic, it will take eight hours which is about all the
17 time we have to conduct this hearing, about ten, really.

18 So in a moment I'm going to ask you to
19 consider -- we might even go off the record and have a
20 discussion for a moment whether we can do this or not, but
21 it doesn't seem quite right to me you get five minutes to
22 cross-examine or five minutes. That just doesn't seem
23 like quality time.

24 So what I did is I put together a chart and I was
25 going to put it up there to show you the percentages based

1 on everybody's input I calculated out what percent and
2 what topic areas did it seem to me that the parties felt
3 were worthy of the most time. Okay.

4 Now, to save time, we will not take time to
5 describe exhibits that are moved into evidence. We have
6 published an exhibits list. You all got that on your
7 e-mail. And I've published and put a copy of the exhibit
8 list in the back of the room today. They describe the
9 exhibits. Normally what I like to do for the benefit of
10 the public is to say, okay, Mr. Proponent, tell me what
11 Exhibit 1 is. Well, Exhibit 1 is this and that. We're
12 offering it for this reason. We're not going to do that.
13 We're relying on the exhibit list. So regarding direct
14 examination, again, no need to discuss resumes. No need
15 to get into that which we've already received in the way
16 of testimony already in written testimony.

17 And when it comes to cross-examination -- and I
18 want to make this point very clear to everybody. And I am
19 someone who has done probably more cross-examination than
20 you're ever going to do in your lifetime. You will never
21 come up with good cross-examination in the heat of battle
22 while I'm sitting here breathing down your neck going come
23 on. Come on. Come on. Let's go. Let's go. Let's go.

24 Where you create your cross-examination is in the
25 quiet of your work space, wherever that may be. But you

1 don't come in here on the fly thinking, oh, I'm just going
2 to cross-examine. Because if you flounder, we will cut
3 you off. So you want to come in here prepared.

4 There is no fishing. And I also want you to know
5 that the legal definition of the moment when people say,
6 "Can I have a moment," it's like ten seconds. Okay. So
7 if you need a moment, I'm not going to give you much time.
8 That's why I'm saying be prepared. Come in here with your
9 questions. Know what you're going to ask. If you're
10 cross-examining somebody on a specific passage in your
11 testimony, you need to be able to say, "Mr. Witnesses
12 isn't it true that at page 3, paragraph 2, line 1, you
13 said" -- blah, blah, blah. I don't want you flipping
14 through papers while you're asking your questions. That's
15 part of the question you're writing down.

16 Now, hopefully this will speed things up.

17 The list -- here it is. The list of topics that
18 are in dispute then are the eleven topics are: Air
19 quality, alternatives, biology, hazardous materials, land
20 use, socioeconomics, soil and water, visual resources,
21 worker safety, traffic and transportation, specifically
22 aviation, and public health. Those are the eleven
23 disputed issues.

24 Now, can I -- I don't know if there's anyone here
25 from BBID who's working on the computer. I need to put

1 something up. There is a Power Point on the computer that
2 I sent to Kelly. It's a pie chart. That's it. I wonder
3 if we can get it so you can actually see it. I'm not
4 saying as you look at this chart, folks, I'm not saying
5 this is the way it has to be. What this chart shows is by
6 percentages how much time you asked to do direct and
7 cross-examination. Can you see all that?

8 So I may have misinterpreted the fact that
9 somebody overestimated their cross-examination by five
10 hours or something like that. But I thought this might be
11 a useful tool for you to see where you want to put your
12 time, because -- let me pull up my sheet.

13 This is based on the 57 -- 5700 plus minutes on
14 cross-examine and direct examination you wanted to put on.
15 This is also something I sent Kelly. It's just a
16 worksheet. But basically I broke the day down to 10:00 in
17 the morning until 10:00 at night. And I have basic start
18 first two hours are going to be things like preliminary
19 matters, motions, et cetera. We're going to take a lunch
20 break and absorbed in that is all of the usual breaks,
21 conferences, things like that, interruptions.

22 This is very optimistic. Eight hours on day one.
23 And day two it looks like we have six hours. By these
24 statistics that I put together, land use, which is
25 obviously the -- you're going to confer because I don't

1 know if this really truly reflects what you value in terms
2 of the time. But land use would take the first two hours.
3 And air quality, if I lump in public health with air
4 quality, because they kind of go hand in hand, would take
5 up everything up to public comment on day one. Public
6 comment would be at 5:00. So if we had public comment
7 from 5:00 to 6:00 and we know there is a lot of interest
8 here. After that, we would have aviation for just a
9 little under two hours. So the rest of the day would be
10 taken up with aviation and socio.

11 STAFF COUNSEL WILLIS: Excuse me, Mr. Celli. How
12 long is air quality?

13 HEARING OFFICER CELLI: This is based on the
14 percentages. And somewhere I had broken it down into how
15 many minutes.

16 STAFF COUNSEL WILLIS: Well, you said land use
17 was the first two hours. I just didn't know the time
18 where that fell in the day.

19 HEARING OFFICER CELLI: Well, if -- this is why
20 the parties need to discuss this. I don't know whether
21 that is really the way they want to spend the day. But if
22 that's the case, I have land -- I was taking off land
23 because that was 20 percent. That was the biggest issue.
24 Followed by air quality and I was lumping in the air
25 quality public health because they go hand in hand.

1 STAFF COUNSEL WILLIS: Right. I was just trying
2 to figure out the number of hours for each topic.

3 HEARING OFFICER CELLI: Truthfully, lands would
4 spill over a little bit.

5 STAFF COUNSEL WILLIS: So that would be
6 approximately two hours.

7 HEARING OFFICER CELLI: Plus then air quality
8 would be a little under. It was more like -- I can't seem
9 to find it, but it was like 108 minutes or something like
10 that. I can't remember.

11 STAFF COUNSEL WILLIS: I was trying to get a
12 general idea. Does that include also the air districts --
13 the witness would be here but we're not providing any
14 direct testimony except just a respond of the FTOC.

15 HEARING OFFICER CELLI: But there was a request
16 to cross-examine Bay Area Air Quality Management people.

17 STAFF COUNSEL WILLIS: And I would request that
18 whatever was dealt with in the air district's hearings not
19 being repeated here because we can't change the FTOC.
20 It's not our document. So I mean, we have an air quality
21 section for staff, but it sounded like Mr. Simpson wanted
22 to cross-examine her for four hours.

23 HEARING OFFICER CELLI: Mr. Simpson, the four
24 hours loomed large in my mind as I read that.

25 MR. SIMPSON: Well, if they had responded to my

1 comments, I wouldn't need that much time.

2 HEARING OFFICER CELLI: Four hours --

3 STAFF COUNSEL WILLIS: I would just argue this
4 isn't the place for that discussion.

5 MR. SIMPSON: Can I respond?

6 HEARING OFFICER CELLI: Well, I just wanted to
7 answer the question which is how do I see this breaking
8 up. So I thought as land use, agricultural -- air quality
9 and then aviation and socio would be all be able to get
10 done on day one. I'm talking about start to finish
11 evidence closed on that topic area.

12 STAFF COUNSEL WILLIS: On socio, I had a few
13 comments on that.

14 HEARING OFFICER CELLI: Hang on just a second.
15 Socio, just so you're clear, Mr. Singh had -- it's hard
16 for us to work with these topics as we use them, air
17 quality, but most of you did a pretty excellent job of
18 using staff's topic names. If your question is like, for
19 instance, Mr. Singh was talking about property values and
20 things like that, he didn't use the topics, that I put
21 under socio.

22 STAFF COUNSEL WILLIS: That's fine. I was
23 concerned about rate payer impacts. There's not something
24 that (inaudible) --

25 HEARING OFFICER CELLI: (inaudible).

1 STAFF COUNSEL WILLIS: And I know that the main
2 issue is whether or not there was an environmental justice
3 population. I'm not sure that's an answer that we can
4 determine during hearing until the 2010 Census is
5 completed, because we'll be spending a lot of time based
6 on the documents that Mr. Singh provided arguing about
7 whether surveys or something, whatever, represents an
8 exact measurement of the population.

9 HEARING OFFICER CELLI: See, we won't be arguing
10 that because that's coming into evidence. I don't -- why
11 do I need to do that which is already in the record. We
12 don't. If it comes in, then we have the evidence. So
13 that won't waste our time. The time waste will be in the
14 direct and cross-examination of witnesses if we're
15 rehashing the stuff that's already in there. We should
16 really be focusing on the areas of genuine dispute.
17 That's what we want to know.

18 MR. SINGH: What if the data is conflict? What
19 (inaudible) provided one data and I'm providing another
20 data and that data is in conflict?

21 HEARING OFFICER CELLI: That's a genuine dispute.
22 And that's what we want to hear. That's how we want to
23 spend our time.

24 MR. SINGH: Sure.

25 STAFF COUNSEL WILLIS: Really that's my point.

1 The 2010 Census is actually the data that's used -- I
2 mean, the 2000 Census was what we -- all we had to work
3 with. We used other surveys to try to bolster that
4 figure. But until we have a 2010 Census, the other data,
5 it's just more data. So I'm not sure if spending two
6 hours discussing which data is better is actually relevant
7 to these proceedings and when the environmental justice
8 issue is whether there is a disproportionate impact on low
9 income or minority population and we, as staff, have
10 determined there wasn't any adverse significant impact
11 unmitigated on any of the population, no less a minority
12 population. So I feel like we're going to be spending
13 hours kind of going around in circles.

14 HEARING OFFICER CELLI: No. I want to be clear
15 what we're going to do is be highly efficient, get in,
16 find out what the problem is, what the dispute is, make
17 the case and get on to the next, because we have to be
18 moving --

19 MR. SINGH: Mr. Celli, this would be a big
20 challenge in cross-examination with the bid going on. If
21 somebody comes to me and say, well, we are using 2000
22 data, now let's say you go back --

23 HEARING OFFICER CELLI: I understand Mountain
24 House came into existence after 2000. And I want to also
25 say -- in fact, now that you brought it up, I read an

1 article in the process of the Mariposa case somebody
2 submitted an article, not an article, an actual study, an
3 academic study of the impacts of power plants within two
4 miles of a housing development. Okay. I didn't see
5 anybody putting that into the record. I don't know
6 that -- I mean that article.

7 MR. LAMB: I thought we asked for it to be part
8 of the record at one of the workshops.

9 HEARING OFFICER CELLI: Well, somebody better
10 move that into evidence. That's all I'm going to say. If
11 you want us to consider it, it's got to be in evidence.

12 MR. LAMB: That was brought up I thought at a
13 workshop and I thought we asked it be placed in the record
14 and I thought it was.

15 HEARING OFFICER CELLI: Let's be clear,
16 everybody. The record now has yet to open. There is no
17 record. All I have is a preview of what we want to put in
18 the record based on your prehearing conference. All I
19 know is that you intend to put in certain things in your
20 prehearing conference and then we have an evidentiary
21 hearing and that's when we take in the evidence.

22 MR. SINGH: So can you give us a deadline or
23 timeline where we can put all these things in the record
24 we're missing?

25 HEARING OFFICER CELLI: Those things are -- that

1 thing I would probably -- the record really is -- you're
2 limited to what you put in the prehearing conference. I
3 think that the Committee would want to see that one
4 article. I think that was interesting.

5 MR. LAMB: I'll send that.

6 HEARING OFFICER CELLI: But the record is what is
7 limited to what you've given us at the prehearing
8 conference.

9 MR. SIMPSON: Excuse me. Are the documents on
10 the searchable documents page for the docket for this part
11 of this record?

12 HEARING OFFICER CELLI: No. There is no record.
13 So it's a common mistake, people think if it's in docket,
14 it's in the record. That's why it has to be moved into
15 the record. Mr. Hoffman.

16 MR. HOFFMAN: Sorry this comes up. There's such
17 a thing as the administrative record. Staff was taking a
18 look at. We used all that information to prepare our
19 document. But it's not the evidentiary record.

20 HEARING OFFICER CELLI: That's right. Did you
21 hear that, because that's important. The evidentiary
22 record is what's going to happen on the 24th and the 25th.
23 And that's the sole basis that the PMPD is going to be
24 based upon.

25 MR. DIGHE: So that document is a part of my

1 exhibit. This is the technology where it's a link. So
2 it's a link. So it just to save the time, I actually
3 posted a link to the docket. So that document is a part
4 of the exhibit of my socioeconomic of my opening. So
5 please we need to clarify that. And one other comment
6 around the public comment period and maybe I --

7 HEARING OFFICER CELLI: One second. For you, Mr.
8 Dighe, I have Exhibit 600 through 609. And which of those
9 documents is being studied on the effect of power plants?

10 MR. DIGHE: So in the --

11 HEARING OFFICER CELLI: I'm at Page 4 of Rajesh
12 Dighe's prehearing conference statement.

13 MR. DIGHE: Exhibit 609?

14 HEARING OFFICER CELLI: Rajesh Dighe, opening
15 testimony.

16 MR. DIGHE: Yes. If you go down the third page,
17 Mountain House community and new home buyers. New home
18 buyers would definitely get limited this because this,
19 this, this, and then they're talking about what the study
20 shows about the document we are currently discussing.

21 HEARING OFFICER CELLI: If a document is
22 mentioned in one of your documents --

23 MR. DIGHE: It's in the docket.

24 HEARING OFFICER CELLI: The docket is -- that
25 other reference to document isn't the evidence.

1 MR. DIGHE: It's technology. It's a link. So
2 maybe I can --

3 HEARING OFFICER CELLI: This is what we call the
4 four corners of the document. If you put in this as
5 Exhibit 10, this is Exhibit 10. Exhibit 10 says, oh, by
6 the way there was a great study that was done and here's
7 the URL and here's how you get that study, that study is
8 not in evidence. Only the four corners of the document.

9 MR. DIGHE: But this link is not outside the
10 scope of the Energy Commission docket. So maybe this is
11 the first time I've been (inaudible). I apologize.
12 Because my understanding was since the document has been
13 disconnected as a part of the (inaudible) to add more
14 documents into the docket. But please consider this.

15 HEARING OFFICER CELLI: I'm going to have you all
16 listen. I re-refer you to Jennifer Jennings on this.
17 She's our public advisor. She's a good lawyer. She's
18 someone you can talk to about the fine points of the law
19 getting evidence in. You might want to talk to her about
20 this, because you know --

21 MR. DIGHE: I should more study it.

22 HEARING OFFICER CELLI: People make mistakes.
23 We're doing our best to get the evidence in. That's why I
24 threw this one out because I thought it was useful.

25 STAFF COUNSEL WILLIS: Mr. Celli, just as a note,

1 staff did respond to the paper and then responded to it in
2 the staff assessment. So it has been discussed.

3 HEARING OFFICER CELLI: But it is in evidence. I
4 just want to be clear, evidence hasn't opened yet. We
5 don't have any evidence.

6 MR. SIMPSON: Can we move the effect of power
7 plants to local housing values and rents into the
8 evidentiary record here?

9 HEARING OFFICER CELLI: At the evidentiary
10 hearing. This isn't an evidentiary record. This is
11 prehearing conference. At the evidentiary hearing, that
12 motion can be entertained. Okay.

13 MR. SINGH: Now can it be part of the evidence if
14 there is a CBS covering on the socioeconomic event in a
15 video? I think if anything is document we can print it or
16 attach it, but how about the video?

17 HEARING OFFICER CELLI: Really excellent video in
18 the Genesis case where it was a video about --

19 MR. SINGH: So do we have to bring the video here
20 or how should we do it? Because we had created the links
21 to those videos.

22 HEARING OFFICER CELLI: Mr. Singh, show me where
23 in your prehearing statement --

24 MR. SINGH: No. Mr. Dighe.

25 HEARING OFFICER CELLI: Mr. Dighe?

1 MR. SINGH: Yeah. The link from the CBS. And we
2 need to --

3 MR. DIGHE: Exhibit 608.

4 HEARING OFFICER CELLI: Mountain House
5 (inaudible) CBS video. Okay. Here's how we deal with
6 video. You can put it on a DVD and we will look at it.

7 Because see, the good news is you told us about
8 it in the prehearing conference statement. So now that is
9 something that we'll be able to look at. You need to file
10 it. You need to take -- you need to docket it with
11 dockets. And that was another point I wanted to make when
12 I talked about exhibit lists. Some of you don't have on
13 your exhibit list the number of the docket number. It
14 needs to be docketed.

15 So yes, we can take video.

16 MR. SINGH: Thank you.

17 HEARING OFFICER CELLI: That's great. And thanks
18 for including that.

19 MR. DIGHE: I had one comment on the public
20 comment period you mentioned.

21 HEARING OFFICER CELLI: Before we do that, I
22 actually started on a long time ago -- I will get to you.
23 I initially we started down this path because I was
24 talking about the percentages of time that people want to
25 put into these various cyclings. And we're trying to

1 economize the best we can. We're trying to take in
2 whatever testimony you give us that seems to be relevant,
3 helpful. And when I wanted you specifically, Mr. Sarvey,
4 I was thinking of you about this because of the visual and
5 you made it clear that you want to raise issues. The way
6 it was presented in your prehearing conference statement
7 made it seem to me to be a bit of an afterthought. And I
8 thought Mr. Sarvey probably wants to spend the time
9 talking about air quality than visual. So that was what I
10 was thinking. But again, this is based on everybody's pie
11 in the sky assumptions of how much time we needed. This
12 may or may not accurately reflect what time we need.
13 Okay.

14 So, the eleven topics -- we're clear about what
15 the eleven topics are. I want to be clear on those eleven
16 topics, because I'm not opening up a twelfth topic. We're
17 going with the eleven disputed topics unless you settle
18 them in the meanwhile, which I'm highly encouraging you to
19 do. There's the worker safety issue. There's the visual
20 issues. There's all kinds of issues that I have the
21 feeling you parties could put your heads together and come
22 up with conditions that would take them off the table and
23 we don't have to hear them. You do have good issues, and
24 you want to air them. And I want to give them the quality
25 time they deserve. So that's what I'm asking to do if we

1 can.

2 Any questions?

3 Yeah, Mr. Wheatland, you had a question.

4 MR. WHEATLAND: Yeah, a question and a
5 suggestion.

6 The question had to do with the exhibits like the
7 video. You mentioned that they have to be filed. But I
8 think also they need to be served on the other parties.
9 We haven't been served by that video. So if there are
10 exhibits where there's merely a link but they've not
11 provided an applicant a copy with the exhibit, we ask that
12 you provide us with a copy.

13 HEARING OFFICER CELLI: Absolutely. All of these
14 exhibits have to be served on the other parties. All of
15 your testimony, anything you want to put into evidence
16 must be served on the other parties to put them on notice
17 what's coming in so they can prepare. If you have a
18 question about that, we have a public advisor who's there
19 to help you serve, file according to our regulations.

20 Mr. Sarvey, you have a question.

21 MR. SARVEY: Well, I just had a comment on the
22 scheduling issue. And I don't want to be arguing here.
23 We're going to have this plant here for 30 years. And I
24 know 95 hours of hearing time sounds like a lot of time,
25 but I've been through this pretty much the same routine

1 twice in this location and it took us four or five days
2 each time. And as far as cross-examination, I can get
3 through my cross-examination really quick if I get a yes
4 or no answer. But if I hear about somebody's
5 mother-in-law's potato salad for half an hour, we're not
6 going to get anywhere.

7 HEARING OFFICER CELLI: That's a good point.
8 Thanks for raising that, because you know what? If they
9 start going off on mother-in-law's potato salad, you turn
10 to me and say "Objection, nonresponsive." And I will say,
11 "Sustained. Quit talking about potato salad."

12 MR. SARVEY: And one other issue that's a concern
13 to me is this is our third presiding member. And I have a
14 lot of faith in Commissioner Douglas. But she's come in
15 at the eleventh hour, and there's going to be a need to
16 explain some of these things to her if she's going to be
17 the ultimate decision maker. So with all due respect, I
18 think we need more time.

19 HEARING OFFICER CELLI: You know what, Mr.
20 Sarvey, let me just tell you -- I know that you know this
21 because you have been around a while -- that one of the
22 things that always impressed me with Commissioner Douglas
23 was she as a pretty quick study.

24 MR. SARVEY: Oh, yeah.

25 HEARING OFFICER CELLI: She's pretty much up to

1 snuff on all of this. But your point is taken.

2 COMMITTEE MEMBER DOUGLAS: I was going to make a
3 quick point.

4 I understand the importance of this case to not
5 only the applicant and staff and its review but
6 intervenors and the people in Mountain House and the
7 people that live around here. This is clear this is a
8 case with a lot of public and interest and that important
9 issues have been raised and need to be adjudicated.

10 So not only will I give this my full attention,
11 but I hope that we will have another Commissioner on this
12 case -- I can't say for sure that we will by that time.
13 So the other Commissioner if there is one that comes on
14 this case, we'll have a lot of meeting to do to be ready
15 to have evidentiary hearings. But there will be time.

16 HEARING OFFICER CELLI: So the exhibit lists --

17 MR. WHEATLAND: Hearing Officer Celli, before you
18 get to the exhibit list, I wanted to make a suggestion
19 with respect to cross-examination to hopefully make it
20 more efficient and make more time available for the
21 intervenors to cross-examine. The applicant is going to
22 waive cross of all intervenor witnesses with respect to
23 any testimony that is after -- we have resolution of the
24 motion to strike for any testimony that's received into
25 evidence.

1 We've indicated our willingness to waive
2 cross-examination for all intervenor witnesses. I
3 understood from the staff's prehearing conference
4 statement they did not have -- as of the time of that
5 statement did not intend any cross-examination of
6 intervenor witnesses.

7 So one of the things that we could do to make the
8 hearings more efficient would be to accept the
9 intervenor's testimony by stipulation and avoid the
10 necessity of having any further direct from those
11 witnesses. That means that all of their evidence other
12 than what might be stricken will come into the record and
13 will be part of the evidentiary record. And then it would
14 allow the intervenors to focus the time that's freed up by
15 that for cross-examination of the applicant and the staff.

16 HEARING OFFICER CELLI: That's a hugely
17 generous -- hugely generous offer, I want you intervenors
18 to know.

19 MR. SIMPSON: Seems a bit odd with the objection
20 to the testimony in the first place.

21 HEARING OFFICER CELLI: I am kind of wondering
22 why we have a motion to strike. But be that as it may --

23 MR. WHEATLAND: I'd like to explain that. We
24 trust the Committee's judgment in taking out what's
25 irrelevant and what's unqualified. So once the Committee

1 has made that determination, we accept the Committee's
2 determination. Once that ruling is made, we'll accept it.
3 But if there is a limited amount of time, we want to make
4 sure that the intervenors have an opportunity to ask what
5 questions they need to. And so for that reason, I think
6 by accepting the testimony by stipulation we'll provide
7 that additional time.

8 HEARING OFFICER CELLI: So to be clear, because
9 we have some open questions, we mentioned we had some
10 evidence that we had yet to rule on from this morning's
11 motion to strike that -- are you saying you're willing
12 to --

13 MR. WHEATLAND: What I'm saying is that for those
14 exhibits that -- that we made a motion to strike that the
15 Committee rules would be received into evidence, we may
16 offer rebuttal testimony pursuant to the Committee's
17 offer. We may have a rebuttal exhibit. But we waive
18 cross-examination of those witnesses and we would be
19 willing to stipulate to the admission of that testimony.

20 HEARING OFFICER CELLI: That's great. So let me
21 explain what a stipulation is so you know.

22 A stipulation is basically legally binding
23 agreement that whatever you're agreeing to is proven, is
24 proved. And so in this case, if the applicant and staff
25 agree to stipulate to your testimony, that means that the

1 testimony can come in unchallenged into the record. And
2 that would save us an awful lot of time because now we're
3 not -- you still have to move your exhibits into evidence.

4 MR. LAMB: They need to be there.

5 HEARING OFFICER CELLI: Yes, you have to be
6 there.

7 MR. WHEATLAND: Yes, you have to be there.

8 Actually, the witnesses don't have to be there. But the
9 party would have to be there to move it in. But Hearing
10 Officer Celli, it's saying that we're allowing that to be
11 part of the evidentiary record. It doesn't mean that we
12 agree with the weight that evidence would be given. We
13 don't necessarily agree the statements are truth or false.
14 But we're willing to accept that would be part of the
15 record.

16 HEARING OFFICER CELLI: I hope that's clear to
17 everyone.

18 MR. SIMPSON: It would be more clear if it came
19 with withdrawal of the objection to the testimony in the
20 first place.

21 HEARING OFFICER CELLI: Well, actually what he's
22 saying is that whatever the ruling is, that which is
23 admissible would be stipulated into the record.

24 MR. LAMB: He's not going to challenge it later.

25 MR. SIMPSON: I guess if it doesn't come with the

1 withdrawal of the objection, then we should retain our
2 right to cross-examine the intervenors ourselves.

3 HEARING OFFICER CELLI: You're not going to lose
4 your right to cross-examine at all. He's giving it as a
5 free --

6 MR. WHEATLAND: Rob, what I'm saying is that your
7 one page of testimony we'll allow to come into the record
8 as part of the evidentiary record and we don't ask you any
9 questions about it. That's what I'm offering to stipulate
10 to.

11 MR. SIMPSON: Well, I think I'm already there.
12 But it's the other intervenors that are --

13 HEARING OFFICER CELLI: So I think that's clear.
14 And I thank you for that offer. And it does save us a lot
15 of time.

16 Mr. Dighe.

17 MR. DIGHE: So that's interesting, because I
18 think intervenors might have some questions on that
19 testimony. So how would that work out?

20 HEARING OFFICER CELLI: Works like this. I'm
21 just going to work from left to right. Staff puts in
22 their evidence. I'm going to go around the table.

23 CalPilots, any objection? No objection.

24 Mr. Simpson, any objection? No objection.

25 Mr. Dighe, any objection? No objection.

1 Like that, boom, boom, boom, boom.

2 Because if a party objects, we're going to hear
3 the objection and the Committee is going to rule on the
4 objection. May sustain it, may overrule it. But the
5 point is if there's no objection, then the evidence is
6 received and the word received is really important,
7 because that's that evidence that we were talking about.
8 That means it's in the record. It's part of the decision.
9 So that's how we proceed. And then if we call a witness
10 and the witness takes the stand, let's say it's a staff
11 witness on air quality takes the stand and sits there and
12 everybody is willing to stipulate to their testimony, then
13 just as I did before, any cross-examination by CalPilots?
14 Any cross-examination by Mr. Simpson? Any
15 cross-examination -- we go that way and you can ask your
16 questions. But like I said, we have to move with
17 alacrity. So I'm going to ask things like how many
18 questions do you have.

19 Go ahead, Mr. Wheatland.

20 MR. WHEATLAND: What we have done in past
21 proceedings is with respect to testimony where there is no
22 cross for that witness and it's subject by stipulation,
23 that witness does not even need to take the stand or
24 appear or be sworn. It is received just as if they have
25 taken the oath and sworn that testimony.

1 HEARING OFFICER CELLI: Right.

2 MR. WHEATLAND: And by the same token, if there
3 are any applicant's witnesses for which no party has a
4 question, staff has indicated they have no questions for
5 us and if the intervenors have no questions of a
6 particular witness, then similarly that witness's
7 testimony could be accepted into the record by
8 stipulation.

9 HEARING OFFICER CELLI: Right. So do you all
10 understand that? Because here's the point. The reason
11 I'm asking you what is and is not in dispute is because
12 we're expecting if you tell us something is not in dispute
13 you will stipulate to the admission of that evidence on
14 the topic.

15 So, for instance, what we have in dispute we --
16 what we do not have in dispute is project description,
17 cultural resources, transmission line, safety, and
18 nuisance, waste management, facility design, geology and
19 paleontology, power plant efficiency, power plant
20 reliability, noise and vibration, transmission systems
21 engineering, and I'm hoping that list is going to grow by
22 the time we all meet, because you'll have your workshop
23 and you're going to have an opportunity to talk and work
24 through your issue. But right now, that's the list. And
25 we -- do you understand that all the testimony as to those

1 topic areas will be submitted by declaration and that
2 witnesses need not be present and will not be subject to
3 direct and cross-examination.

4 Do you understand that, Mr. Wilson?

5 Say yes on the record. We're going to do a
6 little test run.

7 MR. WILSON: Yes, I understand. But right now,
8 I'm not sure that I would agree to it.

9 HEARING OFFICER CELLI: Well, that's the whole
10 point of this meeting. I need you to declare yourself
11 what you're going to cross on, what you're going to direct
12 on. I just read the list of what everybody said was not
13 an issue. And in your prehearing conference you said the
14 only issue was aviation and land use.

15 MR. WILSON: Land use, correct. But that's not
16 what you asked me, is it --

17 HEARING OFFICER CELLI: No --

18 MR. WILSON: -- on the items you just listed.

19 HEARING OFFICER CELLI: Right. And whether you
20 were willing to stipulate to the testimony coming in
21 without the presence of the witness. So for instance, you
22 don't have an issue on cultural resources.

23 MR. WILSON: No, I don't.

24 HEARING OFFICER CELLI: Okay. Well, if you would
25 stipulate to the cultural resources section of the FSA,

1 then that testimony comes in and we don't have to bring in
2 the cultural resources person to come in and say yes, I'm
3 the person that wrote that section. I'm the person and I
4 stand by what I said and lay a foundation for the
5 admissibility of that document. You're just going to say
6 that's not my issue. Bring it in.

7 MR. WILSON: Are you going to do this for each
8 one or do you want to go by the entire list?

9 HEARING OFFICER CELLI: Well, I want to go by the
10 entire list because that was the assumption that was made.
11 And I'm going to read that list again because everybody
12 should be clear on this.

13 Executive summary and project description,
14 cultural resources, transmission line safety and nuisance,
15 waste management, facility design, geology and
16 paleontology, power plant efficiency, power plant
17 reliability, noise and vibration, and transmission systems
18 engineering. So given that list, Mr. Wilson, would you
19 stipulate that all of that -- the testimony in those areas
20 can be committed by declaration and live witnesses need
21 not be present and subject to direct and
22 cross-examination?

23 MR. WILSON: CalPilots agrees to that.

24 HEARING OFFICER CELLI: Thank you.

25 Mr. Simpson?

1 MR. SIMPSON: I was just trying to check them off
2 the list. Is this the in list or out list?

3 HEARING OFFICER CELLI: This is the in list, the
4 things that there is no dispute. Executive summary,
5 project description, cultural resources, transmission line
6 safety and nuisance, waste management, facility design,
7 geology and paleontology, power plant efficiency, power
8 plant reliability, noise and vibration, and transmission
9 systems engineering. So I'm asking whether you would be
10 willing to stipulate that this testimony come in by
11 declaration and live witnesses need not be present and
12 subject to direct and cross-examination.

13 MR. SIMPSON: Was geological hazards and
14 resources in there?

15 HEARING OFFICER CELLI: Geology and paleontology.

16 MR. SIMPSON: It's described different on the
17 tentative exhibit list so it's hard to keep up with you
18 there.

19 HEARING OFFICER CELLI: You're right.

20 MR. SIMPSON: So soils is out. Traffic and
21 transportation is in for -- and water resources?

22 HEARING OFFICER CELLI: That -- no, I didn't read
23 that. I kept visual and soil out of my list on purpose
24 because of Mr. Sarvey. Because I'm hoping that will be
25 resolved over the workshop. Executive summary and project

1 description, cultural resources, transmission line safety
2 and nuisance, waste management, facility design, geology
3 and paleontology, power plant efficiency, power plant
4 reliability, noise and vibration, and transmission systems
5 engineering.

6 STAFF COUNSEL WILLIS: Mr. Celli, can I ask a
7 clarifying question of Mr. Sarvey?

8 Is his water and soil question an alternatives
9 question or actually -- because it sounded more like an
10 alternatives.

11 HEARING OFFICER CELLI: I don't know. He wrote
12 it down as soil and water.

13 STAFF COUNSEL WILLIS: Right. I know how he
14 wrote it down. I'm just trying to -- I need to just bring
15 extra people.

16 MR. SARVEY: The alternatives portion is the
17 turban selection. But the actual dispute I have is that
18 you're not using recycled water. You're not complying
19 with State laws in relation to power plant cooling.

20 HEARING OFFICER CELLI: So --

21 MR. SIMPSON: So for the list that we'll deal
22 with is what's on the pie chart? Is that --

23 HEARING OFFICER CELLI: Yes, because what I just
24 rattled off was anything that's not on that list.

25 MR. SIMPSON: And noise and vibration, I brought

1 we had noise issues.

2 HEARING OFFICER CELLI: No. Noise and vibration
3 came up by Mr. Sarvey saying he had a bio issue with
4 regard to noise and animals in the area. But not noise
5 itself. Not noise and vibration in terms of the usual
6 sense of receptors.

7 MR. SIMPSON: I don't understand the distinction
8 then. You're saying the noise issued would be handled in
9 bio?

10 HEARING OFFICER CELLI: There actually is noise
11 mentioned in bio because of the effect on the noise. But
12 there is a separate section of noise and vibration that
13 deals with, you know, the nearest person living nearby,
14 what are they going to hear, how many decibels, what are
15 the impacts based upon measurement of sound.

16 MR. SIMPSON: I don't recall if or in which
17 section a noise graph would have been. Would that have
18 been in the noise and vibration?

19 HEARING OFFICER CELLI: Noise.

20 MR. SIMPSON: So it sounds like water and noise
21 should remain topics in dispute. But other than that, I
22 agree with what you said.

23 HEARING OFFICER CELLI: Okay. Well, --

24 STAFF COUNSEL WILLIS: I disagree. Noise was not
25 mentioned as a dispute.

1 HEARING OFFICER CELLI: Okay. But what Mr.
2 Simpson said in his prehearing conference statements he
3 joins the other intervenors. So whatever topics they were
4 raising, he's raising.

5 STAFF COUNSEL WILLIS: Nobody else raised noise.

6 HEARING OFFICER CELLI: Right. That's why I'm
7 saying that he just said he thought it should be in there,
8 but otherwise he agrees to stipulate to the non-disputed
9 list. Is that right?

10 MR. SIMPSON: Sounds pretty agreeable.

11 HEARING OFFICER CELLI: Thank you.

12 Mr. Dighe, do you understand my question? Are
13 you willing to stipulate to the testimony coming in by
14 declaration on the undisputed topics so the witnesses need
15 not be present and subject to direct and
16 cross-examination?

17 MR. DIGHE: I think on noise we talk about the
18 noise so vibration. Is it possible to keep that?

19 HEARING OFFICER CELLI: Not now, actually. You
20 know something? I want to -- I want to be clear that the
21 noise issue is something you can talk about in the
22 workshop. But nobody raised it in the prehearing
23 conference statements. So it didn't come up.

24 MR. SIMPSON: Well, are you asking for our
25 agreement or are you just telling us how it's going to be?

1 HEARING OFFICER CELLI: Well, kind of both. I
2 mean, really, you know what I'm trying to do is I'm trying
3 to accommodate the things that you all need to talk about.
4 But I'm trying to clear desks of things really not
5 important.

6 MR. SIMPSON: But it sounds like whatever we're
7 saying you've already made a decision, so I don't know why
8 we're going through this.

9 HEARING OFFICER CELLI: Well, because it's
10 actually working. It's not that I made a decision. It's
11 that I'm giving back to you with what you told me in your
12 prehearing conference statements. This is just me
13 reflecting back to you what I received. I'm not dictating
14 this. I'm basically saying this is what you've asked for
15 and these are the things.

16 Mr. Sarvey raised noise for the first time today.
17 No one raised noise, but the context you brought up noise
18 was in biology. So it wasn't noise, per se. It wasn't
19 vibration. It was in biology. Okay. So I'm accepting
20 that biology is in dispute.

21 MR. SIMPSON: Well, but from the noise and
22 vibration.

23 HEARING OFFICER CELLI: As it relates to
24 biological. So that's what I'm asking for. I'm asking
25 you for your assent to agree that the things that are not

1 included in the list of topics that you wanted to cross
2 and do and put in evidence on be stipulated into evidence
3 so that we don't have to go there.

4 MR. SIMPSON: Okay.

5 HEARING OFFICER CELLI: That's what I'm asking.

6 MR. SIMPSON: And I guess I've been clear I
7 didn't agree with those two so --

8 HEARING OFFICER CELLI: Mr. Dighe.

9 MR. DIGHE: Well, I think I heard transmission
10 system engineering, since Mr. Simpson and Mr. Sarvey is
11 going to have noise and vibration I'm just wondering --

12 HEARING OFFICER CELLI: It's not coming in.
13 That's not part of their -- they didn't ask for that.

14 MR. DIGHE: Is transmission system engineering
15 going to be kind of related to noise because is something
16 that can be reduced. Noise can be reduced because of the
17 engineering?

18 HEARING OFFICER CELLI: What you're talking
19 about, there's transmission systems engineering has to do
20 with the stream of electricity through the power plant.
21 There's also transmission line safety and nuisance that
22 has to do with things like shock and buzzing noise and all
23 of that kind of stuff. But again, those were not raised
24 by anybody. It also deals with things like electric
25 magnetic fields and stuff like that. The public

1 actually -- transmission line safety and nuisance has to
2 do with really public health impacts of the transmission
3 line.

4 So what I'm trying to do is get -- I'm trying to
5 hear from the parties it's okay that we take these
6 non-disputed topics and just accept them into the
7 testimony by declaration. And that's acceptable to you?

8 MR. DIGHE: Yes.

9 HEARING OFFICER CELLI: Mr. Singh, is that
10 acceptable to you?

11 MR. SINGH: Yes, acceptable. I need to ask for
12 clarification. In my testimonial, the exhibit basically
13 asserting together. We are not (inaudible) in these
14 areas. So some of the things that was in Rajesh, now I
15 have a cross-examination, can I refer to those exhibits?

16 HEARING OFFICER CELLI: Yes. You can refer --
17 you know, it doesn't really matter who puts the exhibit
18 in. Once the exhibit is in the record, it's all of our
19 exhibit and all get to refer to that exhibit. It doesn't
20 really matter who puts it in.

21 MR. SINGH: But that is how we were distributing
22 the law. You take this topic, I take this topic so that
23 we don't take up too much time during the hearing process.

24 HEARING OFFICER CELLI: That's excellent. I
25 encourage that. I think that's a great idea. Keep doing

1 that. Because that's a good thing. So with that, do you
2 agree that it can be submitted by declaration and live
3 witnesses need not be present and subject for direct or
4 cross-examination for the undisputed topics listed?

5 MR. SINGH: So far I think undisputed that topic
6 has been vibration and the noise.

7 HEARING OFFICER CELLI: Right.

8 MR. SINGH: And those are the topics.

9 HEARING OFFICER CELLI: I'll read the list again.

10 MR. SINGH: So sorry.

11 HEARING OFFICER CELLI: Okay, everyone, executive
12 summary, project description, cultural resources, which
13 has to do with the possibility of artifacts being on the
14 grounds, transmission line safety and nuisance, waste
15 management, facility design, geology and paleontology,
16 power plant efficiency, power plant reliability, noise and
17 vibration, and transmission systems engineering. These
18 are all the topics that everybody's prehearing conference
19 statement didn't seem to dispute. So I'm just asking if
20 we can bring those in. They'll be in the record by
21 stipulation.

22 MR. SINGH: So let's say it is in the record, but
23 we can still refer back to that?

24 HEARING OFFICER CELLI: Absolutely. Good point,
25 yes.

1 Everyone, after the evidence is in record, you
2 will brief the evidence. We are going to ask for briefs.
3 You're going to be able to argue anything you want as long
4 as it's in the record. So all the stuff is going to be in
5 the record. All this evidence will be in the record. You
6 will be able to brief the evidence because that's the
7 point we're looking forward to you giving us a brief that
8 says my point of view should win because this fact, this
9 fact, this fact, this fact. Do you see what I'm saying?

10 MR. SIMPSON: I'm sorry. His question was
11 pertaining to cross-examination.

12 STAFF COUNSEL WILLIS: Just to clarify, Mr.
13 Singh, we would not be bringing witnesses on those topics
14 areas. So there would not be any availability to
15 cross-examine them during the hearing. You would be
16 stipulating today that those topics are fine just to be
17 put into the record without any cross-examination.

18 MR. SINGH: Then it will be a challenge because
19 unless we decided to discuss at the workshop and we come
20 to a conclusion, some of the data we submitted which is in
21 conflict and I have the data which is in conflict with the
22 data we discussed in the workshop that how we are
23 basically going to present the hearing --

24 STAFF COUNSEL WILLIS: In what topic area?

25 MR. SINGH: In these topics areas that --

1 STAFF COUNSEL WILLIS: All of those topics?

2 HEARING OFFICER CELLI: Like let's talk about
3 cultural resources. Cultural resources has to do with
4 things like artifacts that are in the ground, the
5 possibility of things that are 50 years older and up.
6 There's already mitigation in staff's assessment. That's
7 not the supplemental staff assessment. But the point is
8 there is a study, an analysis done of the cultural
9 resources. And they come to the conclusion, if I'm not
10 mistaken, that there were no cultural impacts or if there
11 were, they were mitigated because they have conditions.
12 In other words, they're digging up pipe line or something
13 like that, and they encounter any cultural resources,
14 there is a whole schema of conditions that they have to
15 satisfy to preserve and protect the cultural resources.

16 Do you understand what I'm saying? Nobody said
17 cultural resources was a big deal. Nobody said it was a
18 dispute no cultural resources. Presumably, when you
19 looked at cultural resources, you thought, okay, these
20 conditions adequately protect the cultural resources, so
21 I'm not going to take issue with that. That's the
22 assumption. Doesn't mean you can't later say I don't like
23 condition number cultural 3 because it doesn't accommodate
24 this or that, because you'll have whatever is in the
25 record as stipulated by you all.

1 MR. SINGH: But again we have to prove it with
2 the record with something, right?

3 HEARING OFFICER CELLI: You do not have to prove
4 it. The burden -- first of all, the burden is on the
5 applicant. They have to prove everything that's what
6 their testimony is. They're basically saying here's the
7 project and doesn't have any environmental impacts. Okay.

8 Staff looks at that evidence and they write their
9 staff assessment and their assessment is this area will
10 not have impacts if all of the impacts are mitigated
11 according to our conditions. Okay. And that's really
12 what we're looking at. Are all of the impacts of this
13 project mitigated by the conditions proposed by staff.

14 Now, if there is a section on cultural resources
15 or power plant efficiency or something like that that you
16 think you're satisfied that the record is adequate as is
17 and it's not in dispute, there is no need to bring
18 somebody down here to testify and take up the time if
19 nobody is arguing with that area.

20 MR. SINGH: If it is in dispute, then we can
21 bring --

22 HEARING OFFICER CELLI: Right. And that's what
23 this shows. What I created here was everything that
24 everybody asked to do direct and cross-examination on and
25 it's just showing the percentages of how much time you

1 asked for. But the topics that are up there are what I'm
2 presuming are in dispute based on what you've told me in
3 your prehearing conference statements. So if I
4 subtract -- so there's eleven topic areas. If there are
5 22 total and those represent 11, there's 11 disputed and
6 11 undisputed. All I'm trying to do is get a stipulation
7 that says the 11 that are undisputed can come in by way of
8 written testimony so we don't have to waste our time on
9 the 11 undisputed topics.

10 MR. SINGH: Just off (inaudible) let's say at the
11 last moment I bring some data which is in conflict with
12 some of the data presented by staff or the applicant at
13 the last moment, but I couldn't make it as a record, how
14 do I deal with that situation?

15 HEARING OFFICER CELLI: You will make a motion.
16 And here's how you make a motion. Committee, I have a
17 document I'd like to move in. It wasn't part of my
18 prehearing conference statement. I understand that you
19 pretty much cut us off at the prehearing conference
20 statement, but here are the facts of why this is relevant
21 and here are the facts of why I couldn't have put it in
22 any sooner. And here's the good cause and good reason why
23 I should get it in. And then you're of course going to
24 hear from your opponents saying that's not good cause.
25 And then the Committee is going to conference and we're

1 going to sustain or overrule depending on your showing of
2 good cause.

3 MR. SINGH: Because there's some of the things we
4 couldn't at the last moment because of the cut-off date,
5 but at the same time we noted the prehearing conference
6 hearing is the 24th of February. Everybody contact staff
7 as well as applicant (inaudible) but we got disadvantaged
8 on that.

9 HEARING OFFICER CELLI: Well, I'll tell you this,
10 the overwhelming presumption is if it isn't in your
11 prehearing conference statement, it isn't coming in unless
12 you've got really compelling reason because we have to
13 draw a line somewhere. We have to say we're cutting it
14 off and this is the day. So that's what we did.

15 So with that, the question to you is are you
16 willing to stipulate that the following areas of testimony
17 that list of 11 I gave you can be submitted by declaration
18 and that live witnesses need not be present or subject to
19 direct and cross-examination?

20 MR. SINGH: Yeah. That's fine with me.

21 HEARING OFFICER CELLI: Mr. Sarvey, do you so
22 stipulate?

23 MR. SARVEY: I'm willing to stipulate to those
24 items to come in without cross-examination. But as far as
25 I'm concerned, the entire application is in dispute. So

1 you may hear from me in my brief. Or if you want to not
2 ignore it, you may hear some things in here related to
3 another topic that just aren't kosher and I'm going to
4 tell you about it in my brief.

5 HEARING OFFICER CELLI: And I welcome that. I
6 want to thank you for drawing that distinction. You
7 understand you're able to argue whatever you want to argue
8 in your briefs. We're just talking about --

9 MR. SARVEY: In other words, the topic
10 (inaudible) it's complete and I don't need to ask any
11 questions. I'm going to rest on what's in there. So
12 that's what I want to say about the entire application.

13 Number two, the couple situations like with
14 noise, I'm going to make a statement on that application.
15 And what happens quite often is staff or the applicant
16 will say that's not my area of expertise. I can't answer
17 that. A lot of times we come into that under
18 cross-examination. That presents a problem, particularly
19 because I'm very sensitive to some of the statements that
20 are being made about noise and the effect of the land use
21 and also biology. So I'm still not going to challenge the
22 noise testimony, I just want to raise that as an issue.

23 I don't know how we deal with that, because if I
24 point to the noise testimony and says, okay, that it's 60
25 DBA impact two-thirds of a mile off the parcel, and I ask

1 a question to the staff's biology witness how are we going
2 to deal with that, "That's not my area of expertise. That
3 comes up quite often. That's the only thing I don't like.

4 HEARING OFFICER CELLI: So first of all, thank
5 you for stipulating to the undisputed testimony coming in
6 without live testimony. Staff is now on notice that you
7 want to talk about the biological effects.

8 STAFF COUNSEL WILLIS: Just to be clear, we're
9 talking about the biological impacts of noise. But that
10 does not transfer all the knowledge about noise and
11 vibration to our biological witness. So she will testify
12 to her area and nobody did raise the noise as an issue in
13 the prehearing conference. So suddenly it's now becoming
14 a bigger issue as the hours go by today and it never was
15 an issue before.

16 HEARING OFFICER CELLI: I just want to be clear
17 about one thing, because I read biology and it does
18 mention noise.

19 STAFF COUNSEL WILLIS: It does.

20 HEARING OFFICER CELLI: So the author better be
21 able to come in here and say yes, this is what I said
22 about noise and I stand by whatever it was. She can
23 answer the question.

24 STAFF COUNSEL WILLIS: And she will be able to
25 answer the question regarding her testimony.

1 HEARING OFFICER CELLI: That's all I'm saying.

2 That's all that we mean, Mr. Sarvey. Thank you.

3 Now, Mr. Mainland, I'm asking the same question
4 to you that I've asked to everyone else that you are
5 willing to stipulate that all testimony will be submitted
6 by declaration and that live witnesses need not be present
7 and subject to direct or cross-examination for the list of
8 undisputed topics that we have previously listed?

9 MR. MAINLAND: I can (inaudible) we could agree
10 to such stipulation. However, I want to be very clear so
11 if we're forfeiting our opportunity or right to
12 cross-examine in this way, you're suggesting that a brief
13 is the way that we have redress if we suddenly discover in
14 the testimony that's been stipulated there are areas of
15 fact or misstatements or otherwise contestable items.
16 What is our recourse?

17 HEARING OFFICER CELLI: Let me give you an
18 example. Before I came to State service, I started as a
19 deputy district attorney and I was a criminal defense
20 attorney for many years. And if had the cop on the stand
21 who's going to say something stupid, which they do
22 accidentally from time to time, I'm not going to
23 cross-examine him on that stupid thing. I'm letting that
24 go right in the record and I'm not going to bring
25 anybody's attention to it, because when the case is

1 closed, and I bring my final brief and closing argument
2 and say and the cop admitted X, and they went and they go
3 flipping through the transcript and sure enough they
4 admitted X. Why would I cross-examine that? I got it in
5 the record.

6 Okay. You know what I'm saying there? You need
7 to be smart about what goes in the record. If you want to
8 fight every little thing, you can. But you put your
9 opposition on notice of what it's about, you educate the
10 other side. So you have to block your balance. And what
11 I'm trying to say is that, you know, you want to be
12 judicious in your use of your direct and
13 cross-examination.

14 And in this case, there is a bunch of undisputed
15 topics. So all we want to do is say, okay, those topics
16 can come in. They may have some really bad things in
17 let's say the staff supplemental staff assessment. I
18 don't know if there is or not. But there might be
19 something in there that proves your point. Okay. It's
20 there and you get to argue it in your brief. Why do you
21 need to bring the witness out to call and talk to him
22 about that which you've already got. Do you see what I'm
23 saying? I hope that's clear to you.

24 MR. MAINLAND: The other point, Mr. Celli, is
25 that even though this is the pre-conference hearing and

1 even though some of us didn't bring up noise in our pre
2 conference statement, I think it's a reasonable use of
3 (inaudible) hearing to identify such topics or such issues
4 as perhaps have been overlooked to this point. So they
5 can be dealt with.

6 For example, I don't think noise and its
7 perception or effect is negligible at all. We've talked
8 in terms of noise and its effect on biota, but the fact if
9 this is a noisy plant, I would think that the nearby
10 residents would want that issue covered.

11 HEARING OFFICER CELLI: Sure.

12 MR. MAINLAND: So that's more a problem for those
13 living in the area and so forth. I'm not saying that we
14 have cross-examination on the noise issue. I'm just
15 raising that as a normal thing that can be identified at
16 this hearing.

17 HEARING OFFICER CELLI: And I appreciate that.
18 And if there are sufficient facts to convince the
19 Committee that there is a topic that we need to open up
20 because some somebody has raised something that we're all
21 in agreement going, wow, that's something we unqualified
22 to hear, then we will hear that. We haven't necessarily
23 heard the facts on that with regard to noise. But if you
24 do read the noise section, what you would find is that
25 there's first of all laws and rules about how much noise

1 anything can emit in a particular jurisdiction and they
2 have to abide by that. But then there's also things like
3 post -- I don't know if you know this, but if this
4 application for certification is granted and they are
5 allowed to build this power plant, after the power plant
6 is -- well, throughout the process, the Energy Commission
7 doesn't just, oh, your license can go away. We have a
8 compliance unit. So there is a complete -- we're
9 basically cradle to grave with the project.

10 And in the context of noise, there is always a
11 condition that says that they have to have the sign up
12 that says if you think this is too noisy, you call this
13 1-800 number or whatever and there is a complaint process
14 by which you complain to the applicant or at this point
15 the project owner who then brings -- has to bring that to
16 the compliance project manager's attention and it's dealt
17 with at the Energy Commission. I'm just saying just so
18 you know, there is a lot of noise conditions on the issue
19 and all that.

20 STAFF COUNSEL WILLIS: Mr. Celli?

21 MR. SINGH: I just want to make a statement --

22 STAFF COUNSEL WILLIS: I was just going to add a
23 quick note --

24 HEARING OFFICER CELLI: Let me hear from staff
25 first.

1 STAFF COUNSEL WILLIS: In some cases and in this
2 case in particular, the project manager is now going to be
3 the compliance manager. So Mr. Hoffman is here and you'll
4 also get a compliance manager as well.

5 HEARING OFFICER CELLI: Congratulations.

6 MR. HOFFMAN: I lost the bet.

7 HEARING OFFICER CELLI: No good deed goes
8 unpunished.

9 MR. SINGH: So the statement I want to make is
10 let us say on a permitted issue to build a power plant and
11 then the compliance will take after that. So if they
12 wanted compliance they will be penalized in terms of you
13 know X amount of money.

14 HEARING OFFICER CELLI: Or we shut them down.
15 I've shut down plants before. And we shut them down
16 because they're out of compliance and we don't let them
17 operate until they get in compliance.

18 So from what I'm thinking, there was a big rain
19 storm. The power plant did not have its water drainage
20 set up properly. We made them stop and devote their time
21 to getting the wall set up. There was a permit pull next
22 door. There were all sorts of things they needed to fix.
23 And we didn't let them operate until they corrected that
24 and got it to full compliance. So that's one possibility.
25 We also fined the noncompliant power plant as well.

1 MR. SINGH: I see. But at that point, my
2 assumption -- I may be wrong. Shutting down is much, much
3 more difficult process. If somebody goes out of
4 compliance, you can penalize. You can say one, two, three
5 times if they don't get into the compliance then shutting
6 down operation can happen.

7 But if you take this topic of vibration and noise
8 which is not in compliance then getting the permit will
9 get delayed. So what I'm saying is if something is
10 triggered and then shutting down is most to impossible,
11 because when you're dealing with companies like
12 Mitsubishi, those are deep pockets. So those are the
13 things.

14 HEARING OFFICER CELLI: I understand what you're
15 saying. And this is really a tangent that I wanted to
16 finish. I have yet to talk to Mountain House about this.
17 I'm not even sure whether I got to finish with Mr.
18 Mainland or not, but we'll talk compliance. And
19 throughout the process there is always during the
20 construction -- there is a CBO, a building official,
21 compliance project managers, all kinds of oversight during
22 the process and even after.

23 So I just wanted you to understand. And that was
24 really Mr. mainland, I was really talking -- forgive me.
25 I'm the one that went off on the tangent. I was talking

1 about noise in particular with you. So anyway, I think
2 that I satisfied your answer.

3 Did you stipulate that the undisputed topics can
4 come in without live testimony?

5 MR. MAINLAND: Yes.

6 MR. SIMPSON: Can I ask a quick question about
7 the noise side?

8 HEARING OFFICER CELLI: Can you hold it and let
9 me get to Mr. Lamb and then I'm going to get to the
10 applicant and then I've gotten through this.

11 Mr. Lamb, do you stipulate that --

12 MR. LAMB: I do.

13 HEARING OFFICER CELLI: Thank you.

14 Mr. Wheatland?

15 MR. WHEATLAND: So stipulated.

16 HEARING OFFICER CELLI: Thank you.

17 Your question, Mr. Simpson?

18 MR. SIMPSON: You said it's going to be --

19 HEARING OFFICER CELLI: One more interruption.

20 Did I get a stipulation from staff?

21 STAFF COUNSEL WILLIS: We stipulate.

22 HEARING OFFICER CELLI: Thank you. I've got a
23 stipulation from everybody on undisputed topics. So all
24 the undisputed topics will come in without direct or
25 cross-examination.

1 Go ahead, Mr. Simpson.

2 MR. SIMPSON: So you said there will be a sign
3 posted where you can call if there is a noise complaint.
4 Will that be posted at the end of the site or the parcel?

5 HEARING OFFICER CELLI: Mr. Hoffman, do you have
6 an answer for that in noise?

7 MR. HOFFMAN: I'd have to take a look at --

8 HEARING OFFICER CELLI: Isn't it usually on the
9 periphery fence?

10 MR. HOFFMAN: Yes. Where the public has access
11 to it.

12 HEARING OFFICER CELLI: Usually if you're driving
13 by, there is a chain-linked fence around the property.

14 MR. SIMPSON: So it would be more on the parcel.
15 See, the site and the parcel are two different things.

16 MR. WHEATLAND: It will be on the parcel outside
17 the fence that directs public access to the site.

18 MR. SIMPSON: Is there a sign out that gives
19 someone notice of this action?

20 HEARING OFFICER CELLI: I don't know other than
21 what's on our website.

22 MR. WHEATLAND: Unlike a local building permit,
23 you're not required to post notice of an Energy Commission
24 proceedings on the project site.

25 HEARING OFFICER CELLI: I never heard of that, so

1 no.

2 MR. SIMPSON: Well, a conditional use permit for
3 the county, one of the things we're skipping requires a
4 sign to be posted on the parcel that says this is what's
5 about to happen so the neighbors can figure out what's
6 going on there.

7 HEARING OFFICER CELLI: Well, maybe you have a
8 LORS issue here you might want to raise at the evidentiary
9 hearing.

10 I'm going to move on now.

11 MR. WHEATLAND: Are you still with stipulations?

12 HEARING OFFICER CELLI: Yeah. I thought we had
13 gotten the stipulations.

14 MR. WHEATLAND: I'd like to suggest one more as
15 follow up to what I recommended which is we would
16 stipulate to the admission of the intervenors' opening
17 testimony to which no objection has been made, to those
18 rebuttal testimonies to which no objection has been made,
19 and to those rebuttal testimonies where the Committee's
20 tentative ruling was to accept the testimony. I'd like to
21 suggest that we might today stipulate to the admission of
22 those exhibits, that they would be received by declaration
23 without the need for the witness to appear.

24 HEARING OFFICER CELLI: I'm writing this down,
25 because I want to accurately reflect your language. So

1 all testimony submitted --

2 MR. WHEATLAND: All opening testimony and
3 exhibits from the intervenors.

4 HEARING OFFICER CELLI: Opening testimony and
5 exhibits from intervenors.

6 MR. WHEATLAND: And all rebuttal testimony and
7 exhibits from intervenors to which no objection -- to
8 which we have not moved to strike or the Committee has
9 determined as a tentative ruling to accept that testimony.
10 That's at least for only those matters where the tentative
11 ruling was to deny and those issues are still open.

12 HEARING OFFICER CELLI: Okay. So all the offer
13 is intervenors and staff, that applicant would stipulate
14 to the admission of all opening and rebuttal testimony and
15 evidence submitted by intervenors to which the applicant
16 has not moved to strike or that -- should I just rather
17 than say what you've moved to strike that the Committee
18 has ruled admissible.

19 MR. WHEATLAND: Yes. That would be fine.

20 HEARING OFFICER CELLI: This should be a
21 no-brainer, folks.

22 MR. SIMPSON: It's meaningless, because he's
23 already moved to strike everything.

24 HEARING OFFICER CELLI: No, it isn't. Because
25 what we're going to do -- what he's stipulating to is that

1 whatever the ruling from the Committee is from the
2 testimony that he did move to strike, if we rule it
3 admissible, he's stipulating to its admission.

4 MR. SIMPSON: Okay. Then the only thing I would
5 say is that we need to go through the list that is still
6 on the fence.

7 HEARING OFFICER CELLI: Well --

8 MR. SIMPSON: You've already said you're going to
9 strike my alternatives testimony. You may strike my
10 hazardous materials testimony.

11 HEARING OFFICER CELLI: So what we're doing --
12 we're not going to rule on those necessarily today. The
13 way this language accommodates that is that the Committee
14 is going to have to rule on all of those motions to
15 strike.

16 And for those -- for that evidence that the
17 Committee admits, plus all of the evidence that was not in
18 his motion to strike, the applicant is willing to
19 stipulate into evidence. So that's the way we can do this
20 without having to actually rule on those right now.

21 MR. SIMPSON: Well, yeah. I understand that. I
22 just want to know what is in dispute at this time. What
23 have you already decided to strike and what have you
24 decided maybe that you're going to accept. That's what
25 I'm asking.

1 HEARING OFFICER CELLI: Because, you say, you
2 were going to brief -- we were going to get a brief from
3 you regarding the hazardous material pipeline.

4 MR. SIMPSON: I understand that.

5 HEARING OFFICER CELLI: I can't rule on that.

6 MR. SIMPSON: I don't expect you to.

7 HEARING OFFICER CELLI: So that's why the
8 language is the way that it is.

9 MR. SIMPSON: So at this point all you've
10 stricken is your alternatives testimony.

11 HEARING OFFICER CELLI: Because of need.

12 MR. SIMPSON: You struck the need (inaudible).
13 Thank you very much.

14 HEARING OFFICER CELLI: Okay. So first I want to
15 tackle this stipulation. The stipulation is, ladies and
16 gentlemen, that the applicant will stipulate to the
17 admission of all opening and rebuttal testimony and
18 evidence submitted by the intervenors that the Committee
19 has ruled and will rule to be admissible.

20 Do you so stipulate, staff?

21 STAFF COUNSEL WILLIS: Just to be clear, the only
22 thing that hasn't been ruled on is the gas pipeline
23 testimony that -- that's the only testimony -- I'm trying
24 to figure out what's the open ended level. I assume that
25 you had already ruled on --

1 HEARING OFFICER CELLI: We had ruled on -- we
2 were going to get the parties -- we were not settled on
3 the question of the pipeline because of the impacts.

4 STAFF COUNSEL WILLIS: Right. That was my
5 question. Is that the only piece of testimony that's
6 still unruled on?

7 HEARING OFFICER CELLI: I think so. Yes. Yes.

8 STAFF COUNSEL WILLIS: We so stipulate.

9 MR. SIMPSON: Can we start the question over
10 here?

11 STAFF COUNSEL WILLIS: It was my question and I
12 understand it now so --

13 MR. SIMPSON: You're throwing me off now.

14 HEARING OFFICER CELLI: Mr. Wilson, do you accept
15 the applicant's stipulation to admit all of your
16 testimony?

17 MR. WILSON: This includes 700, 701, 702, 703?

18 HEARING OFFICER CELLI: Yes.

19 MR. WILSON: No. And the reason I won't accept
20 that, because I think it's imperative that the Commission
21 hear from the pilots and users of that airport, the Bryon
22 airport where the space is going to be restricted or
23 reduced.

24 HEARING OFFICER CELLI: Let me offer one thing.
25 I want -- the Committee was asked to read all the

1 evidence. So we will read all the statements made. Two,
2 you can make the parties here to make the verbal comment.
3 We have yet to do comment today. We're going to hear
4 comment from the public. So they can address the
5 Committee that way.

6 But the question is -- see, in your case because
7 you're interested in traffic and aviation, you'd like to
8 spend about six hours on traffic and aviation. But since
9 really we're down to some fraction of that -- I don't
10 remember how much -- we need to move with alacrity. And
11 what's the beauty of what the applicant is offering is
12 that all of your testimony goes in.

13 If you don't make the stipulation, then what you
14 have is a formidable attorney who's going to be able to
15 argue they lack foundation. They lack expertise. There's
16 no authentication. Whatever he's going to come up with,
17 there is a lot of legal basis that he could use to
18 undercut your evidence and prevent it from coming in. And
19 he's saying I'm willing to give up. I'm willing to
20 give -- waive my right to all those objections in the
21 interest of time if the parties will just stipulate and
22 move those in. That's what he's offering.

23 MR. WILSON: So has CalPilots' 700, 701, 702, 703
24 been accepted?

25 HEARING OFFICER CELLI: It will be at the

1 evidentiary hearing. Right now, what's been offered is a
2 stipulation which pretty much guarantees that you're going
3 to get that evidence into the record at the evidentiary
4 hearing if you accept that stipulation.

5 MR. WILSON: Okay. Very good. Thank you.

6 And then CalPilots has the right to cross-examine
7 their testimony?

8 HEARING OFFICER CELLI: Right. You're going to
9 be able to cross on testimony of any witnesses called.
10 And what we're doing in this process right now is making
11 sure that we're only calling witnesses that need to be
12 called that are -- there is a real dispute and that's what
13 we're trying to get to.

14 So I hope I'm answering your question. Am I?
15 Did I answer your question?

16 MR. WILSON: Yes.

17 HEARING OFFICER CELLI: So are you willing to
18 accept the stipulation?

19 MR. WILSON: CalPilots will accept the
20 stipulation.

21 HEARING OFFICER CELLI: Thank you.

22 Ms. Jennings, you look like you'd like to address
23 the Committee.

24 MS. JENNINGS: Yes. I just would like some
25 clarification. The proposal from applicant is that none

1 of the intervenors' witnesses will testify. They will
2 just come in on the papers. All testimony from the
3 intervenors will come in on the papers only.

4 HEARING OFFICER CELLI: The testimony we've
5 received to date.

6 MS. JENNINGS: To date. And then the applicant
7 is not stipulating to the truth of anything that is
8 submitted. They will argue in their briefs against the
9 testimony of the intervenors?

10 HEARING OFFICER CELLI: Right. And the
11 intervenors obviously will take the opposite position and
12 say based on the evidence we put in, here's our position.

13 MS. JENNINGS: Thank you. Can I talk to the
14 intervenors? This is something I've not seen before. If
15 the intervenors can get together and take a break and talk
16 about whether this should be --

17 MR. WHEATLAND: We've done this hundreds of times
18 in Commission proceedings.

19 MS. JENNINGS: I've not seen this, so I would
20 like to have some time to talk to the intervenors.

21 HEARING OFFICER CELLI: Actually, I do like where
22 you're coming from, Ms. Jennings. So when we get back --
23 let's take a little break.

24 MR. SARVEY: Can we ask one question before we
25 go? This is going to help the discussion quite a bit.

1 He's stipulating not to cross-examine any of the witnesses
2 or challenge their testimony. I've got several
3 intervenors I've already listed I wanted to cross-examine.
4 That's not precluding myself from cross-examining? That's
5 my question.

6 HEARING OFFICER CELLI: I'm not sure. You want
7 to cross-examine the intervenors?

8 MR. SARVEY: I listed in my testimony several of
9 the intervenors' testimony that I wish to cross-examine.
10 I don't care whether he stipulates to them or not. But I
11 still want to ask my questions of those intervenors so --
12 he may not want to, but I do.

13 HEARING OFFICER CELLI: That's correct. You have
14 that right.

15 Mr. Wheatland.

16 MR. WHEATLAND: But do they have that right? The
17 Commission has had -- the Commission has had a very strong
18 policy over the years of not permitting friendly cross.
19 In other words, before a party is permitted to
20 cross-examine another party, their interests have to be
21 adverse.

22 HEARING OFFICER CELLI: I thought you meant that
23 you had a hostile interest, Mr. Sarvey. In other words,
24 you're at --

25 MR. SARVEY: I've got a question about particular

1 the air traffic testimony that's been proffered. And just
2 because he doesn't want to ask questions of those folks
3 doesn't mean that I don't want to. I've already listed --
4 if you're telling me now I can't ask the intervenors
5 questions, that's a whole other ball of worms. But as far
6 as he doesn't wasn't to cross-examine the intervenors,
7 fine. I can stipulate to that. But I'm not stipulating
8 to the fact that I'm not going to ask him some questions.
9 Because I have some questions about these demographics and
10 Mountain House, some of the property value testimony that
11 was laid out, particularly the air traffic testimony. And
12 also asking questions about the --

13 HEARING OFFICER CELLI: So you question the
14 credibility of this evidence?

15 MR. SARVEY: The correct?

16 HEARING OFFICER CELLI: Yes, sir.

17 MR. SARVEY: Not necessarily. Not necessarily
18 the correct. But I have some questions about their
19 testimony.

20 HEARING OFFICER CELLI: When you say questions --
21 here's what I'm trying to get to. Do you understand what
22 Mr. Wheatland was talking about when he said friendly
23 cross?

24 MR. SIMPSON: Was there some citation for that?

25 HEARING OFFICER CELLI: You know, essentially,

1 let's put it this way. This is a procedural issue that's
2 going to be governed by the Committee. And what we're
3 trying to do is efficiently get the information in. You
4 have some testimony that you've got air testimony that you
5 want to put in. You've put in your air testimony. Now,
6 right now, without a stipulation, your testimony is
7 subject to challenge from who ever, okay.

8 MR. SARVEY: That's fine.

9 HEARING OFFICER CELLI: Including its
10 admissibility. And what he's willing to stipulate is that
11 that testimony is admissible and it comes in without
12 objection. So you would not need to call -- I guess in
13 your case it would be yourself as a witness to testify and
14 you would not need to be cross-examined on your testimony.
15 In other words, your testimony would stand on its own two
16 feet. It would come in on its own. And it would come in
17 unchallenged.

18 Do you understand that? I don't want to put
19 words in your mouth, Mr. Wheatland, because this is your
20 stipulation.

21 MR. WHEATLAND: That's exactly right.

22 HEARING OFFICER CELLI: So that's what he's
23 putting out there.

24 MR. SARVEY: I understand that. But Mr. Mainland
25 wants to ask a question about air quality, I mean,

1 friendly cross, I mean, every time you introduce your
2 witness and ask them to elaborate on their testimony,
3 that's friendly cross.

4 HEARING OFFICER CELLI: What I'm trying to avoid
5 is this: There is points that you're making in your air
6 quality testimony. Okay. Now, if Mr. Mainland wants to
7 say Mr. Sarvey, is that point that you made really, really
8 true, it's like it doesn't do anything except waste our
9 time.

10 You know, what we're looking for -- again, I want
11 to be clear with all of you. We want to know where the
12 disagreements are so we can really hear the pros and cons
13 and weigh that evidence. But for someone to say, yeah, I
14 agree with that guy and heap on more and more cumulative
15 evidence, I'm trying to avoid that.

16 I'm just trying to do what we can to be as
17 efficient as we can so we really get to the heart of the
18 matter. What are the issues that you have? What are the
19 things that people are fighting over and let's hear the
20 fight. What are the two positions? What's the evidence?
21 How are we going to come to a decision on that? That's
22 what we're here for. That's the purpose of all that.

23 MR. SINGH: So let me make it very clear. So
24 will I be given the opportunity to cross-examine other
25 intervenors?

1 HEARING OFFICER CELLI: No. Not in the context
2 of what we were just describing. In other words, if Mr.
3 Sarvey's testimony comes in as -- basically it's been
4 allowed in and it's over no objection, there's no need for
5 Mr. Sarvey to testify. Now, if you have a genuine
6 dispute, Mr. Singh, let's say Mr. Sarvey said something to
7 hurt your position having to do with Mountain House
8 somehow -- I'm not sure but let's just imagine, then you
9 would have the right to cross-examine Mr. Sarvey on that
10 point. Because that's a point in dispute. That's a real
11 controversy. Am I --

12 MR. SINGH: Yes. So let's say I want to
13 cross-examine Rajesh, right, on some of the facts which I
14 do not know, although we are buddies. But I want to bring
15 those facts to the hearing officer here for examination --

16 HEARING OFFICER CELLI: That's what I'm trying to
17 avoid. If the stipulation came through, all of this
18 evidence is in. All of the evidence that he put in is in.

19 MR. SINGH: But let's say some of the evidence
20 he's not able to put but we should be given the
21 opportunity that as you cross-examine him to come up with
22 some facts. The reason I'm telling is think about a
23 situation, right, there is another 20 days plus 10 days
24 for the evidentiary hearing. Some of these people sitting
25 here -- I'm sorry to use -- they may get brought over by

1 Mr. Mitsubishi. Please excuse me for using that although
2 it is not going to applicant. So now the things done that
3 that aren't against us that we should be given the
4 opportunity to cross-examine them.

5 HEARING OFFICER CELLI: I'll tell you what I
6 think is appropriate now. I think we're going to take our
7 break. This is a working break. This isn't just a break,
8 break. I want the parties to meet and confirm with
9 Jennifer Jennings if you would, please, and talk about the
10 pros and cons and understand from Mr. Wheatland what he's
11 offering and what the expectations are. If we take a 15
12 minute break, 15 minute breaks would be 20 minutes until
13 4:00 and then we will decide whether the stipulation -- we
14 want to go forward with the stipulation or not. I'll see
15 you at 20 to 4:00.

16 (Off record.)

17 HEARING OFFICER CELLI: Thank you for taking that
18 time. I hope it was productive. Thank you, Jennifer
19 Jennings, for facilitating that discussion.

20 I wonder, it might be useful, Ms. Jennings, if
21 you wanted to kind of have anything to report or should we
22 just proceed. Let's hear from Jennifer Jennings.

23 MS. JENNINGS: Thank you. I think Mr. Wilson was
24 prepared to speak on what the intervenors decided.

25 HEARING OFFICER CELLI: Mr. Wilson, go ahead.

1 MR. WILSON: Mr. Hearing Officer, CalPilots after
2 a meeting with the Hearing Officer, discussion of some of
3 the issues that you brought up about reducing time, at
4 this time CalPilots would like to retract our stipulation
5 on the items that we agreed to and I think you're going to
6 hear the same from the other intervenors, that they will
7 not stipulate.

8 We feel that the Commission has to hear our
9 witnesses and we've also agreed to some meetings and have
10 better communication amongst us to try to whittle down the
11 time. And that's where we are right now.

12 HEARING OFFICER CELLI: Thank you.

13 So can I just looking across at the intervenors,
14 do I have nodding heads? Everybody is nodding their head
15 in agreement.

16 So the stipulation will not carry and the parties
17 will have to put in their evidence, suffer whatever
18 objections and motions may arise thereafter.

19 STAFF COUNSEL WILLIS: Mr. Celli, just a point of
20 clarification. At the time of the prehearing conference
21 statement, we had not seen all of what was called rebuttal
22 testimony. That in our mind was basically the first time
23 we had ever seen it before. So it was opening testimony
24 for us. We did not indicate we would be cross-examining
25 anyone, but we would like to reserve time if needed to

1 cross. But we also would like to be able to provide
2 rebuttal testimony for those areas that we saw for the
3 first time.

4 HEARING OFFICER CELLI: We would grant the
5 applicant -- sorry -- staff, the same February 14th date
6 for rebuttal to -- this is limited, right, to those
7 matters that you saw for the first time as opening
8 testimony on rebuttal.

9 STAFF COUNSEL WILLIS: Well, we were just wanting
10 to incorporate it just into our testimony. This isn't
11 really formal rebuttal but just in case. Most of the
12 information that was brought up somehow related to
13 something in staff's testimony which I believe we can do
14 without actually doing a rebuttal but just referring to
15 their previously filed testimony. We didn't plan on
16 filing additional testimony.

17 HEARING OFFICER CELLI: Well, my concern -- I
18 mean, what my thought would be is that if you were given
19 the right to file the rebuttal them, there may not be the
20 necessity to call a witness.

21 STAFF COUNSEL WILLIS: Well, our witnesses are
22 going to be here. They're not -- ours are the ones that
23 were essential to be here.

24 HEARING OFFICER CELLI: Right.

25 STAFF COUNSEL WILLIS: So it's not that we're

1 going to provide new witnesses or new testimony that in
2 the instance that some additional topic like for example
3 Mr. Celli's data that we will be discussing probably for
4 hours and hours because we're not coming to a decision
5 that that can go in --

6 HEARING OFFICER CELLI: We won't be discussing
7 for hours and hours.

8 STAFF COUNSEL WILLIS: It's really the basis for
9 their environmental justice complaint. So since that
10 hasn't been resolved, our staff will have to be discussing
11 that and it may -- it may include some rebuttal to some of
12 the things or we may be objecting to his documents as not
13 being testimony because he can't lay -- he probably will
14 not be able to lay a foundation for supporting it. I
15 mean, a newspaper article that you just found does not
16 constitute testimony.

17 HEARING OFFICER CELLI: So you're saying that
18 you're rejecting the ability to file rebuttal testimony on
19 the 14th?

20 STAFF COUNSEL WILLIS: At this point we're going
21 to be filing testimony on or briefing the gas line issue
22 that was outside of our jurisdiction --

23 HEARING OFFICER CELLI: That was a yes or no.

24 STAFF COUNSEL WILLIS: I'm just telling you and
25 trying to get a workshop at the same time. So I guess my

1 answer is no, we're not going to be filing additional
2 rebuttal testimony on the 14th. We just wanted to be able
3 to if there is -- because it feels like it's becoming a
4 little bit of an unstructured that we are being able to
5 provide some rebuttal testimony on the stand if that so is
6 warranted at the time. I'm very confused about how the
7 intervenors are going to be cross-examining each other.

8 HEARING OFFICER CELLI: They aren't.

9 STAFF COUNSEL WILLIS: Well, that's what they've
10 indicated they wanted to do.

11 HEARING OFFICER CELLI: I'm trying to make that
12 clear that we're not going to have friendly cross. You're
13 not going to be able to sit there and make points in
14 cross-examination by somebody else's witnesses. You can
15 make your points on your testimony and that's the way you
16 do it.

17 Now, Mr. Mainland, you had a question.

18 MR. MAINLAND: If I could ask, what is your basis
19 for saying no friendly cross? Because my impression has
20 been that's never been the case in the hearings.

21 HEARING OFFICER CELLI: That has always been the
22 case in every hearing I've ever done. And the basis is is
23 that the Committee isn't going to put up with it. We
24 don't have the time for that. That's a luxury we don't
25 have. So to sit there and have you call a witness and

1 then have Mr. Sarvey ask more points on that same witness
2 when that information is already in the record by way of
3 written testimony, why do we need to do that? That's a
4 waste of time.

5 MR. SARVEY: I think if you take that position,
6 you can't allow staff and applicant to ask anything
7 because from the sounds of it they agree on everything.

8 STAFF COUNSEL WILLIS: We said we were not going
9 to do that. That was part of our prehearing conference
10 statement. We said we were not going to be crossing
11 anybody at that point in time.

12 MR. SARVEY: And that's still your statement?

13 HEARING OFFICER CELLI: Yes.

14 STAFF COUNSEL WILLIS: Well, no because after
15 that you all filed a whole stack of testimony that was
16 termed rebuttal and it wasn't.

17 HEARING OFFICER CELLI: So I want to point out
18 right now is that this is an conference and we're having a
19 bit of an informal discussion right now. But if this were
20 an evidentiary hearing, where would be no cross talk like
21 this. All of the discussion is directed to the Committee
22 and we call on one person at a time and we don't talk
23 across the table at the hearing. So I'm allowing it now.
24 I'm just making a point because it came up.

25 So go ahead, Mr. Simpson.

1 MR. SIMPSON: Could I propose a stipulation that
2 we consider Mountain House an environmental justice
3 community?

4 HEARING OFFICER CELLI: I actually don't know if
5 that determination can be made. You might want to talk to
6 the other parties about that if they're willing to
7 stipulate that Mountain House is an EJ community. Then at
8 the evidentiary hearing we would accept that stipulation.

9 MR. SIMPSON: Should I talk to them now?

10 HEARING OFFICER CELLI: Well, I mean, you're
11 going to have a workshop before our evidentiary hearing.
12 So that would be the time for you all to work out these
13 things. Okay.

14 So, yes, stipulations as Mr. Simpson just raised,
15 that's what workshops are all about. You go to the
16 workshop so you can find out what things you can take off
17 the table by way of stipulation, agreements. That's what
18 we want to do.

19 MR. SINGH: So I have a question.

20 HEARING OFFICER CELLI: Mr. Singh.

21 MR. SINGH: Before we went for break, Mr. Celli,
22 there was one big concern. We have another 15 days to go
23 for evidentiary hearing. So again, if some of us get
24 brought over on the line in 20 days, now, friendly -- if
25 we do cross -- if you don't allow us to have a

1 cross-examination because you think like we are friendly
2 but we need to take care of that. We should cross-examine
3 and get the data out.

4 HEARING OFFICER CELLI: Do you remember what I
5 explained to you what a motion was, which is basically a
6 request to the Committee to take some action or to do
7 something. That's all that a motion is. It's a request.
8 So you would come to us and say I request
9 cross-examination on Mr. Dighe's witness because -- and
10 you would explain your case. And then we would say, okay,
11 you've made a case or why you are at odds with each other.
12 He's been bought off by Mitsubishi. Therefore, you have
13 adverse interests or whatever.

14 MR. SINGH: Okay. You know, anyway --

15 HEARING OFFICER CELLI: Do you understand --

16 MR. SINGH: Very much. But at the same time, do
17 I have the confidence that you will allow me for the
18 cross-examination? I will come and talk to you, but will
19 you give me the opportunity to do the cross-examination
20 from my point?

21 HEARING OFFICER CELLI: Here's what we're looking
22 at. Right now -- okay. Let me make it from the
23 beginning. There's a thing called the burden of proof. I
24 hope you all know what the burden of proof is, but what
25 the burden of proof is is the obligation of the party to

1 go forward and prove their case. The burden of proof is
2 with the applicant. It's on them to show that this
3 project will have no significant impacts on the
4 environment or public health. That's their burden.

5 Now, what is the standard that we're using is
6 called the preponderance standard. Like this, you know
7 when you do jury duty and you do criminal law and they say
8 you have to prove beyond a reasonable doubt, that's not
9 the preponderance standard. Preponderance means if
10 somebody has 51 percent and the other person has 49
11 percent, the person with the 51 percent wins. Put another
12 way, if Mr. Wheatland puts on evidence that we think takes
13 you up to 50 percent and you put on evidence that takes it
14 down to 50 percent so it's an absolute equilibrium, you
15 won and he loses because he has the burden of proof and
16 you don't and he didn't meet his burden.

17 That's -- do you understand what I'm saying by
18 burden of proof? That's what I describe is the burden of
19 proof. He's got the obligation to go forward. So that's
20 why he gets to do the things like rebut and bat last
21 because in fairness, he puts on the evidence, everybody
22 crosses, and then he gets to put in the last word.

23 MR. SINGH: Another question I have is let's say
24 on cross-examination I'm cross examining the applicant.
25 Now --

1 HEARING OFFICER CELLI: I actually -- I was
2 getting to your first question. Let me just finish.

3 So presumably you are at odds -- your interests
4 are adverse to the applicant. Let's say Mountain House
5 doesn't want the power plant. They want the power plant.
6 You don't. Okay. So traditionally, what you're trying to
7 do if they put on a witness is you're going to
8 cross-examine that witness to try to find and demonstrate
9 the holes in his testimony. That's normal
10 cross-examination. Okay.

11 If the staff puts on witnesses that shows that
12 there's no EJ community in Mountain House and you have
13 evidence that says that there is, you're going to cross
14 that witness because you're at odds. You're adverse.
15 Because if Mr. Dighe puts on evidence that shows that
16 Mountain House is an EJ community and you've shown it's an
17 EJ community also that's not really cross-examination, to
18 take his witness on and say tell me more about what I want
19 to hear that makes my case, that's just what's called
20 needlessly cumulatively evidence.

21 MR. SINGH: I got it. So let me make two points
22 very clear. So let's say I can come here not to
23 cross-examine but I can ask questions from them, right?

24 HEARING OFFICER CELLI: Yes.

25 MR. SINGH: I can do that.

1 HEARING OFFICER CELLI: Yes. And I'm encouraging
2 you to do that, working -- in other words, you're going to
3 come in here with a list of questions for every witness
4 you want to call and every witness you want to
5 cross-examine. Two heads are better than one. If you and
6 Dr. Dighe put your heads together and now you say I have
7 no cross because you know Mr. Dighe is going to be
8 crossing and asking your questions. Do you know what I'm
9 saying? I'm saying you will be able to cross the witness.
10 But I'm saying in the interest of time I'm hoping you will
11 all work together.

12 MR. SINGH: So let's say I bring Rajesh and I
13 have a few questions I ask him to give me the data X, Y,
14 and Z, because I was not able to file in the report but
15 the data is aligned with him, so I could able to do that,
16 right? I'm not cross-examination but I'm asking him can
17 you give me the data or show me the data which you have in
18 your mind. Can I do that?

19 HEARING OFFICER CELLI: Are you asking about new
20 information that you didn't say was in the prehearing
21 conference statement?

22 MR. SINGH: Right.

23 MR. WHEATLAND: If I could, I think he's asking
24 whether if Mr. Dighe is on the stand whether he can ask
25 Mr. Dighe additional direct or do additional discovery of

1 Mr. Dighe.

2 HEARING OFFICER CELLI: Right. In other words,
3 you're limited by the scope on cross-examination by the
4 scope of the direct examination. You understand what I'm
5 saying when I say direct and cross everyone? Direct
6 examination is when the person calls a witness. If
7 Ms. Willis calls a witness to take the stand and she says
8 what is your name, what do you do, what's your testimony,
9 that's direct examination. And then each intervenor would
10 be able to cross-examine that adverse witness. If they
11 want to. I'm hoping you'll consolidate, but you'll be
12 given the right to cross-examine that witness. Okay. And
13 everybody gets to cross-examine that witness.

14 MR. SINGH: Okay. So --

15 HEARING OFFICER CELLI: But that's going to be
16 subject to the usual objections like asked and answered.

17 MR. SINGH: So let's say I ask questions from the
18 applicant and applicant doesn't want to reveal the data,
19 how shall I go about compel to motion to reveal the data
20 everyone? It's again coming back to my discovery question
21 that I'm asking applicant that did not apply to me because
22 of the sensitive word of overburden to provide the data.
23 But can I ask those questions to give me the data, the X,
24 Y, Z?

25 HEARING OFFICER CELLI: You're asking me about a

1 specific objection to a specific question, and I'm not --
2 I can't really pre-rule on what any of our rulings are
3 going to be. But I think what I would do is refer you to
4 the public advisor, because her job is to tell you -- you
5 understand, Mr. Singh, that there is a part of me that
6 wants to give -- keep answering these questions for you.
7 And it's kind of unfair if I give you the benefit of my
8 legal perspective and I don't give it to everybody else.
9 I'm trying to be fair. We have to be unbiased and
10 unprejudiced up here. But the public advisor's job is to
11 advocate -- well, not necessarily advocate, but her job is
12 to support -- what was your word?

13 STAFF COUNSEL WILLIS: Help.

14 HEARING OFFICER CELLI: Help them through the
15 process. That's what her job is, is to help you. She's
16 an experienced qualified lawyer who can answer these kinds
17 of questions. That's what we do.

18 STAFF COUNSEL WILLIS: Mr. Celli, as a point of
19 clarification, the cross-examination isn't the time to do
20 additional discovery. And staff will object vehemently.
21 That's what Mr. Singh's question was is can he
22 cross-examine.

23 HEARING OFFICER CELLI: And Jennifer Jennings
24 will straighten him out.

25 STAFF COUNSEL WILLIS: I just want to make sure

1 that's clear now that we would be objecting to further
2 discovery that was denied because it wasn't timely and
3 then we use a valuable hearing time to start getting
4 obligates and pieces of new data.

5 HEARING OFFICER CELLI: So that won't happen.
6 But I still encourage you to talk to the public advisor
7 about that. But so now I want to -- Mr. Wheatland, did
8 you have anything to add?

9 MR. WHEATLAND: I think we've covered it.

10 HEARING OFFICER CELLI: What I would like to do
11 now is talk about your evidence. I'm just going to
12 acknowledge that Mr. the applicant I've received exhibits
13 1 through 67. From staff, I've received Exhibits 300
14 through 302. Mr. Sarvey, I received exhibits 400 through
15 14, but Exhibit 409, I don't know if you skipped one.

16 MR. SARVEY: Yeah, I skipped one.

17 HEARING OFFICER CELLI: So we'll treat 409 as
18 essentially omitted or something like that. In other
19 words, I don't like to disrupt the consecutive numbers so
20 I'm just going to say left blank on purpose or something
21 like that. 401 I don't have anything as Exhibit 401. So
22 both of those would be -- I'd leave them as blank or
23 omitted or something like that.

24 Mountain House has no exhibits.

25 Dighe has Exhibits 600 through 609.

1 MR. DIGHE: I just want to clarify that the issue
2 which we had with the links, so I will be submitting the
3 video and I think there are a probably couple of things in
4 Exhibit 609 that I will be submitting.

5 HEARING OFFICER CELLI: And we will take that up
6 at the evidentiary hearing, but my advise to you is to do
7 it fast, fast, fast.

8 MR. DIGHE: Today.

9 HEARING OFFICER CELLI: So that the applicant is
10 in a position to appropriately respond.

11 CalPilots, I have 700 through 703.

12 MR. WHEATLAND: I have a question on CalPilots,
13 the reference to the opening testimony. Is there
14 additional rebuttal testimony from Mr. Wilson?

15 HEARING OFFICER CELLI: I don't -- I haven't
16 received any. I only have Exhibit 700 through 703. Is
17 that right?

18 MR. WILSON: That's correct at this point.

19 HEARING OFFICER CELLI: So --

20 MR. WHEATLAND: I thought there was additional
21 rebuttal testimony and in addition to the opening
22 testimony? Or is this --

23 MR. WILSON: We had a joint -- that you're
24 referring to the joint rebuttal that Mr. Sarvey wrote? It
25 included CalPilots and it included --

1 MR. WHEATLAND: I'm referring to documents
2 entitled "CalPilots rebuttal testimony."

3 HEARING OFFICER CELLI: I'll tell you what I
4 have. I'm trying to find my list here. CalPilots -- you
5 know why? Because you had sent me a separate sheet of
6 your exhibits list. But the exhibit list that I received
7 from you was only 700 through 703.

8 MR. WILSON: Correct.

9 HEARING OFFICER CELLI: So that should be 700,
10 701, 702, 703, that's four documents.

11 MR. WHEATLAND: Right. But there's a document we
12 received that's captioned CalPilots rebuttal testimony. I
13 I'm trying to determine whether that's a document that Mr.
14 Wilson intends to -- it's updated, but it has attached to
15 it a CalPilots resume.

16 MR. WILSON: Yes. It's CalPilots rebuttal
17 testimony.

18 HEARING OFFICER CELLI: Did you mean to put that
19 into evidence?

20 MR. WHEATLAND: The dates don't match. The
21 declaration was executed January 21st, 2000 --

22 MR. WILSON: CalPilots will submit that as 704.

23 HEARING OFFICER CELLI: Well, I take it over
24 objection.

25 MR. WHEATLAND: The only objection because the

1 declaration is dated January 21st and it's signed February
2 7th. It supports our position they withheld the document
3 until rebuttal.

4 HEARING OFFICER CELLI: What is the date that you
5 received the document?

6 MR. WHEATLAND: It was on the date that it was
7 due for rebuttal testimony is the date we received it.

8 HEARING OFFICER CELLI: And that was the 21st,
9 wasn't it? As I recall.

10 MR. WHEATLAND: I believe it was February 7th.
11 Dated February 7th. Yeah, whatever the date of rebuttal
12 testimony is the date that --

13 MR. SIMPSON: It's rebuttal testimony on the
14 rebuttal testimony day.

15 MR. WHEATLAND: But I didn't see it on the list
16 and I didn't want CalPilots to miss out on it just because
17 of their inadvertence.

18 HEARING OFFICER CELLI: For the record, 704 would
19 be called -- will be marked for identification as
20 CalPilots rebuttal testimony.

21 MR. WILSON: That's correct.

22 HEARING OFFICER CELLI: Did you serve that on me?

23 MR. WILSON: Yes, I did.

24 HEARING OFFICER CELLI: Paper or electronic?

25 MR. WILSON: Both.

1 HEARING OFFICER CELLI: I'll go looking for it.

2 And you will, I take it, reserve the right to object?

3 MR. WHEATLAND: Yes.

4 HEARING OFFICER CELLI: So I'm going to go ahead

5 and just basically say CalPilots at least for now is

6 Exhibit 700 through 704 marked for identification.

7 Mr. Singh, you gave me Exhibit 800 through 803,

8 but I don't have an Exhibit 802. So what I got from Mr.

9 Singh is --

10 MR. SINGH: I think there was a link. I don't

11 have the documentation in front of me.

12 HEARING OFFICER CELLI: I have -- let me pull it

13 up. You had moved in all of Sarvey's exhibits. And

14 Sarvey's exhibits will come in on their on two feet as it

15 were. But you were putting in 800 says discovery

16 document. 801, environmental justice for racial

17 minorities and 803, Census track 5203, but I have no

18 Exhibit 802. Did you intentionally omit that number?

19 MR. SINGH: Not intentionally. I think I was

20 trying to include the document probably I missed that

21 about the evidence about how the impact is having on the

22 Mountain House. So --

23 HEARING OFFICER CELLI: Well, I have not received

24 that.

25 MR. SINGH: So is it possible I can send it by

1 today?

2 HEARING OFFICER CELLI: You can -- the point is
3 that it's going to be over objection. We've not seen it.
4 It's not been identified. And unless I already have it
5 and you just accidentally omitted to list it here, but you
6 gave it to me with your other testimony, that would be a
7 different case.

8 MR. SINGH: Okay.

9 HEARING OFFICER CELLI: So this isn't an
10 opportunity to reserve the number in case you forgot
11 something. You come to the prehearing conference and, oh,
12 by the way, I want to insert something in 802.

13 So I'm just going to leave that open and call it
14 omitted.

15 Sierra Club, 900 through 901; is that correct?

16 MR. MAINLAND: That is correct.

17 HEARING OFFICER CELLI: Mr. Simpson was only
18 1,000?

19 MR. SIMPSON: I'm sorry

20 HEARING OFFICER CELLI: You have one exhibit,
21 Exhibit 1,000?

22 MR. SIMPSON: Yes, sir.

23 HEARING OFFICER CELLI: That pretty much covers
24 exhibits. I passed out exhibit list. If there's any
25 differences or changes, please put in your and send your

1 changes to me and Maggie Reed to tell us what the docket
2 number is. If you've omitted a docket number, we'll need
3 your docket number. So we covered witness. We covered --
4 I want to thank you all. This is a lot of hard work. And
5 I know you're trying to do your best. I want to thank you
6 in advance for taking advantage of the workshop, because
7 hopefully you can clear up the small stuff in the workshop
8 so that we can deal with the big problems and big issues
9 at the hearing.

10 We are on next to the briefing schedule.

11 Mr. Sarvey, you had a question?

12 MR. SARVEY: The witness list?

13 HEARING OFFICER CELLI: The witness list?

14 Actually, I didn't send out -- or did I? Ms. Jennings, I
15 gave you the witness list, but I neglected to send it out.
16 I have a witness list, which I can send out, but I loathe
17 to do it.

18 MR. SARVEY: I just have one question about the
19 witnesses.

20 HEARING OFFICER CELLI: Yes, go ahead.

21 MR. SARVEY: Is staff going to be presenting in
22 Alameda County? They're deferring to Alameda County for
23 the land use source so I'd like to be able to
24 cross-examine Alameda County. It's listed in my
25 prehearing conference brief.

1 STAFF COUNSEL WILLIS: No.

2 HEARING OFFICER CELLI: Pardon me?

3 STAFF COUNSEL WILLIS: No. Alameda County is not
4 one of our witnesses. We'll be -- an outside agency will
5 be sponsoring --

6 HEARING OFFICER CELLI: From the Bay Area.

7 STAFF COUNSEL WILLIS: Right.

8 HEARING OFFICER CELLI: Let me -- this is an
9 important question for the Committee. Mr. Sarvey, I'm
10 going to paraphrase -- is asking whether the staff is
11 going to call any witnesses from Alameda County with
12 regard to land use. And staff has indicated they will
13 not. So I'm going to ask you, Mr. Sarvey, what is it --
14 can you give us more of the area --

15 MR. SARVEY: There is about 40 LORS in ECAP that
16 this project doesn't comply with. I don't think staff is
17 going to be able to answer those questions, but if they
18 want to try, that's fine.

19 HEARING OFFICER CELLI: Let me ask you something.
20 This isn't the same sort of area that we talked about
21 earlier about the difference between closing argument and
22 cross-examination. If there is a LORS that's been
23 violated, that's a question of law, more probably than a
24 question of fact. In other words, if there is testimony
25 that's in the record in the staff analysis that evidence

1 is a violation of some LORS that you have in mind, I'm
2 just trying to explore with you whether it's really needed
3 that you call someone from the county to say we think it
4 comports with the law or not, because what that ends up
5 being is essentially somebody's verbal brief versus your
6 verbal brief. I mean, an argument --

7 MR. SARVEY: I understand what you're saying, but
8 that's not the situation. The situation is there's
9 concrete LORS. Staff hasn't even addressed them in the
10 FSA and everywhere else. I'm not a qualified witness to
11 bring it forward in the testimony. So the only way to
12 bring it out is in cross-examination.

13 HEARING OFFICER CELLI: Actually, you are
14 qualified to present -- listen, you don't have to be a
15 lawyer to know what the law is. And in fact the law
16 presumes that we all know what every law on the books
17 says. And so you are qualified to say section blah, blah,
18 blah was completely ignored. The section applies because
19 of this or whatever, in your brief though. I'm just
20 saying that's a legal argument to state from a factual
21 problem or question such as how many desert tortoise were
22 found out at the property or something like that.

23 MR. SARVEY: I don't think it's going to quite
24 play out like that.

25 HEARING OFFICER CELLI: I don't know.

1 MR. SARVEY: I think that a witness from Alameda
2 County because staff is going to sit here and say, well,
3 Alameda County says all their LORS are satisfied. I'll
4 give you another example. They're telling us they don't
5 want us to cross-examine the Bay Area Air Quality
6 Management District on their FDOC. You go over to the Bay
7 Area Air Quality Management District Hearing Board and try
8 to get a hearing on an FDOC which is going to be an ATC
9 and they're going to say CEC adjudicates that, we don't.

10 HEARING OFFICER CELLI: Well, we are going to let
11 you cross-examine the Bay Area. The intervenors are going
12 to cross-examine whatever witnesses we call and one of
13 them is going to be Bay Area Air Quality Management
14 District witness.

15 STAFF COUNSEL WILLIS: My point of clarification
16 is that this isn't the time to replay all their comments
17 on the FDOC that were rejected during the Bay Area Air
18 Quality Management District's process which is not this
19 current procedure. And for us to waste a lot of time, we
20 can't rewrite the FDOC. We don't have that authority.

21 HEARING OFFICER CELLI: But I don't know his
22 questions until he asked. The question is does he get to
23 cross-examine Bay Area Air Quality Management District.
24 And the answer is yes. So you know, that much --

25 MR. SARVEY: The reason I say that is because if

1 I go challenge their ATC, they're going to tell me you
2 should have asked that question of the CEC even though
3 they rejected their FDOC. They say exclusive
4 jurisdiction. We can't touch it. It's happened more than
5 once.

6 And the other question I have are you going to be
7 the present Sacramento Valley Air Pollution Control
8 District witnesses?

9 HEARING OFFICER CELLI: Staff says no.

10 STAFF COUNSEL WILLIS: Our intent is to have the
11 air district in which the project is located and we're
12 providing that witness.

13 HEARING OFFICER CELLI: There you go.

14 MR. SARVEY: And if I ask questions on this
15 mitigation agreement, somebody is going to be able to
16 answer them?

17 HEARING OFFICER CELLI: The mitigation agreement
18 between --

19 MR. SARVEY: Between the applicant and the San
20 Joaquin Valley Air Pollution Control District which staff
21 is accepting as partial CEQA mitigation for this project.
22 I don't think that your witness is going to be able to
23 answer the questions I have related to the San Joaquin
24 Valley Air Pollution Control District.

25 STAFF COUNSEL WILLIS: Well, our witness may not

1 be able to but applicant's witnesses will be here. And
2 also just for the record, when the day changed for the
3 hearing, we do no longer have Brewster Birdsall as our air
4 quality witness available. So we'll be having to
5 substitute. Unfortunately, people take vacations and
6 everybody is scheduled around the original schedule.

7 MR. SARVEY: So should we just subpoena these
8 folks?

9 HEARING OFFICER CELLI: We're doing our best
10 here, folks, to make this work. Who's going to testify
11 about air quality if Brewster Birdsall isn't?

12 STAFF COUNSEL WILLIS: Well, that proposes
13 another issue because his supervisor is on jury duty for a
14 capital case and may or may not be available as well,
15 which would probably mean Matt Layton at this point.

16 HEARING OFFICER CELLI: So you're going to have
17 somebody to cross-examine.

18 STAFF COUNSEL WILLIS: Mr. Layton is very
19 qualified to testify as well.

20 HEARING OFFICER CELLI: I'm just -- I want to
21 answer your question, Mr. Sarvey.

22 MR. SINGH: Do you think we can do the deposition
23 on those people?

24 HEARING OFFICER CELLI: We don't do depositions.

25 So let me --

1 MR. MAINLAND: I wasn't clear on how you came out
2 on the question whether there would be an Alameda County
3 witness or not.

4 HEARING OFFICER CELLI: That's what I was still
5 trying to see what the relevance and what the use of the
6 witness would be.

7 MR. MAINLAND: I think Mr. Sarvey has already
8 indicated that.

9 HEARING OFFICER CELLI: That he want to question
10 how somebody -- you know, I'm kind of concerned, because I
11 know I read in the record that Alameda County came out in
12 favor of the project. And Contra Costa did as well. This
13 was really in the context of the airport, because the
14 Airport Land Use Commission did not. And such action as
15 the Board of Supervisors action for the county -- you're
16 shaking your head no. Who are you expecting to have here?

17 MR. SARVEY: The Board of Supervisors hasn't
18 taken any action on the application.

19 HEARING OFFICER CELLI: No. I thought we
20 received a letter from the Board.

21 MR. SARVEY: You received a letter not from the
22 Board of Supervisors. You received a letter from the
23 community development director and giving his opinion and
24 staff is referring to his opinion. I think his opinion is
25 wrong. But staff's deferring to him, then who do I ask

1 the question to.

2 HEARING OFFICER CELLI: But the question I'm
3 getting at is that what this seems to be about is
4 compliance with LORS. And you're just -- you're taking
5 positions that they're not in compliance. They're taking
6 the position that they are in compliance. And I think
7 that's a legal question, not a factual question.

8 Unless it is -- I mean, you know it better than
9 I. But I'm saying in general, that's a question that you
10 can show us based on the evidence and in a brief. And it
11 doesn't necessarily need a witness, because a lawyer can't
12 come in here and say this is what the law says and this is
13 what it means. We don't do that. You're not even allowed
14 to do that.

15 MR. SARVEY: Well, that's what the applicant's
16 air quality -- or their traffic -- air traffic witness is
17 saying that the CEC has no jurisdiction. They're
18 providing their legal opinion that the CEC can't even
19 opine on the air quality or the air traffic issues because
20 CEQA doesn't cover that. Only the FAA does. So if that's
21 the case, you would want to strike that testimony.

22 HEARING OFFICER CELLI: Well, the point is we're
23 going to hear contrary evidence. We're going to hear from
24 CalPilots and others about it.

25 MR. SARVEY: What I'm saying, you have the

1 applicant presenting legal lawyers as witnesses saying
2 that you got no jurisdiction over the air traffic issue.
3 That's something that should be stricken from the record.

4 HEARING OFFICER CELLI: No. We will give it the
5 weight it deserves. And if you know what I mean.

6 MR. SARVEY: I still think we have a legal right
7 to request it be stricken.

8 HEARING OFFICER CELLI: You do. And I'm not
9 ruling on that. I'm just saying this is the way that it's
10 going to lay out. There's going to be a motion, counter
11 motion. So we will deal with that.

12 Did we have anything -- Mr. Wheatland?

13 MR. WHEATLAND: Just on this point. As spelled
14 out in the Commission's regulations, one of the first
15 things that the Commission does when it sends an
16 application is to write all other interested State and
17 local agencies and ask for their determination with
18 respect to the consistency of the project to that agency's
19 LORS. That's a routine part of the Commission's process.

20 And in response to that, the agencies write back
21 to the Commission and give their opinion and
22 recommendations with respect to the project. The
23 Commission did write to Alameda County and Alameda County
24 wrote back to the Commission on a letter dated May 21st,
25 -- May 20th, 2010. The applicant and the staff have both

1 considered that letter in the formation of their testimony
2 on this issue. That letter is included and identified as
3 applicant's Exhibit 41. And we will have witnesses that
4 will be available to answer any questions with respect to
5 that exhibit.

6 HEARING OFFICER CELLI: Thank you. And we'll ask
7 those questions.

8 Staff.

9 STAFF COUNSEL WILLIS: Just as a follow up.
10 Staff often relies on other agencies, other local
11 jurisdiction fire departments, whatever, but we don't
12 generally ream everybody with us. We testify to what we
13 were told, what was sent to us, letters that were
14 received. I mean, this is a common practice. We don't
15 provide every county representative that we've talked to.
16 Our staff will be more than willing to answer questions
17 and under cross-examination on any of the information that
18 they received, how they received it, conversations that
19 they've had and so forth. But that is not our general
20 practice to bring all the references that we've relied on
21 with us to the hearing.

22 MR. SARVEY: Mr. Celli, if both these Altamont
23 tests the exact same situation came up the Commission
24 staff brought out Alameda County in both instance. Not
25 once, both. It's the same issues Measure D.

1 HEARING OFFICER CELLI: Who did they bring?

2 MR. SARVEY: They brought Adolph Martinelli who
3 is no longer -- he's now the applicant's hired gun. We're
4 asking for somebody from Alameda County, but if they don't
5 want to provide them --

6 MR. WHEATLAND: First of all, I object to the
7 characterization.

8 Second of all, I was counsel in the Altamont
9 proceeding and staff requested the county's participation
10 at the request of the Committee in that instance and the
11 county was kind enough to offer a person to come and
12 discuss these issues with the Committee.

13 HEARING OFFICER CELLI: Thank you for that
14 clarification.

15 I'm not -- frankly, I'm not inclined to go there,
16 because it sounds to me like a legal question.

17 MR. SARVEY: Well, in Tesla, they did the exact
18 same thing. I don't know if staff invited them or not.
19 They were never privileged to them. I'm surprised Mr.
20 Wheatland knows who staff was inviting or not inviting.
21 But in any event, it's a common practice -- and it's not
22 even a common practice. Both hearings we've had on these
23 issues in this exact area were the exact same issues,
24 Alameda County has appeared.

25 HEARING OFFICER CELLI: I think you're going to

1 be able to make your points without him legally.

2 MR. SARVEY: As long as they don't call it a
3 surprise.

4 HEARING OFFICER CELLI: But I want to also -- the
5 reason we're meeting right now is because I'm trying to
6 reduce time, not increase time. And this seems to me to
7 be a no-brainer that you can tackle this one as a legal
8 issue. Now, if it turns out, if it sounds like there is a
9 factual issue that needs to be resolved and that comes out
10 in the evidence, we'll revisit the question.

11 MR. SARVEY: Thank you.

12 HEARING OFFICER CELLI: I'm not hearing that
13 right now.

14 I want to move onto briefing schedule.

15 Mr. Mainland.

16 MR. MAINLAND: Yeah, a few questions

17 HEARING OFFICER CELLI: I'm sorry. I'm getting
18 the sounds from up here. I can't tell direction wise.

19 MR. MAINLAND: Rather than belabor this, I just
20 raise one issue that getting somebody's testimony about a
21 letter that is said to have been received from Alameda
22 County or the staff testifying as to what they heard from
23 Alameda County, this is not the same as having an Alameda
24 County representative on authority to take questions.
25 It's -- I won't call it hearsay, but it's similar to it.

1 So this is an extremely important big impactful
2 project. And on this question of land use, I think
3 everybody, the CEC, others, deserve a direct testimony
4 from Alameda County.

5 This is certainly the position of my attorney who
6 can't be here today but is a resident of Alameda County,
7 and he requested me to assert this in fairly strong terms
8 that on this issue of land use he would hope that you
9 would see fit to have the appropriate official from
10 Alameda County present.

11 HEARING OFFICER CELLI: Well, thank you. I got
12 the communication. I'm not hearing a fact need. It
13 sounds like a legal call. And we'll see what the evidence
14 brings in and then make another determination if we have
15 to at this time.

16 Mr. Wheatland.

17 MR. WHEATLAND: Before we go to briefing, can we
18 discuss briefly the division of testimony during the two
19 days? It would be helpful if we can identify the topics
20 that will be heard the first day so that we don't need to
21 bring all of the witnesses for the second day to that
22 hearing.

23 HEARING OFFICER CELLI: One of the questions that
24 I need the parties to clarify for me is whether that
25 evidence -- that image that was up earlier is an accurate

1 reflection of the values that -- areas that need to be
2 discussed. I'm talking about this. I'm holding up the
3 pie chart. And my question is: Is this an accurate
4 reflection of how much time of the relative weight we
5 should give these topics? Because if it is, then I have a
6 generalized view of how you would proceed, I think. And
7 this is based on requests the number -- enough time for
8 cross-examination by the parties. So what I came up with
9 would be that land and air quality -- when I say air
10 quality, I'm including public health would be -- would
11 take up to about 4:00 in the afternoon on day one.

12 MR. WILSON: Hearing Officer Celli, Andy Wilson,
13 CalPilots.

14 This could be referred to as just one morning for
15 the evidentiary hearing. So are we going back to the two
16 days based on the original number of hours that you had --

17 HEARING OFFICER CELLI: Right. That was the
18 question. So I'm sharing with you -- based on this pie
19 chart, what I was able to figure out is we could do this
20 if we do land and air quality on day one before public
21 comment at 5:00. And after public comment we get the
22 aviation and sociology -- socioeconomics, rather.

23 MR. WILSON: And how much time for direct and
24 cross are we talking about then?

25 HEARING OFFICER CELLI: The entire all of the

1 direct and cross has about little under two hours for
2 aviation.

3 MR. WILSON: The only question I have about the
4 two hours, I think we might be able to do it much less
5 time than that, but it's the number of witnesses that the
6 applicant has and the volumes of documents. And it might
7 take two or three of the aviation consultants to respond.
8 And so it depends how quick the applicant can come back
9 with the answer.

10 HEARING OFFICER CELLI: And one of the things as
11 you can see here -- the BBID was good enough to lay out.
12 I told them how I wanted the room to lay out. But the
13 parties can call panels instead of calling one witness at
14 a time and eating up the clock with one person getting up
15 and back they get to call all of their aviation people.
16 They all sit there and they bounce the microphone back and
17 forth, the same with staff's panels. And that will speed
18 things up.

19 Mr. Wheatland.

20 MR. WHEATLAND: I was going to say, for example,
21 on aviation, we would be pleased to offer our witnesses as
22 a panel.

23 HEARING OFFICER CELLI: And that's what we're
24 going to do.

25 MR. WHEATLAND: And I'd also -- we're not

1 intending to do additional direct testimony. I understood
2 your admonition earlier we're not going to be doing the
3 preliminary as additional direct. We're going to put the
4 witness on the stand, have them sworn --

5 HEARING OFFICER CELLI: You have to appreciate
6 what we're doing is milking the maximum time out of the
7 time that we have. So that's great. So thank you for
8 doing that, Mr. Wheatland. That answers your question.

9 Mr. Simpson.

10 MR. SIMPSON: Given the reality this is not
11 likely to finish in two days and we don't have Dr.
12 Birdsall or an air quality lined up, what about taking air
13 quality off of the first two days and bringing that when
14 they have a witness that actually knows what was testified
15 to?

16 HEARING OFFICER CELLI: Well, I mean, it's not
17 unheard of. The only thing is is I really want to get
18 this thing done in two days.

19 But what about that, Ms. Willis?

20 STAFF COUNSEL WILLIS: Well, at this point we
21 haven't met with all of the -- changes have come so fast
22 that we have not been able to meet -- as I said, Mr.
23 Birdsall's supervisor has been in jury duty. So they've
24 not established whether he would be available or not.

25 Either way, either Mr. Layton or Mr. Bemis can

1 sponsor the testimony because they supervised Mr.
2 Birdsall.

3 HEARING OFFICER CELLI: So --

4 STAFF COUNSEL WILLIS: So they're qualified to
5 testify. I think we probably prefer to move forward.

6 HEARING OFFICER CELLI: Matt Layton used a
7 real -- didn't he head up air quality section?

8 MR. SIMPSON: But he didn't for the testimony.

9 HEARING OFFICER CELLI: But he's going to come in
10 and basically be held responsible for it. He's going to
11 sponsor it.

12 STAFF COUNSEL WILLIS: He'll sponsor the same
13 just the same.

14 HEARING OFFICER CELLI: So your cross on him is
15 going to be the same on crossing on Mr. Birdsall.

16 MR. SIMPSON: Since I've got the mike and based
17 on some dialog earlier about the interaction between the
18 agencies and the inability of the CEC to alter what's on
19 FDOC, for instance, if we have an issue with what's on the
20 FDOC, should we be bringing it up in this proceeding or is
21 there some other venue --

22 HEARING OFFICER CELLI: You're going to raise all
23 of your questions. You're going to be able to
24 cross-examine the Bay Air Area Quality Management District
25 as to what's in their document.

1 MR. SIMPSON: And if you find something wrong in
2 their document or I find something wrong in their document
3 but you're unable to change their document, what's the
4 recourse?

5 HEARING OFFICER CELLI: You're going to make that
6 point in your brief. In other words, as we talked about
7 earlier when I was describing what it was like when I used
8 to do criminal defense, they're going to put on a witness.
9 You're going to get whatever goodies you can get out of
10 the witness and you're going to write a brief. And you're
11 going to demonstrate to the Committee in your brief why
12 you should win because the evidence dictates the result
13 that you have in mind.

14 MR. SIMPSON: But if you don't have the authority
15 to change the FDOC, then why -- how are you adjudicating?
16 Are you adjudicating the FDOC? When I go to the air
17 district, the CEC weighs in and says you can't have a
18 hearing here. The CEC comes to the air district hearing
19 and says you can't have a hearing at the air district
20 because this is between you and the CEC. So I go to the
21 CEC, I hear that, well, you don't have authority over the
22 FDOC. So I don't how to get witnesses is why we're in
23 federal court now.

24 MR. WHEATLAND: Mr. Simpson is asking some very
25 leading questions right now. He recently received a

1 ruling denying appeal to the Bay Area Air Quality
2 Management District Hearing Board. Mr. Simpson and Mr.
3 Sarvey. And --

4 MR. SIMPSON: That's not correct, sir.

5 MR. WHEATLAND: One of the two. But the point of
6 this is this is a matter that's been pending before the
7 Bay Area before their Hearing Board and is in federal
8 court. I don't think it's appropriate to have a dialogue
9 on this at your conference.

10 HEARING OFFICER CELLI: I don't even know what
11 you're talking about. I want to be clear on that. I
12 don't -- this is evidence -- I haven't read the evidence
13 yet. But this is evidence that we're going to deal with
14 when we deal with it. You're going to ask whatever
15 questions. They're going to put whatever evidence they
16 put on. Here's the FDOC. You're going to be able to
17 cross whatever you need to cross on. There's going to be
18 a -- an objection to some question. We're going to rule
19 on those questions then.

20 MR. SIMPSON: So my question, much like you say
21 you can't deal with me here, if you can't deal with
22 changing the FDOC, then what are we really adjudicating?
23 If I move that the FDOC was done illegally, do you stop
24 something? Do you change something? Is there something
25 that happens?

1 HEARING OFFICER CELLI: I don't know. I've never
2 actually ran into that one where nobody has been able to
3 come in and show us that an FDOC was illegally done.

4 MR. SIMPSON: Well, I have.

5 HEARING OFFICER CELLI: Well, not in my cases
6 yet.

7 MR. SIMPSON: Well, I have. And I get the answer
8 that you can't change the FDOC. I come in with the
9 evidence. I say, look, this was done wrong. They say,
10 well, that was the FDOC. We can't touch that. So I go to
11 the Air District Hearing Board, and I say hey, I want to
12 appeal the FDOC and the CEC says you can't come here
13 because this is CEC jurisdiction. The CEC lawyers weigh
14 in at the air district hearings and say there's no
15 authority there and I hear there is no authority here. So
16 I don't know where I get justice.

17 STAFF COUNSEL WILLIS: Just to clarify, the FDOC
18 is not a staff document. It's not our staff document at
19 all. The staff assessment, supplemental staff assessment,
20 those are the documents we published and those are the
21 documents we'll be sponsoring and be discussing. But the
22 FDOC was outside of our jurisdiction because we did not do
23 it. So therefore it's out of our control to change it.
24 We did not write it. It's not our document. So to spend
25 a long time discussing that here is not going to be

1 fruitful.

2 HEARING OFFICER CELLI: What I'm telling you is
3 that you're going to be able to cross-examine the witness
4 and then as you're crossing we're going to take question
5 by question by question and hear whatever objections are.
6 But you're asking me essentially for a pre-ruling which
7 I'm not going to do at a prehearing conference. This
8 isn't evidence day. This is conference.

9 MR. SIMPSON: I'm just trying to understand the
10 authority, what the CEC has the authority to do with
11 respect to FDOC.

12 HEARING OFFICER CELLI: What the CEC has the
13 authority to do is grant a license to power plants greater
14 than 50 megawatts if they have no impacts. And you might
15 think there are some impacts that aren't mitigated. And
16 that's your job to demonstrate that.

17 Do you see where I'm going with this?

18 MR. SIMPSON: Yeah, but what I was concerned are
19 within FDOC. And it's just the FDOC is okay because
20 somebody else said it and you don't have the authority to
21 adjudicate it, then it will interfere with the authority
22 for the industry to adjudicate it.

23 HEARING OFFICER CELLI: We have the authority to
24 weigh evidence. That's what we do. We weigh evidence.
25 If you can show weakness in the evidence, then that's

1 great. That's what we're here to do. Test the evidence.

2 MR. LAMB: You can reject the conclusions of the
3 FDOC, the Commissioner can reject the --

4 COMMITTEE MEMBER DOUGLAS: Mr. Simpson, --

5 MR. LAMB: If he demonstrates it's invalid or
6 there is improper information, you don't have to change
7 the document, you just have to show it's not credible.

8 COMMITTEE MEMBER DOUGLAS: In this forum, we'll
9 adjudicate the substantive air quality issues. So we
10 would look at staff analysis and look at the FDOC. If you
11 see weaknesses, you should bring them to our attention in
12 this forum.

13 We have not had the situation arise certainly not
14 recently where we found the air districts were to be
15 inadequate. But it has not been completely unheard of in
16 the history of the Energy Commission that our staff -- in
17 one case at least -- did bring forward a different opinion
18 on. So we will adjudicate the substantive issues here on
19 air quality.

20 HEARING OFFICER CELLI: So I want to move on.
21 And I think you got an answer to your question.

22 MR. SINGH: I just want to make a point here. If
23 you look into Alameda County not coming as a witness for
24 cross-examination, think about a situation if they are not
25 being given --

1 HEARING OFFICER CELLI: They're not a witness.
2 There is no person who's Alameda County, per se. Let's
3 just say that there's head of the planning department or
4 something like that that --

5 MR. SINGH: So we can say some of those people
6 who got the mitigation, so think about if they haven't got
7 the mitigation they'll be sitting in this room along with
8 us. Right? So --

9 HEARING OFFICER CELLI: That happens all the
10 time, by the way. It is common for cities, neighboring
11 cities of a power plant to come in against the power
12 plant. It isn't a given guarantee -- this is par for the
13 course right here. We have, you know, cities come in,
14 counties come in, agencies come in and say we want to
15 intervene. We are opposed to this power plant.

16 MR. SINGH: So let us bring those people who got
17 the mitigation or head of the department who called the
18 mitigation and come here for the cross-examination.

19 HEARING OFFICER CELLI: That would be staff.
20 Staff --

21 MR. SINGH: That is a problem. What happened
22 there is once they got mitigated, then the staff come and
23 shelter them or defense them, right?

24 HEARING OFFICER CELLI: No. Staff does not have
25 a burden. Applicant has a burden of proof. So staff

1 takes the position they do as pretty much expert witnesses
2 reviewing the applicant. The applicant comes in and says
3 we want to build a power plant. They look at it. They
4 make determinations and they say if you want a power
5 plant, you've got an impact here, here, here, and here and
6 you need to mitigate these impacts or we won't give you a
7 license. That's what staff's job is, essentially.

8 MR. SINGH: In the same way that San Joaquin
9 County they got the mitigation and they are off the hook
10 now. People like us were standing here spending our time
11 for the justice, right. So the whole point of this -- I'm
12 just telling you the mitigation should never be done
13 before any final hearing happens, you know. It should be
14 done after that. Once the people get mitigated, it
15 doesn't come into the hearing or they don't want to
16 basically put their points there.

17 So anyway, so I just want to say something.

18 HEARING OFFICER CELLI: All right. And I want to
19 move on the briefing schedule. Go ahead.

20 MR. DIGHE: Is there any way I can ask for a
21 motion for San Joaquin County and Alameda County be here a
22 representative to be here during the hearing?

23 HEARING OFFICER CELLI: You can bring that
24 motion.

25 MR. DIGHE: Can I make it right now?

1 HEARING OFFICER CELLI: No. You're going to give
2 us a written motion and you're going to have to show proof
3 of cause. I'm not going to rule on that today.

4 MR. DIGHE: Can I put my comments right now about
5 the good cause of land uses --

6 HEARING OFFICER CELLI: I don't want to because
7 everybody here wants to go home.

8 MR. DIGHE: Sure. Let me put it in the motion
9 then. Thank you.

10 HEARING OFFICER CELLI: Thank you.

11 STAFF COUNSEL WILLIS: Mr. Celli, before you go
12 on to the briefing schedule, is it possible or could you
13 take into consideration moving the air quality and the an
14 mall first, that way we can get the Bay Area Air District,
15 because that's the only one that we're sponsoring that's
16 from out of staff.

17 HEARING OFFICER CELLI: Here's what I need to
18 ask.

19 STAFF COUNSEL WILLIS: That way she's not running
20 into her overtime.

21 HEARING OFFICER CELLI: I'm going to put the onus
22 back on you all as parties. Because frankly you'll get
23 really tired of doing scheduling. It's very hard for me
24 to manage this many people and get everybody in the same
25 place, same time and on the same page. So when you have

1 your workshop, I'm going to ask that staff, applicant, and
2 parties, intervenors, put your heads together. If you
3 want, I can send a copy of this percentage chart to you if
4 you were interested in that. And figure out on your own
5 how you want to spend the time. And work it out amongst
6 yourselves. And then when we go in on the 24th, staff or
7 whoever could present to us this is our collective
8 thinking. This is the way we'd like to spend our time and
9 this is how we want to proceed.

10 STAFF COUNSEL WILLIS: Mr. Celli, I'm going to
11 object to that proposal, because between the staff and
12 applicant, we could be done in 20 minutes. So to go on
13 for two hours on socioeconomics, to me, we're not going to
14 work out any --

15 HEARING OFFICER CELLI: Welcome to my world.

16 STAFF COUNSEL WILLIS: We're a party. We're not
17 going to be able to work out an agreement. I don't agree
18 there is an EJ issue or it takes any more time than 20
19 minute cross, not hours and hours. So it's not -- I don't
20 believe it's for us to try to figure out a schedule at a
21 workshop. It's not an option.

22 HEARING OFFICER CELLI: Well, the options are
23 that I let the parties work it out amongst themselves or
24 you accept whatever we tell you.

25 MR. WHEATLAND: The applicant would be willing to

1 accept whatever you tell us. But as an alternative, if
2 there are ten hours of time for cross-examination, I mean,
3 another alternative would be to allocate the staff and the
4 applicant each an hour for cross. I previously offered to
5 waive all of it, but to give us each an hour of cross and
6 let the intervenors divide that time among themselves on
7 these subject matters as they deem appropriate and ask
8 them to advise us given the issues you've got in effect
9 for the first day if there are any additional issues
10 they'd like to be heard that day.

11 HEARING OFFICER CELLI: I'd like to be clear
12 nobody is getting an hour for cross.

13 MR. WHEATLAND: I'm saying cumulative for out of
14 the ten. That was just as a suggestion. It could be
15 30 minutes. It could be an hour. Cumulative time.

16 HEARING OFFICER CELLI: Okay. So you're
17 suggesting that since you're backing out of the --

18 MR. WHEATLAND: I'm not backing out. We've made
19 the offer and it was rejected.

20 HEARING OFFICER CELLI: It was rejected.

21 MR. WHEATLAND: I'm not backing out by any means.
22 I'll still willing to have that on the table. But if they
23 are insisting on having their witness testify,
24 notwithstanding the offer that I made, then some
25 allocation of time will need to be made to the staff and

1 the applicant. I was suggesting a very modest share of
2 that entire time on a cumulative basis. And then allow
3 the intervenors to divide the remaining hours among
4 themselves, however they see fit.

5 HEARING OFFICER CELLI: Well, initially what I
6 had in mind was land use for first two hours, air quality
7 and public health for the second hours, second half of the
8 morning. The morning was mostly defined from 10:00 to
9 4:00 in the afternoon on day one. Land use, public
10 health, and air quality.

11 That evening we would tackle aviation and
12 socioeconomics. The following day we would be left with
13 alternatives --

14 MR. WILSON: Excuse me. CalPilots. So 10:00 to
15 4:00? And then you threw in the evening. What's evening?

16 HEARING OFFICER CELLI: Aviation would be from
17 7:00 p.m. until approximately -- let's just say for the
18 sake of 8:30. And then socioeconomics would be from 8:30
19 to 10:00.

20 MR. WILSON: In the evening?

21 HEARING OFFICER CELLI: Right.

22 MR. DIGHE: I have a comment. There is going to
23 be public comment between five --

24 HEARING OFFICER CELLI: At 5:00. At 5:00 p.m.

25 MR. DIGHE: At 5 o'clock?

1 HEARING OFFICER CELLI: It depends. How many
2 people are here that want to make a public comment? Show
3 of hands. I have zero.

4 MR. DIGHE: But there are going to be many more
5 on February the 24th.

6 HEARING OFFICER CELLI: Right. So what I'll do
7 is I will gauge how many people show up. If there is ten
8 people, I'll give them as much time -- not as much time
9 but within reason I'll try to get all of their comments in
10 let's say an hour. I have actually booked myself two
11 hours here, because I'm thinking what we'll do is take
12 public comment and have the dinner break at the same time
13 so the Committee can be up here eating and listening to
14 the public comment at the same time.

15 But if you've got 100 people in here, then we're
16 going to go more than two hours, I would have to control
17 it basically and say okay, folks, you get a minute and a
18 half to speak your mind. I don't like to do that.

19 MR. DIGHE: I think there are going to be a
20 significant amount of people because of the impact on
21 Mountain House and the residents are concerned. So I just
22 wanted to bring it up so you can plan accordingly.

23 HEARING OFFICER CELLI: I do appreciate that.

24 I have from 5 o'clock to 7:00 for public comment
25 on both days. And hopefully I can get everybody in at

1 that time. That's what we're going to try to do.

2 MR. SIMPSON: I'm afraid it might be culturally
3 insensitive to be eating while people are giving their
4 public comments.

5 HEARING OFFICER CELLI: We're going to have to
6 suffer some indignities I'm afraid.

7 Briefing schedule. It takes three days to get a
8 transcript of the proceeding. So if the hearings go
9 through 2/25 -- they start on 2/25 and the transcript is
10 ready, let's say, on 3/1 which is three days later. The
11 opening briefs will be filed on 3/10/11. So I'm giving
12 you ten days to file your opening brief. Rebuttals are
13 going to be due on 3/17, which is seven days after the
14 opening briefs are filed. Any briefs for any subsequent
15 hearing which I'm hoping we don't have to do will be due
16 ten days after the transcript is published and rebuttals
17 will always be due seven days after the brief. So that's
18 kind of the formula that we're using.

19 At this time, I'm going to ask staff if there's
20 anything further.

21 STAFF COUNSEL WILLIS: Yes, I didn't quite get
22 the second day schedule of what topics.

23 HEARING OFFICER CELLI: Opening briefs.

24 STAFF COUNSEL WILLIS: No, on the 25th. I need
25 to make sure I have the right staff here on the

1 evidentiary hearing. We got to alternatives on the 25th.

2 I didn't hear anything after that.

3 HEARING OFFICER CELLI: Sorry. Alternatives in
4 the morning of day two, followed by biology, soil and
5 water, worker safety and if need be, visual.

6 Now, of course, what I'm describing is a highly
7 idealized very efficient there's no ums and ers and you
8 knows in that calculation. Basically people are speed
9 rapping.

10 This is kind of -- I understand there is a
11 certain pie-in-the-sky element about my estimate of time.
12 But I'm going to try to stick to this as closely as I can.
13 So I want you all to understand that I'm going to truly be
14 limiting people on their cross and directs and we're going
15 to be -- we have to be efficient. So that's why I'm
16 encouraging you to please use your workshop. Get together
17 and coordinate to operate and find ways to get the most
18 out of this. Because it's not about you showing how great
19 a cross-examiner you are. I'm sure you're all fabulous.
20 What it's about is making sure that the Committee knows
21 what the facts are that support your position. That's
22 what it's about. And so I'm asking that you elevate the
23 bigger purpose over other possible cross purposes you
24 might have and be efficient and economical.

25 So with that, that's the plan.

1 Mr. Hoffman, you were say --

2 MR. HOFFMAN: I'd like to talk a little bit more
3 about this workshop.

4 Previously, we were looking at doing a workshop
5 on worker safety and fire protection. And it's somewhat
6 morphed into the other eleven sections. And all show
7 staff does appreciate the confidence that the Committee
8 has in us based upon the discussion today, the majority of
9 the topics are not going -- we're not going to reach any
10 type of resolution on. I think realistically we could
11 have a very meaningful discussion on worker safety and
12 fire protection. I'm very confident that that's a topic
13 that we can make some headway on. I think we can have a
14 discussion on environmental justice and be able to inform
15 how we got there and have that type of discussion. I
16 think we could have a discussion on visual and maybe we
17 could talk a little more about schedule.

18 Realistically, the majority of the items that we
19 heard today I think we are where we are. I think we've
20 realistically hit a point where there is disagreement and
21 that's fine. I don't want to waste the intervenors' time.
22 I think we'll try to schedule a workshop somewhat on the
23 15th or 16th. I don't know if that's going to be down
24 here or at the CEC building. We'll definitely be getting
25 a call-in number to make it convenient for everyone. But

1 I just want to make sure that everyone is aware. There is
2 a lot of disagreement. I don't know that any one or two
3 intervenors necessarily agree to try to get to a point
4 where we all agree, that's doubtful.

5 HEARING OFFICER CELLI: You can only do your
6 best. I'm going to say this: If I think that the parties
7 will be rewarded if they can economize. Because if you
8 really want to spend your time doing things like air
9 quality, land, alternatives, then you might want to think
10 about what you can do to get the most out of that.

11 So anything further, Mr. Wilson?

12 MR. WILSON: Yes. Andy Wilson, CalPilots.

13 I'd just like to remind everybody it was
14 Commissioner Byron's record saying there has been a delay
15 in this project and that's partially due to the emphasis
16 that the Commission had to switch and accommodate the
17 solar projects and that kind of put this project behind.

18 The other is the furlough days that I believe are
19 still in effect with the Commission or have been. And
20 what we're hearing today is a summary of what's been going
21 on. And the applicant being put off, he certainly wants
22 to rush this through. But on the other hand, there were a
23 number of intervenors that had requested workshops to try
24 to resolve these issues. And we had -- so what turned out
25 is no workshop. We're going to move ahead. Now we have

1 another workshop. So I appreciate -- CalPilots
2 appreciates the opportunity for another workshop, but I
3 think in summary, we're at where we're at today because of
4 what I just said.

5 HEARING OFFICER CELLI: Thank you, Mr. Wilson.
6 Thanks for being here today.

7 Mr. Simpson.

8 MR. SIMPSON: If I could propose a stipulation to
9 the applicant that they withdraw their objection to the
10 testimony, that would save everyone a lot of time. I
11 think they've already mooted it by saying if it's not
12 rejected they'll just accept it. I think you could save
13 the Commission time to review all these briefs that are
14 due on the 14th and everyone who has to fight to keep
15 their testimony in in time. So what do you say?

16 HEARING OFFICER CELLI: That we're winding down.
17 So that's something again that I applaud you for bringing
18 up, Mr. Simpson. Please see what you can do at the
19 workshop to get stipulations.

20 MR. SIMPSON: I believe the workshop will be
21 after the briefing on this motion, isn't it?

22 HEARING OFFICER CELLI: It probably is. But it
23 would be before the evidentiary hearing so that --

24 MR. SIMPSON: Maybe he's going to say yes.

25 (Laughter)

1 MR. WHEATLAND: Actually, I was going to say with
2 respect to the workshop what would really make the
3 workshop productive is if the intervenors say what project
4 changes they wanted to see. I don't presume to know where
5 they're coming from. If they're intending by this
6 proceeding to make this project better or to have specific
7 mitigation of impacts they've identified, and they would
8 like to identify those to us, we would be happy to discuss
9 those with you.

10 On the other hand, if the intervenors are simply
11 opposed to this project and do not want it licensed under
12 any conditions if you'd inform us as well that would also
13 help to know. We really need to know at this point where
14 you're coming from. If you have concerns and you want to
15 work with us, let us know what those are. And it would be
16 a much more productive workshop if you identified those to
17 us before the workshop so we can discuss those.

18 MR. SIMPSON: I thought you were going to respond
19 to my stipulation.

20 MR. WHEATLAND: As you reminded me, your
21 testimony is in. That is not a matter that concerns you.

22 HEARING OFFICER CELLI: All right.

23 Mr. Dighe. Any further? I'm just going around
24 the table. Any parting shots?

25 MR. DIGHE: I look forward for the public

1 workshop.

2 HEARING OFFICER CELLI: Thank you. Thank you for
3 being here.

4 Mr. Singh?

5 MR. SINGH: Yes, definitely a workshop is
6 encouraging to have a discussion. But at the same time,
7 you know, I'm hearing from staff that there is a lot of --
8 going on between the intervenor and the staff. Staff is
9 independent party here they should be more biased towards
10 us and it doesn't come from any expert background or law
11 background and all that. We all have taken a day off from
12 our work and we are trying to see what would be helpful to
13 the Committee.

14 And I think, at the same time, CEC is also
15 independent party, which is run by the taxpayer people,
16 like us, to do the things in favor of and we do not see
17 that we are basically fighting against staff. We are here
18 to bring our points. That's what my point of view is.

19 HEARING OFFICER CELLI: Thank you. And your
20 point will be heard. I appreciate your being here.

21 Mr. Sarvey.

22 MR. SARVEY: Yeah, staff in their prehearing
23 conference statement asked for the opening brief to be two
24 weeks from the day of the transcript. And I support that.
25 It's a hardship for me to get that thing out in ten days.

1 Three more days would be appreciated. I asked for three
2 weeks, but I understand we're under a time frame. So I
3 would appreciate if you would change the opening brief to
4 two weeks after the transcript is received. Thank you.

5 HEARING OFFICER CELLI: Thank you for your
6 comments.

7 And I'm just going to respond to that briefly.
8 Those briefs are really for the benefit of me and the
9 Committee, because that's how we know what the issues are,
10 what the evidence is that supports the issues. We really
11 rely on those briefs. So I'm sort of in a holding pattern
12 waiting for briefs, and especially rebuttal briefs as I'm
13 waiting for the briefs to come before I can actually start
14 writing the PMPD. So that's why I chose the ten days.
15 I'm not etched in stone. I'm not -- I'll walk around with
16 that one and maybe we can change our mind at the time of
17 the evidentiary hearing. But I think ten days was fair.

18 MR. SIMPSON: At least when it falls on a Friday,
19 can you extend it to Monday morning?

20 HEARING OFFICER CELLI: Possibly. We'll see how
21 the calendar shakes out.

22 Mr. Mainland.

23 MR. MAINLAND: Mr. Celli, for clarity purposes
24 before we break up, could you restate where you came out
25 on the gas pipeline discussion and there was talk of a

1 workshop? Is this the workshop where that will be taken
2 up or is the gas pipeline workshop a separate? Clarity,
3 please.

4 HEARING OFFICER CELLI: There's only one workshop
5 and staff is going to tackle as many of these issues and
6 notice it for all of the issues we've talked about that
7 are in dispute. And you're all going to work together to
8 reduce as many issues as you possibly can. But the
9 hazardous materials pipeline issue is a brief to be filed.

10 The brief is going to be due on the 14th. That's
11 the brief on the relevance of the pipeline issues to the
12 California Energy Commission jurisdiction.

13 MR. SIMPSON: That's before the workshop?

14 HEARING OFFICER CELLI: Yes. I'm afraid it is.
15 But that was the date we made.

16 Now, let me just go off record for a second.

17 (Off record.)

18 HEARING OFFICER CELLI: The Committee has
19 determined that the brief on the pipeline impacts, the
20 hazardous materials as raised by Mr. Sarvey and I guess
21 Mr. Mainland as well I don't remember who else raised it,
22 but we would give you until the 18th in order to enable
23 the parties to use some workshop time on that as well.

24 MR. SIMPSON: Sounds like a moment of logic.

25 HEARING OFFICER CELLI: Pardon me?

1 MR. SIMPSON: Sounds like a moment of logic.

2 HEARING OFFICER CELLI: It could happen.

3 Anything else, Mr. Mainland?

4 MR. MAINLAND: Just to be clear, so after the
5 18th, but before the 24th, there would be a workshop?

6 HEARING OFFICER CELLI: No. The reason we're
7 extending the brief is so that you can hash it out on the
8 16th, which is when the brief -- the workshop would be.
9 So your brief would follow the workshop.

10 MR. HOFFMAN: What I'll do tomorrow is send out
11 an e-mail to everyone on the POS list, try to figure out
12 what the best day and time is realistically, I know how
13 busy everyone is. We'll have a call in number. We'll
14 probably be doing the workshop from the CEC building. But
15 we'll look at either the 15th or the 16th. And that will
16 give a couple days to do the brief afterwards.

17 HEARING OFFICER CELLI: And please remember to
18 stay focused on the question, which is jurisdictional.
19 Okay. Thank you. Mr. Mainland. Thank you for being
20 here.

21 Sierra Club. Mr. Lamb.

22 MR. LAMB: I'm good.

23 HEARING OFFICER CELLI: Thank you for being here,
24 all of you. I want to thank you for being here.

25 Mr. Wheatland, any closing statement you'd like

1 to make?

2 MR. WHEATLAND: I'd like to thank the Hearing
3 Officer and the Committee for your patience today.

4 HEARING OFFICER CELLI: Thank you. And thank you
5 all for participating.

6 Are there any members of the public who would
7 like to make a comment who are here today? I'm seeing
8 none.

9 I'm going to go to the Web Ex. Is there anyone
10 who's on the phone who would like to make a public comment
11 to the Committee?

12 Hearing none, I will hand the lead back over to
13 Commissioner Douglas for adjournment.

14 COMMITTEE MEMBER DOUGLAS: Thank you, Hearing
15 Officer. Thank you to all of the parties for being here
16 and your good work today. And we are adjourned.

17 (Thereupon the hearing adjourned at 5:05 p.m.)

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1 CERTIFICATE OF REPORTER

2 I, TIFFANY C. KRAFT, a Certified Shorthand
3 Reporter of the State of California, and Registered
4 Professional Reporter, do hereby certify:

5 That I am a disinterested person herein; that the
6 foregoing hearing was reported in shorthand by me,
7 Tiffany C. Kraft, a Certified Shorthand Reporter of the
8 State of California, and thereafter transcribed into
9 typewriting.

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

13 IN WITNESS WHEREOF, I have hereunto set my hand
14 this 14th day of February, 2011.

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TIFFANY C. KRAFT, CSR, RPR

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Certified Shorthand Reporter

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