

PREHEARING CONFERENCE
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification) Docket No.
for the PANOCHÉ ENERGY CENTER) 06-AFC-5

)

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

TUESDAY, OCTOBER 2, 2007

10:33 a.m.

Reported by:
Peter Petty
Contract No. 170-07-001

PETERS SHORTHAND REPORTING CORPORATION (916) 362-2345

COMMITTEE MEMBERS PRESENT

Jeffrey D. Byron, Presiding Member

James D. Boyd, Associate Member

HEARING OFFICER AND ADVISORS

Paul Kramer, Hearing Officer

Gabriel Taylor, Advisor

Peter Ward, Advisor

STAFF AND CONSULTANTS PRESENT

James Reede, Jr., Project Manager

Caryn Holmes, Senior Staff Counsel

Jared Babula, Staff Counsel

APPLICANT

John A. McKinsey, Attorney

Alan Thompson, Attorney

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Gary Chandler, President

Panoche Energy Center, LLC

Bullard Energy Center, LLC

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1 P R O C E E D I N G S

2 10:33 a.m.

3 PRESIDING MEMBER BYRON: Good morning.

4 I'm Jeff Byron, the Presiding Member here on the
5 Panoche Energy Center application for
6 certification. I'm sorry if we're a little bit
7 late; I think that clock is a bit fast, actually.

8 My Associate Member on this Committee is
9 Commissioner Boyd; and our Hearing Officer is Paul
10 Kramer. To Commissioner Boyd's left is his
11 Advisor, Peter Ward. And to my right is my
12 Advisor, Gabriel Taylor.

13 I'm going to turn it over to our Hearing
14 Officer, because this looks like it's mostly legal
15 stuff we're going to talk about.

16 HEARING OFFICER KRAMER: If you want,
17 sure. Welcome, everyone, to the prehearing
18 conference. I anticipate this won't take that
19 much time. Do we have anyone on the phone? Okay.

20 I think everyone here knows what a
21 prehearing conference is about, so I'm not going
22 to make the statement that would educate the
23 public who apparently is not listening. And we'll
24 just go right into the details.

25 The first detail would be for the

1 parties in this case to identify themselves.

2 We'll start with the applicant.

3 MR. MCKINSEY: Thank you, Hearing
4 Officer Kramer. My name is John McKinsey and I
5 represent Panoche Energy, LLC. Also behind me is
6 Alan Thompson; we're co-counsel on the case. And
7 to my right is Gary Chandler who is here on behalf
8 of Panoche Center, LLC.

9 HEARING OFFICER KRAMER: And staff.

10 DR. REEDE: Good morning, Commissioners
11 and Mr. Kramer. My name is Dr. James Reede; I'm
12 the Energy Facility Siting Project Manager
13 assigned to the Panoche Center Project.

14 With me are Ms. Caryn Holmes, Senior
15 Staff Counsel; and Jarad Babula, Staff Counsel.

16 HEARING OFFICER KRAMER: Okay. I
17 believe CURE was also an intervenor in this case.
18 Do we have anyone from CURE here today?

19 MR. MCKINSEY: We communicated with them
20 on Thursday and Friday of last week, and from that
21 communication we weren't expecting them to
22 participate any further in the case. And they
23 also gave us, I think, which we docketed last
24 week, a waiver of having to receive any written
25 documents that they didn't already have via

1 service. And so I'm not surprised they're not
2 here.

3 HEARING OFFICER KRAMER: Okay. And I
4 note they did not file a prehearing conference
5 statement, so apparently they do not intend to
6 present any witnesses or cross-examine any.

7 As has been noticed in the case, we have
8 already prescheduled on the assumption the matter
9 would be ready to go to hearing, the hearing in
10 this case, for next Wednesday, October 10th,
11 beginning at 2:00 p.m. in this same room.

12 That will follow the business meeting of
13 the Commission which I presume will be over by
14 then, but if it isn't, we'll just be delayed by
15 however long we need to be delayed.

16 PRESIDING MEMBER BYRON: I had an
17 opportunity to review the agenda yesterday; I
18 think we'll be okay. Other than opposed to last
19 week. We did go a little long.

20 ASSOCIATE MEMBER BOYD: Well, I worry a
21 little bit about the AB-1007 report, but we'll
22 see.

23 HEARING OFFICER KRAMER: The parties,
24 from their statements, indicate that they are
25 ready for a hearing. And the only contested issue

1 is the issue of water, specifically the source of
2 cooling water. And one minor request regarding
3 timing of condition land-1. And let's see, there
4 was one other item, I believe, was there not --
5 oh, the use of the building -- the building code
6 to be used in the engineering analysis.

7 Staff, do you believe that we will need
8 to adjudicate the building code question?

9 DR. REEDE: Yes, I do. The land use
10 question, if I may, staff has reviewed it and it,
11 in fact, should be 30 days prior, rather than 120
12 days prior, in land use-1. So that issue can go
13 away forever.

14 Then the other issue, the use of the
15 2007 building code, in June of 2006 the California
16 Building Standards Commission adopted the 2007
17 building code, which is supposed to be used
18 effective January 1, 2008, basically an 18-month
19 grace period.

20 This 2007 building code will apply to
21 any documents submitted after January 1, 2008. In
22 the event that the Committee and the Commission
23 issue a decision sometime in January it's highly
24 unlikely that all the drawings would be able to be
25 submitted to a CBO prior to January 1st. Still

1 have to select a CBO.

2 You're going to have to do all your
3 final drawings and submit them to the CBO and to
4 the compliance project manager.

5 If they were to use the 2001 building
6 code, they would then not be in compliance with
7 LORS. And there was a previous case at the
8 Calpine's Sutter Power Plant where Calpine asked
9 the Presiding Member to specify in the decision
10 that the project could be designed and built to
11 the old version of the building code.

12 Staff recommended that it not be adopted
13 in that particular decision, as the updated
14 version of the code had been adopted and would
15 become mandatory within months.

16 The Committee acceded to Calpine's
17 request and included in the decision the
18 requirement that the project be designed and built
19 to the old version of the code. Soon thereafter,
20 staff was invited to attend a preconstruction
21 meeting with Calpine and their prior contractors.

22 Present were Calpine's project
23 management, the engineering procurement
24 construction contractor and Westinghouse, the
25 turbine generator supplier.

1 The Calpine manager announced that the
2 project would be designed and built to the old
3 version of the code. Both the EPC, engineering
4 procurement and construction manager and
5 Westinghouse manager both said, no, it won't.
6 We've already shifted over to the new version of
7 the code, and going back to the old version would
8 cost millions.

9 Before design could begin Calpine was
10 required to return to the Commission for an
11 amendment to the decision allowing them to design
12 and build the project to a new version of the
13 code.

14 In a nutshell, the 2007 California
15 Building Code goes into effect January 1, 2008.
16 To allow them to do anything other is deeming that
17 an amendment will be necessary before you've even
18 made your decision.

19 And so staff remains in support of
20 requiring this project to use 2007 building code.

21 HEARING OFFICER KRAMER: Okay, well,
22 thank you for previewing your testimony. Of
23 course, if the applicant wants to press for that
24 change that's something that will be litigated at
25 the hearing next week.

1 I would encourage the applicant in its
2 brief to be filed later to provide some authority
3 for the Commission's ability to throttle back to
4 the earlier version of the code.

5 MR. McKINSEY: Hearing Officer Kramer, I
6 want to clarify the issue a little bit. We're not
7 advocating that we want to design, as an absolute
8 decision in this case, to a particular building
9 code. The condition gen-1 that's at issue here
10 currently cites the 2001 building code. And then
11 it contains a second paragraph which says, or
12 you're going to use another code if that code is -
13 - and it doesn't use the term in effect at the
14 time of a particular date; it has some wording
15 that isn't entirely clear.

16 And so we have two issues. One, our
17 engineering and designing the plant at this time
18 to the code that is in effect. And we read this
19 condition and we felt that it's a probable
20 interpretation that when we file our documents
21 that we will be in compliance with this condition.

22 And so we were mainly seeking
23 clarification from the staff or this could become
24 an issue. And so we're trying to avoid it being
25 an issue. And so what may be needed is a

1 discussion about modifying the wording of gen-1.
2 And maybe that's what we ought to brief is -- the
3 second paragraph of gen-1 currently says that "it
4 shall be the code in effect at the time that
5 documents or design drawings are filed." It
6 doesn't say all of them; it doesn't say the first
7 one.

8 And the code is literally going to
9 change while this project is having drawings being
10 filed. And so we wanted it really clear that the
11 project -- the code that's in effect now is the
12 one the project's being designed to. And we want
13 to continue that code.

14 We don't have an objection -- if we were
15 to not build it for another year or two, then
16 clearly this provision would kick in, because we
17 would be filing all of our documents at a time
18 when a different code is in effect.

19 So we may only need an agreement on the
20 meaning of the language in this paragraph. But we
21 might need to change the language slightly. And
22 that may be what we ought to brief. And this
23 could end up being almost a de minimis change that
24 could be resolved from a proposed decision to a
25 final decision, as well.

1 But we're not seeking to radically alter
2 a change in gen-1. We mainly wanted a
3 clarification on the second paragraph to make it
4 clear as to which code would be in effect for the
5 project.

6 HEARING OFFICER KRAMER: It might be
7 wise, then, also to brief, you know, exactly when
8 the codes go into effect, to draw us a roadmap so
9 we don't have to do a lot of original research.

10 I believe I recall in the recent Russell
11 City case that the parties there both proposed
12 that all the references to 2001 be changed to
13 2007. So, Mr. McKinsey, I would suggest that you
14 be available to -- because we're going to have
15 questions about why it's infeasible to, and why
16 your people are not designing to 2007 at this
17 point, since it's clearly on the horizon. That
18 may be a question that we want to ask you. I'm
19 just giving you a heads-up.

20 MR. MCKINSEY: Okay. But I should
21 indicate the biggest problem we have is that when
22 this project was filed we anticipated starting
23 construction while the 2001 code was completely in
24 effect. In other words, if we'd have received a
25 decision one year from filing date, then we would

1 be clearly in the 2001 code.

2 And so it isn't unreasonable for all the
3 engineering work to have begun on this project
4 using the 2001 code, because that clearly would
5 have been the code in effect had we received a
6 decision in that timeframe.

7 And that's why we're caught in a
8 situation where the issue isn't that it's
9 infeasible, it's primarily a pretty significant
10 delay issue of having to go back and engineer the
11 project all over again.

12 HEARING OFFICER KRAMER: Okay. Well,
13 the details obviously should be left to next week
14 when we're conducting the hearing.

15 PRESIDING MEMBER BYRON: Excuse me,
16 would it be appropriate, as well, to have some
17 sense of what the major differences are between
18 the '01 UBC and the '07 version of the code?
19 Would that have any bearing on our thinking here
20 with regard to what would be contained in the
21 briefs.

22 HEARING OFFICER KRAMER: It could, and
23 it sounds like it does in your case, so that's an
24 appropriate question. It may be difficult to --
25 well, actually somebody should have charted it

1 along the line -- when they were reviewing the
2 codes, you would think.

3 So we could treat that as another heads
4 up to the parties, to be ready to discuss the
5 differences.

6 Any other issues we need to put on the
7 list?

8 MR. MCKINSEY: None from us.

9 HEARING OFFICER KRAMER: Staff?

10 MS. HOLMES: No, there isn't.

11 HEARING OFFICER KRAMER: Okay. As I
12 understand from Mr. McKinsey, he is ready to
13 exchange the printed copies of his evidence today.

14 MR. MCKINSEY: That's correct.

15 HEARING OFFICER KRAMER: And we'll do so
16 right after we adjourn.

17 Staff, your only exhibit to this point
18 is the final staff assessment, which, Mr.
19 McKinsey, you've already received that. Do you
20 require any additional copies?

21 MR. MCKINSEY: No.

22 HEARING OFFICER KRAMER: Okay, as a note
23 to the parties I have not completed my extensive
24 review of the FSA yet, but today I can tell you
25 about several areas where we will need to have

1 staff witnesses present to answer some relatively
2 minor questions, but clarifying questions, about
3 what is in the final assessment.

4 Those areas would be air quality, land
5 use, noise, cultural and hazardous materials. And
6 there may be a couple of additional areas as I
7 finish that review in the next day or so. If
8 there are I will send an email to all the parties
9 letting them know.

10 And by and large, these are some of the
11 questions to clarify the evidence as I think I
12 need to have it clarified in order to write a
13 decision. Not any major questions, but just
14 clarifications.

15 Also as a part of my review of that and
16 other documents that have come across my desk, I
17 wanted to make sure that we have various documents
18 in the evidentiary record. And it may be obvious
19 from the exhibit list, but I wanted to make sure
20 and go over with you this list of documents to see
21 that we have them.

22 Not evidence, but it would be very
23 helpful if staff can provide the Committee with
24 copies of the Water Resources Control Board
25 policies and the reference, at least, to the

1 portion of the IEPR that you've spoken about in
2 your analysis of the water issue.

3 As I understand it from the staff's
4 filing the applicant will be introducing the final
5 determination of compliance from the Air District,
6 is that correct?

7 MR. McKINSEY: That's correct.

8 MS. HOLMES: May I ask a question? Is
9 there going to be a witness from the District
10 available?

11 MR. McKINSEY: We had not planned on
12 that, nor did we inform the District.

13 HEARING OFFICER KRAMER: That was
14 actually my next question. Because the statute, I
15 believe it's 25523 requires a certification by the
16 Air District at -- I'm not going to try to
17 paraphrase it, but well, better than try to quote
18 it, I guess -- that the applicant will have the
19 credits available in the appropriate time; and
20 that adequate offsets have been identified; and
21 that they will be available at the appropriate
22 moment under the Air District rules.

23 MS. HOLMES: In addition, California
24 Code of Regulations in Title 20, section 1744.5
25 requires a witness from either the District or the

1 Air Resources Board to be available at the
2 hearing.

3 MR. MCKINSEY: And on the latter one I
4 think that's if there is a need. I don't think
5 it's -- in fact, statutorily there's no
6 requirement that the determination of compliance
7 be attested to or witnessed by somebody from the
8 Air District.

9 But often -- I think that regulation was
10 written because if there are issues about
11 conditions and determinations in the determination
12 of compliance, then they need somebody from the
13 Air District. But statutorily the Warren Alquist
14 Act doesn't compel the Air District to appear,
15 then there's no way to make them appear, of
16 course.

17 And I think the regulation was designed
18 to indicate that this is a needed component to
19 hearings when there's issues in air, but here
20 there's no controversy involving the final staff
21 assessment and the determination of compliance.
22 And both the staff and the applicant are in
23 agreement.

24 So I mean, we could attempt to have
25 somebody from the Air District appear via

1 telephone to testify. We are submitting the
2 determination of compliance by declaration, so it
3 is sponsored and it is in the evidentiary record.

4 HEARING OFFICER KRAMER: Someone on the
5 telephone would be sufficient, I think, in this
6 case.

7 ASSOCIATE MEMBER BOYD: And I would like
8 to join those who encourage that we have someone
9 if not here, at least on the phone, even though
10 this sounds rather perfunctory from a policy
11 standpoint, air quality in the San Joaquin Valley
12 has become quite an issue.

13 And I think it's incumbent upon this
14 agency to be very sure that we have thoroughly
15 addressed that question in light of the huge
16 debate that's taking place in this town over the
17 extension of the SIP planning time for the San
18 Joaquin Valley, and how critical that was to the
19 survival of the Chairman of the Air Resources
20 Board, et cetera, et cetera.

21 I think we'd better make sure that this
22 agency has fulfilled its responsibilities to see
23 that everybody's comfortable with the air quality
24 aspects and its ramifications on the San Joaquin
25 Valley air quality plan.

1 HEARING OFFICER KRAMER: My next item
2 was the final determination from Cal-ISO about
3 this project. It may be in the record, but if it
4 isn't I think we should get it there. Or at least
5 an explanation of where that stands.

6 I had on my list evidence of the
7 Williamson Act cancellation, but that is attached
8 as an addendum to the land use section of the FSA.
9 So that's taken care of.

10 The next item on that list is the MOU
11 between the applicant and the U.S. Fish and
12 Wildlife Service. I don't know if that is in the
13 exhibits since I haven't had a chance to look into
14 that box yet. But I believe that should be in the
15 record, as well.

16 DR. REEDE: It is in the docket, Mr.
17 Kramer.

18 HEARING OFFICER KRAMER: Okay, but the
19 docket is not necessarily into evidence unless we
20 introduce it and accept it. So the parties can
21 work on that. I just think that's an important
22 document; it should be in the record.

23 MR. MCKINSEY: The applicant will take
24 that on. I believe we have included everything
25 that was relevant in the docket, and that was our

1 intent. So we'll verify these items. And if
2 they're not, then we will sponsor them.

3 HEARING OFFICER KRAMER: Yeah, for
4 instance a lot of your descriptions just describe
5 the data response number, and until I see it I
6 don't know if maybe it was one of those.

7 The land use section talked about the
8 Fresno County site plan review, and spoke of it as
9 if it has occurred. But I didn't find in the
10 addenda a copy of the letter or anything from the
11 County that described the results. Either I
12 overlooked it, or it needs to be added as an
13 exhibit.

14 DR. REEDE: Are you talking about the
15 general plan conformity application letter from
16 the County of Fresno that's one of the exhibits in
17 land use?

18 HEARING OFFICER KRAMER: No, let me find
19 the reference to it. Well, it's referred to in
20 condition land-2; it's site plan review number
21 7586, issued -- well, it says it was issued on
22 March 26th. And since that apparently forms the
23 basis for the requirements in that condition, and
24 also the staff's determination that it's
25 unnecessary to have a subdivision to create the

1 parcel for the project, I think it would be good
2 to have that into evidence, as well. And I didn't
3 see it in here.

4 Actually I saw -- what I was a bit
5 confused by was I saw a general plan conformancy
6 determination both for Panoche and Starwood
7 followed it. And I'll just let you know that one
8 of my questions is what is the relevance of this
9 Starwood determination in here? Was it just --

10 DR. REEDE: It was all one document.

11 HEARING OFFICER KRAMER: Oh, okay,
12 that's all. Okay.

13 DR. REEDE: And because it was all one
14 document it had to be docketed together.

15 HEARING OFFICER KRAMER: It does appear
16 to be a separate letter, but -- so, basically I
17 should ignore it or I --

18 DR. REEDE: Yes. If you notice up at
19 the top right-hand corner of the general plan
20 conformity application, the fax, the number of
21 pages in the fax, we couldn't just break it out.
22 We got a 21-page fax, we needed to docket a 21-
23 page fax. Half of it's Panoche, half of it's
24 Starwood, but we can't just cut documents up.

25 HEARING OFFICER KRAMER: Okay, well,

1 that answers my question.

2 Site control information. I don't
3 recall seeing a description of the terms of the
4 lease. A copy of the lease would be one way to
5 deal with that. But some evidence of the lease,
6 the fact of the lease and its terms. It may be
7 that because this is a commercial lease you
8 recorded some kind of notice of lease with the
9 recorder to protect your interests. That might be
10 adequate.

11 And then there's a discussion in the
12 staff analysis of an agreement to relocate one or
13 more of the residences that are nearby. I'll have
14 some questions about the status of that, whether
15 the agreement is nailed down, or still being
16 negotiated.

17 DR. REEDE: You're referring to the
18 noise section mitigation?

19 HEARING OFFICER KRAMER: Right.

20 DR. REEDE: Okay.

21 HEARING OFFICER KRAMER: And we'll
22 probably have some questions about the
23 intersection of relocations that relate to
24 Starwood. For instance, if you're relying on the
25 Starwood project to remove some residences, and

1 for some reason Starwood doesn't go forward and
2 doesn't undertake that obligation, we'll want to
3 know what's going to happen.

4 And that is basically it for my heads-up
5 questions at this point. As I said, I will send
6 around an email if I have some more.

7 Ms. Holmes, did you want to comment?

8 MS. HOLMES: We have a couple of
9 questions when it's an appropriate time.

10 HEARING OFFICER KRAMER: Go ahead.

11 MS. HOLMES: Okay. We looked at the
12 applicant's prehearing conference statement and we
13 didn't have the folder that they brought in this
14 morning. And I'd like to just get a couple of
15 questions clarified on the record about the
16 exhibits.

17 Are all of the exhibits that you
18 identified in your prehearing conference
19 statement, including 27 through 37, included in
20 that binder?

21 MR. McKINSEY: They're included in that
22 binder and three more binders.

23 MS. HOLMES: Fine. And that constitutes
24 all of the pieces of testimony that were
25 referenced in section 4 of the prehearing

1 conference statement. We had trouble cross-
2 referencing across the list in the prehearing
3 conference statement and the appendix attached to
4 the prehearing conference statement that also
5 listed them. We had trouble making a match
6 across. But as long as they're all in the folder,
7 that's sufficient.

8 And with respect to the declarations,
9 the declarations reference only testimony that's
10 been included in the binder? There's not
11 additional testimony that they're referencing
12 that --

13 MR. MCKINSEY: Exactly. The
14 declarations are in all the noncontroverted areas,
15 and they reference only the exhibits that are
16 included in the package.

17 HEARING OFFICER KRAMER: I'd point out
18 that in the binder there are some tabs for
19 testimony of various individuals on water that
20 don't currently have exhibit numbers. And what
21 I'll do is -- I've already prepared a tentative
22 exhibit list that I'll circulate to the parties
23 later this week. And that'll become our master
24 list.

25 And I will add those, with numbers, to

1 the list. And then I think we'll, at least for
2 the time being we'll have a complete list.
3 Obviously it might be supplemented later. But
4 we'll get that circulated to you.

5 MS. HOLMES: And I had one other, I
6 guess, just general comment to make with respect
7 to the water testimony. First of all, one of the
8 witnesses whose name is listed on the testimony
9 will not be available, Summer Goulet (phonetic).
10 But the testimony will be sponsored by the other
11 three witnesses.

12 The second point I wanted to make, as we
13 stated in our prehearing conference statement,
14 staff would like to address only the factual
15 issues related to water quality and costs in
16 testimony.

17 Staff is happy to provide oral argument
18 or discussion by the attorneys with respect to the
19 policy issues, but we do not have a witness
20 available to discuss the policy issue.

21 We believe that that's something that's
22 appropriate for, we'll be addressing it in our
23 brief and also for oral argument, but not as a
24 subject of testimony.

25 HEARING OFFICER KRAMER: The testimony

1 should be about facts, I agree.

2 MS. HOLMES: Correct.

3 MR. MCKINSEY: Well, the issue we have
4 is that the staff assessment contains a
5 significant amount of assessment of whether the
6 project complies with water policy 7558. And so
7 it is a factual question that has to be presented
8 via evidence of whether or not the project
9 complies with LORS.

10 This isn't an impact issue at all; this
11 is simply a LORS compliance question. It's the
12 only controverted issue in this project. And that
13 requires an assessment of the facts of the case
14 and how they fit with water quality 7558.

15 And we don't think that's arguing law.
16 And, in fact, if you look at the staff assessment,
17 that's essentially what it does. And so clearly
18 that's what the Commission has to assess, is
19 whether or not this project, as proposed by the
20 applicant, complies with all applicable LORS.

21 There clearly is a legal question in
22 there as to whether or not 7558 is a LOR. And
23 there could be a partially legal, partially
24 factual question as to what 7558 then requires if
25 it is a law, ordinance, regulation and standard.

1 But there's still a very important factual
2 question of how and whether this project, as
3 proposed by the applicant, complies with that
4 policy. And that's the focus entirely of our
5 testimony.

6 HEARING OFFICER KRAMER: I'm not sure I
7 understand, or I'm not sure I'm hearing that you
8 two disagree. Mr. McKinsey, you intend to put on
9 factual evidence with your witnesses and then
10 argue as the attorney for your client, correct?

11 MR. MCKINSEY: Correct.

12 HEARING OFFICER KRAMER: And, Ms.
13 Holmes, that's what you're asking for?

14 MS. HOLMES: Correct. Maybe it would
15 make it clear if I said specifically what our
16 witnesses are prepared to testify on is what is
17 the water quality associated with the water
18 associated with this project. And what are the
19 costs associated of the alternatives that were
20 examined.

21 Now, once those facts are in evidence,
22 staff is prepared to argue -- the staff attorney
23 is prepared to argue on behalf of the staff, as to
24 why the policy and the facts lead to the
25 conclusion that staff has reached in its final

1 staff assessment.

2 HEARING OFFICER KRAMER: And will you
3 both be prepared to at least have the first words
4 of that argument on next Wednesday? Or do you --

5 MS. HOLMES: Staff plans to address that
6 issue in the brief that's filed next week.

7 MR. BABULA: Yeah, I think actually we
8 agree on a lot of the technical aspects, as well;
9 the total dissolved solids and stuff -- I think we
10 actually used their analysis and their numbers on
11 some of that. So the factual issue of how much
12 saline -- the salinity of it is in agreement.

13 The issue then becomes the policy part.
14 And that's where we would argue that to a brief
15 and oral testimony as opposed to having a
16 hydrologist or a technical person start to
17 interpret the results.

18 That was what we were -- and I think it
19 is helpful that we are both on the same page for
20 the most part regarding the technical analysis of
21 the quality of the water. It's just a matter of
22 how you interpret that; and that's the part that
23 we're ready to go with in our brief.

24 MR. MCKINSEY: I don't know if we're
25 entirely on the same page because if you read both

1 the final staff assessment, which is the staff's
2 testimony, and you read our written testimony,
3 both those testimonies do more than just discuss.
4 They don't just present raw data. And that's
5 because there isn't a law or an ordinance or
6 anything that says all projects shall have water
7 below this total dissolved solids, or below this
8 chlorides.

9 And so there is a large question of
10 whether or not what 7558 requires. And the staff
11 analyzes that in their testimony as to whether or
12 not this project complies. It goes beyond just
13 saying here is the requirement and here is the
14 data. And it's just not that simple.

15 And that's why both the staff's
16 testimony already, which is their testimony in the
17 record, presents more than just data about aquifer
18 water quality and costs of alternatives. It goes
19 into the question of whether or not the aquifer
20 should be used.

21 And the policy, itself, in question, in
22 fact, doesn't have an emphatic thou shall or thou
23 shall not use water of this quality. It has a lot
24 of statements that require analysis and
25 application that isn't legal argument. And that's

1 why there are experts from the staff that are
2 evaluating that in the staff testimony. And
3 that's what we're presenting in our testimony.

4 We propose that that's completely
5 appropriate for us to present to you and the
6 Commissioners to get an assessment. And that
7 separately we're providing, as required by your
8 order, briefs by Friday that analyze the purely
9 legal questions of what 7558 says, what its
10 authority is, and whether and how it applies to a
11 power plant project. And likewise for the IEPR.

12 HEARING OFFICER KRAMER: Well, without a
13 specific question and objection in front of us, we
14 can't make any precise determinations. But I
15 think it's fair to say that questions of fact or
16 professional opinion are properly directed to the
17 technical experts; and questions of law would be
18 debated among the lawyers. Does that put you both
19 on the same page?

20 MS. HOLMES: I would hope so.

21 MR. MCKINSEY: Well, the issue, I think,
22 at least is staff has proposed that the witnesses
23 would only speak to two particular, very precise
24 topics. And that is water quality data. In other
25 words, what is the total dissolved solids content;

1 what is the chlorides content; other things in the
2 aquifers. And what is the cost of the alternative
3 that the staff has proposed.

4 And what I've indicated is that's not
5 what the staff testimony does. And that's not
6 what ours does. So we're proposing that there are
7 other facts beyond those two particular topics.
8 There are facts as to what is the nature of this
9 aquifer. And if you read 7558 it doesn't provide
10 any numbers, or at least it doesn't provide clear
11 guidelines. It talks in terms of policy and
12 recommendations.

13 And so the staff had to delve far beyond
14 simply saying this is water quality data. And so
15 our testimony has a factual category, we're
16 calling facts, that the staff didn't include. And
17 that is this discussion of the nature of these
18 aquifers.

19 And their level of use; who's using
20 these aquifers; who's not. Are these aquifers
21 really fresh; are they potable; are they usable
22 for agricultural uses. That's all in the staff
23 testimony. And that's in our testimony. And we
24 believe those are all facts, but they weren't in
25 that category that the staff proposed.

1 MR. BABULA: I think a lot of that is
2 facts. We mention use, like in acrefeet, the
3 current use of the aquifer, or the 30-year
4 average, so that would be factual.

5 I mean there is a greyish area. But I
6 think what we're saying is we're not going to have
7 a hydrologist up here talking about the IEPR
8 policy and getting into the legal nuances of water
9 policy for California.

10 So I think that's what we were trying to
11 say. Sounds like we are saying a lot of similar
12 stuff.

13 MR. MCKINSEY: Well, we're not, because
14 the staff testimony does discuss water quality --
15 water policy. And that's what's at issue. And
16 our testimony, as we described in the prehearing
17 conference statement in our written testimony,
18 does do the same thing that staff is doing. And
19 it's not lawyers that need to discuss that. It's
20 not legal argument.

21 It's from hydrologists and water policy
22 and water use experts that can discuss the
23 characteristic of the two aquifers in question,
24 and how useful they are for different purposes,
25 and who's using them. And how that fits with the

1 policy.

2 And that's exactly what the staff
3 testimony does. It's not legal argument if there
4 isn't a lawyer listed as a witness for the water
5 resources section of the staff testimony. It's an
6 engineer and a water hydrologist, an environmental
7 policy analyst.

8 And we're presenting the counter
9 testimony to that, and so we are discussing these
10 things that the staff would indicate would somehow
11 be presented by a lawyer when it can't be. A
12 lawyer can only discuss the legal interpretation
13 of that policy and the precise meaning of the
14 words, and the meaning of the Warren Alquist Act
15 when it talks in terms of laws, ordinances,
16 regulations and standards.

17 But in terms of talking about these
18 aquifers, we do have to present testimony, just as
19 the staff did, about whether or not these aquifers
20 are really something that the use of would counter
21 policy.

22 HEARING OFFICER KRAMER: I think once
23 you get into policy then pretty much anybody can
24 argue about policy. And it's going to be the
25 judgment of the two Members of the Committee as to

1 what the policy ultimately means, and how it will
2 be applied.

3 So, in my mind the distinction between a
4 water expert or a lawyer discussing policy doesn't
5 have much meaning. Either could do it, I believe.

6 MS. HOLMES: Let me offer a comment that
7 I'm hoping will be helpful. You're correct in
8 that there are conclusions in the staff testimony
9 about policy. And we struggled with this issue
10 before in some other FSAs. If you go through them
11 you'll find that there's a section that's
12 specifically labeled legal argument or policy
13 discussion or something to that effect.

14 That didn't happen in this case. The
15 concern that staff generally has and why it does
16 those in certain cases is that we want to make
17 sure that the evidentiary hearings are carefully
18 conducted so that factual issues are the subject
19 of testimony; and policy and legal issues are the
20 subject of argument.

21 If you want to have a person who you
22 think is an expert in water policy present an
23 argument as to why 7558 does or doesn't apply, or
24 leads to a specific result in that case, we have
25 no objection to that.

1 We may have objection to it being
2 factual testimony, but we wouldn't have objection
3 to it coming in as some sort of a policy
4 discussion or a legal argument.

5 Our point is simply that we want to make
6 sure that when the Commission drafts its decision
7 and makes findings of facts, that those findings
8 of fact are based on factual discussions that are
9 properly derived from the record. And that the
10 policy or legal conclusions are derived from
11 policy or legal kinds of discussions or arguments.
12 And not to mix the two together.

13 I just think that's a recipe for
14 mischief, and I would encourage the Committee to
15 keep those two issues somewhat separate.

16 So we're not trying to prevent you from
17 having somebody talk about whether it's
18 appropriate or not appropriate to use a certain
19 aquifer under the water policy. We're just asking
20 that there be some thought given to whether or not
21 that's factual testimony that's subject to cross-
22 examination, or whether that's a policy discussion
23 that's more of a situation in which the parties
24 present their various views, and the Committee
25 asks questions of them.

1 MR. MCKINSEY: One good example of this
2 issue is the question of what is fresh water, and
3 whether either aquifer or both of them or none of
4 them are fresh water, as that term is used in
5 7558.

6 The meaning of the term fresh is a legal
7 question, as is every word in 7558. But the
8 discussion of the characteristics of an aquifer
9 and whether or not it is a fresh aquifer requires
10 discussion about more than just water quality
11 data. And that's what I'm getting at.

12 I would suggest that, in fact, another
13 issue we have, again, is that the only staff
14 testimony we have has a complete mixture of those.
15 And so we -- because they really are very hard to
16 separate. There are some very clearly legal
17 issues of what is the meaning of each word in the
18 relevant questions, and whether or not those are,
19 indeed, a law, ordinance, regulation or standard
20 that the project must comply with.

21 But the discussion of whether an aquifer
22 is fresh is not an easily legal definition. And
23 that's the testimony that we have. And that's
24 what the staff does, as well. They say 7558 uses
25 this term, fresh. Well, what does it mean? And

1 if it has these meanings, then is this aquifer
2 fresh?

3 And so we're presenting our counter-
4 testimony to staff's testimony about what the
5 staff is calling fresh. And really they're
6 presenting an analysis of what it might mean. And
7 then comparing the aquifers.

8 Most of our testimony is about the data
9 of those aquifers, but woven into that, and it's
10 inseparable, is the discussion of the character of
11 those aquifers and how well they comport with
12 water policy.

13 And so it would be unfair to, for
14 instance, forbid us from discussing policy in our
15 written testimony and in our oral testimony
16 because that's what the staff has presented, is
17 this incorporated. And it makes sense to do that,
18 because the Commissioners are tasked with making a
19 complete decision; and that requires that they get
20 a very clear understanding of both the policy and
21 how it fits with the facts.

22 So, again, the only reason I'm saying
23 this is because we are presenting more than
24 aquifer A has a total dissolved solids of X; and
25 aquifer B has a total dissolved solids of Y. We

1 are saying this is the character of aquifer A. We
2 are providing that data, but we're also saying
3 this is the use of that aquifer, this is who's
4 using it, who's not. This is whether this aquifer
5 is usable for different uses.

6 And this, as a whole, tells us that the
7 aquifers do or do not -- the use of the aquifers
8 by a power plant project does or does not comply
9 with policy. And that is a very tough question;
10 and it's not one that's going to be easily divide-
11 able into simple facts and straightforward law.

12 And we would suggest that the
13 Commissioners and the Commission have the ability
14 to do what staff is proposing, which is be very
15 careful to delineate what the law is and what the
16 facts are. And that the way we're presenting the
17 testimony will be clear. And we are, indeed,
18 where we see clear legal questions, restricting
19 those to our brief.

20 HEARING OFFICER KRAMER: Okay. Ms.
21 Holmes, I guess I understood you to be speaking
22 not so much about what the universe of the
23 testimony would be, but about what your witnesses
24 were coming and intending to speak to.

25 MS. HOLMES: That's correct. Our

1 witnesses will be talking about the numbers;
2 they'll be talking about who uses the aquifer;
3 they'll be talking about what the aquifer gets
4 used for.

5 But in terms of why a particular
6 interpretation of 7558 is more reasonable than
7 another, that's something that the staff counsel
8 will be prepared to address for the Committee, not
9 the witnesses.

10 MR. MCKINSEY: And, indeed, as required
11 by the order that's what we're briefing by Friday.

12 HEARING OFFICER KRAMER: Okay. Mr.
13 McKinsey, you may decide on a slightly different
14 division of labor among your witnesses and
15 attorneys. And it sounds as if the staff will not
16 have any particular issue with that.

17 MS. HOLMES: That's correct. I wanted
18 to make it absolutely explicit that if there is an
19 issue that's really more of a policy issue that
20 you have retained an expert for, I have no
21 objection to that person discussing his or her
22 conclusions or rationale with the Committee. Even
23 if it's not factual testimony.

24 HEARING OFFICER KRAMER: Sounds almost
25 as if it's a difference in style. And we don't

1 get paid style here generally.

2 MS. HOLMES: Hearing Officer Kramer, may
3 I ask one last question?

4 HEARING OFFICER KRAMER: Certainly.

5 MS. HOLMES: And that is you had
6 indicated in your order that you were not
7 intending to preclude any sort of supplemental
8 rebuttal testimony. I'm assuming, based on what
9 we've heard today, that there will be none. But
10 if there is, I would certainly like to know it.
11 And I would also like to know what the deadline
12 for that is. We have no plans at this point to
13 file any.

14 MR. MCKINSEY: And neither do we.

15 MS. HOLMES: Okay.

16 HEARING OFFICER KRAMER: Well, as late
17 as the hearing I think you -- if you have, for
18 instance, an exhibit that you're using to impeach
19 or rebut. Given the timeframes that we've set in
20 order to try to expedite the rendering of a final
21 decision in this case, it might be a little
22 inconvenient, but I think you can certainly bring
23 it in as late as the hearing.

24 MS. HOLMES: I guess in my mind I
25 distinguish between rebuttal testimony and

1 exhibits that are used for purposes of cross-
2 examination. For example, for impeaching a
3 witness. Are you referring simply to the latter
4 types of documents?

5 HEARING OFFICER KRAMER: I think in this
6 case both.

7 MS. HOLMES: Okay, thank you.

8 HEARING OFFICER KRAMER: And I'm hoping
9 that the briefs that you will file this week will
10 sufficiently address all the legal issues. If
11 not, one of the things we will discuss at the
12 conclusion of the hearing is whether we do need
13 additional briefs.

14 But my point in trying to get the
15 obvious issues briefed ahead of the hearing was to
16 make it perhaps possible for us to more quickly
17 decide the matter.

18 Do we have anyone on the telephone?

19 Mr. McKinsey, do you have any additional
20 issues you want to raise before --

21 MR. MCKINSEY: I wanted to raise one
22 item that wasn't entirely clear in our prehearing
23 conference statement. In our testimony we propose
24 an alternative soil-and-water-8.

25 And so I wanted to really call that to

1 the attention of the staff, that one of the things
2 in the staff testimony indicated that there wasn't
3 any mitigation that had been offered. And that
4 wasn't entirely correct because the applicant had
5 proposed to make a payment to offset theoretical
6 water issues. And soil-and-water-8 embodies that.
7 It also embodies upping the ante, so to speak,
8 making a larger contribution.

9 And so given the fact that the staff
10 testimony may have overlooked the fact that that
11 had been offered during some workshops and in a
12 letter. It is possible that that could even cause
13 the staff to reflect on, and come into the hearing
14 with a view on soil-and-water-8.

15 And so ultimately what we're headed for,
16 I think, is staff has proposed a particular
17 condition soil-and-water-8 which goes in the
18 direction of requiring different aquifer use. And
19 we've proposed a soil-and-water-8 that proposes
20 increased mitigation from what had been offered
21 earlier.

22 And I mainly wanted to call that to the
23 attention of the staff, that that's worth taking a
24 look at. Because it doesn't come out in our
25 prehearing conference statement that that was

1 there. There's a mention of it, but not by the --
2 that clearly.

3 MS. HOLMES: The Project Manager would
4 like to know the exact location in your exhibit
5 list of that.

6 MR. MCKINSEY: It's in the written
7 testimony of Gary Chandler, which, as the Hearing
8 Officer noted, is in the back of that main binder,
9 in the pocket. And he is going to be assigning
10 exhibit numbers to that.

11 HEARING OFFICER KRAMER: Do we have any
12 members of the public in the audience who would
13 like to make any comments?

14 Seeing none -- and nobody has checked in
15 on the telephone?

16 (Pause.)

17 HEARING OFFICER KRAMER: Okay, just a
18 reminder then, we will have our hearing on
19 Wednesday of next week, October 10th, hopefully
20 beginning at 2:00. But if the Commissioners are
21 delayed by the morning business meeting, we'll
22 begin as soon thereafter as we can.

23 Any closing comments from the parties?

24 MR. MCKINSEY: I did forget one item.
25 We had proposed in our prehearing conference to

1 have one of our witnesses appear by telephone.
2 And that didn't really get mentioned. I just
3 wanted to verify that that was not an issue.

4 And then I don't know if we had -- I
5 can't recall if we had scheduled a call-in number.
6 But obviously we need to coordinate having that
7 person appear by telephone.

8 HEARING OFFICER KRAMER: That number's
9 already been established.

10 MR. MCKINSEY: Good.

11 HEARING OFFICER KRAMER: It's on the
12 notice.

13 MS. HOLMES: Staff has no objection to a
14 witness appearing by phone.

15 HEARING OFFICER KRAMER: That would be
16 just one witness, though?

17 MR. MCKINSEY: Correct.

18 HEARING OFFICER KRAMER: Because I think
19 we ordered --

20 (Parties speaking simultaneously.)

21 MR. MCKINSEY: And then, yeah, there
22 might be somebody appearing by phone for air, as
23 well. Or we might, who knows, we might actually
24 talk somebody into coming up here.

25 HEARING OFFICER KRAMER: If you get

1 quite a number of people proposing to do that, let
2 me know because we may exceed the number of
3 telephone lines we have at some point.

4 Otherwise, seeing no further comments,
5 we'll adjourn, and see you next week.

6 (Whereupon, at 11:23 a.m., the
7 Prehearing Conference was adjourned.)

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CERTIFICATE OF REPORTER

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 10th day of October, 2007.

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