

PREHEARING CONFERENCE  
BEFORE THE  
CALIFORNIA ENERGY RESOURCES CONSERVATION  
AND DEVELOPMENT COMMISSION

In the Matter of: )  
 )  
Application for Certification ) Docket No.  
for Small Power Plant Exemption ) 04-SPPE-01  
Riverside Energy Resource Center )  

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

WEDNESDAY, JULY 28, 2004

10:11 A.M.

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COMMITTEE MEMBERS

John L. Geesman, Associate Member

HEARING OFFICER and ADVISERS PRESENT

Gary D. Fay, Hearing Officer

Tim Tutt, Adviser

STAFF and CONSULTANTS PRESENT

James W. Reede, Jr., Project Manager

Lisa DeCarlo, Staff Counsel

PUBLIC ADVISER

Margret Kim

APPLICANT

Allan J. Thompson, Attorney

Robert B. Gill, Principal Electrical Engineer  
City of Riverside

Dave Tateosian, Project Manager  
Power Engineers, Inc.

ALSO PRESENT

Marc D. Joseph, Attorney  
Suma Peesapati, Attorney  
Adams, Broadwell, Joseph & Cardozo  
California Unions for Reliable Energy

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

10:11 a.m.

HEARING OFFICER FAY: Good morning.

This is the prehearing conference for the Riverside Energy Resource Center. Before we begin we'll have introductions. To my left is Commissioner John Geesman, the Associate Committee Member of the Committee for this. Commissioner Jackalyne Pfannenstiel is not available today; she's the Presiding Member, but her Adviser, Tim Tutt, to my right. And he will be listening on behalf of Commissioner Pfannenstiel.

We also have our Public Adviser here, Margret Kim. And in a moment I'll give you the opportunity to say something if there's anybody --

MS. KIM: (inaudible).

HEARING OFFICER FAY: Okay, all right, fine.

On behalf of the applicant, Mr. Thompson, do you want to introduce --

MR. THOMPSON: Thank you very much, Mr. Fay. My name is Allan Thompson representing the City of Riverside Public Utilities. To my right is Bob Gill, who is the Project Manager for the City. And behind me is Dave Tateosian with Power

1 Engineers, who would be the Project Engineer for  
2 the engineering environmental work on the project.

3 HEARING OFFICER FAY: Okay. And, Ms.  
4 DeCarlo.

5 MS. DeCARLO: Yes, thank you, Mr. Fay.  
6 My name is Lisa DeCarlo; I'm the Energy  
7 Commission's Staff Counsel for this project. To  
8 my right is Dr. James Reede; he's the Energy  
9 Commission's Project Manager.

10 HEARING OFFICER FAY: Thank you. Mr.  
11 Joseph.

12 MR. JOSEPH: Thank you. My name is Marc  
13 Joseph representing CURE. To my left is Suma  
14 Peesapati, my colleague.

15 HEARING OFFICER FAY: Okay. Anybody  
16 else here to comment or participate in any way?  
17 All right.

18 By way of background the Committee  
19 scheduled today's prehearing conference in a  
20 notice of June 14th. As explained in the notice  
21 the basic purposes of the prehearing conference  
22 are to assess the parties' readiness for hearings,  
23 to clarify areas of agreement or dispute, to  
24 identify witnesses and exhibits, to determine upon  
25 which areas the parties desire to cross-examine

1 witnesses from other parties, and to discuss  
2 associated procedural items.

3 To achieve these purposes we required in  
4 the notice that any party desiring to participate  
5 file prehearing conference statements by July  
6 21st. And we received prehearing conference  
7 statements from the applicant, the staff and  
8 intervenor CURE.

9 We understand that the staff's initial  
10 study will be released soon. Do we have a date on  
11 that?

12 MS. DeCARLO: I believe tomorrow.

13 HEARING OFFICER FAY: Tomorrow, okay.

14 And thus final positions for the parties are  
15 somewhat uncertain. But along that line, if the  
16 staff can indicate on a given topic whether there  
17 is any change or minor change from the initial  
18 study, I think it will help everybody understand  
19 whether their position is likely to be modified  
20 vis-a-vis the staff initial study.

21 I'll also note that in response to  
22 applicant's July 19th motion to close discovery  
23 the Committee issued an order closing discovery  
24 effective July 23rd. And that really was, while  
25 it was in response to applicant's motion, it also

1       responded to the regulatory schedule that we have  
2       in an SPPE, which is extremely short, 135 days for  
3       the total case.

4               Now, I don't know if that's ever been  
5       achieved, but we certainly have to do our best to  
6       try to meet that.

7               Today's agenda is basically divided into  
8       three parts. We will discuss a number of motions  
9       and options for proceeding with the case. And  
10       then we will move into the prehearing conference  
11       statements and try to explore the various topics  
12       and how they will be handled. And finally we'll  
13       have public comment period available.

14               So, first of all, in terms of options  
15       for proceeding, we have the date now, anticipated  
16       date for the staff initial study. And yesterday,  
17       I believe, or day before, CURE filed a motion to  
18       convert the SPPE to an AFC. And we also have the  
19       question of the effect of apparent disputed topics  
20       and how that ties into CEQA's fair argument  
21       standard applied to a negative declaration, which  
22       is really the work product that would come out of  
23       the SPPE process if the exemption is approved.

24               So, I think the two tie in together and,  
25       Mr. Joseph, did you want to add anything further

1 to the motion you filed? We have that before us.

2 MR. JOSEPH: I would like to say a few  
3 words about it because I think it is the threshold  
4 question which will drive most of the rest of what  
5 will happen this morning.

6 First, I just want to be sure that  
7 everybody actually received the motion. It was  
8 emailed to everybody yesterday. And I hope the  
9 Commission has had a chance to look at it and  
10 peruse the document. We recognize it was long,  
11 and it was sent as an email without the  
12 attachments. The originals are being filed today  
13 and we have copies for you.

14 I think, you know, the question which is  
15 before the Commission on this motion really is  
16 simple. The issue is neither novel nor untested.  
17 And the Commission's analysis of the legal  
18 standard is clearly set forth in its recent  
19 decision of three months ago in the Modesto case.

20 This is, Mr. Fay, as you said, the  
21 negative declaration standard. And under that  
22 standard all it takes is substantial evidence of a  
23 fair argument that the project may cause a  
24 significant impact.

25 It does not matter -- repeat that, it

1 does not matter if someone disagrees. The  
2 Commission's role in evaluating a negative  
3 declaration is not to weigh the evidence, is not  
4 to weigh the evidence. It's simply to determine  
5 whether there is any substantial evidence to  
6 support a fair argument of any impact.

7 Now, --

8 HEARING OFFICER FAY: Now -- excuse me  
9 for interrupting you. Is it your position that  
10 your motion alone, with its offer of proof,  
11 constitutes substantial evidence when we have no  
12 record at this time?

13 MR. JOSEPH: Absolutely it is. Like any  
14 other agency, you opened the door to receiving  
15 comments. We filed them, and we filed the  
16 qualifications of the experts who are supporting  
17 that. And we filed the underlying evidence. And  
18 that is what it takes.

19 We, of course, could go through the  
20 motions of having someone sit down here and say,  
21 you know, do you solemnly swear this is your  
22 testimony. They would say yes. And then it would  
23 be over. That would be, you know, a waste of  
24 time, frankly.

25 Like any other --

1 HEARING OFFICER FAY: But, of course,  
2 that person would be subject to cross-examination  
3 by other parties.

4 MR. JOSEPH: But it doesn't matter  
5 because unless you expect that for every one of  
6 the 12 impacts that we listed that our witness is  
7 going to break down on the stand and confess that  
8 she made it all up, there's not the slightest  
9 basis for any opinion, then it simply doesn't  
10 matter that there might be conflicting evidence.

11 The whole idea of a negative declaration  
12 is to start the process. And what we're saying is  
13 there is enough evidence, there is more than  
14 enough evidence. There are 12 independent bases  
15 why the Commission has to embark on its EIR  
16 equivalent process, that is the AFC process.

17 HEARING OFFICER FAY: Well, it occurs to  
18 me that it doesn't require a breakdown on the  
19 stand Perry-Mason style. That cross-examination  
20 might just elicit the witness' awareness at the  
21 time they filed their testimony of say the staff's  
22 latest draft or some fact that was not taken into  
23 account.

24 So, it certainly would be unusual, in  
25 terms of the way the Commission does business, to

1 act before we've created a record of any kind. So  
2 I --

3 MR. JOSEPH: Well, typically lead  
4 agencies in CEQA processes do not have evidentiary  
5 hearings at all. And there's no requirement to  
6 have an evidentiary hearing in order to create the  
7 record that you need to determine that a negative  
8 declaration is not appropriate here.

9 Most lead -- in fact, I'm not sure  
10 there's any other agency in the entire state that  
11 requires an evidentiary hearing to get there.  
12 Everybody else simply takes written comments that  
13 look exactly like this.

14 HEARING OFFICER FAY: What verifies  
15 those comments?

16 MR. JOSEPH: Exactly what happens with  
17 every other lead agency across the state. They're  
18 submitted; they're signed; we have the r, sum, s of  
19 the consultants.

20 HEARING OFFICER FAY: They're signed by  
21 you --

22 MR. JOSEPH: Yes.

23 HEARING OFFICER FAY: I don't think  
24 they're even signed by the consultants. You know,  
25 that --

1 MR. JOSEPH: That's typically --

2 HEARING OFFICER FAY: -- wouldn't be a  
3 big problem but --

4 MR. JOSEPH: That's typically the case  
5 but if it would address some concern, we have no  
6 problem, you know, submitting a declaration saying  
7 yes, indeed, these are my comments. But cross-  
8 examination won't change the outcome.

9 Now, you know, we could have laid back,  
10 not commented on the initial study at all, and  
11 waited for the evidentiary hearings and sprung all  
12 this stuff on the Commission. I don't like to do  
13 business like that. I want to get it out there as  
14 early as possible; and this was as early as  
15 possible.

16 If there were just one bullet item on  
17 our list, and maybe you could anticipate that  
18 somehow, you know, some key fact was overlooked  
19 and the analysis would turn out to be utterly  
20 wrong because of that key fact, then maybe it  
21 would be worth spending the time to explore that.

22 But we've got a dozen here; and frankly,  
23 we stopped writing only because we ran out of  
24 time. And the result here is not surprising. I  
25 mean think about it. Would you really expect that

1 you could site a substantial size power plant in  
2 the L.A. Basin and not have any air quality  
3 impacts? That, on its face, is counterintuitive.  
4 You wouldn't expect that result.

5 And so you shouldn't be surprised that  
6 we've got six or seven air quality impacts here  
7 that are significant. There should be no surprise  
8 at all. The surprise would be if there weren't  
9 any.

10 COMMISSIONER GEESMAN: Mr. Fay.

11 HEARING OFFICER FAY: Yes, Commissioner.

12 COMMISSIONER GEESMAN: Mr. Joseph,  
13 without arguing over your opinion of what your  
14 motion demonstrates, your reference to the  
15 Commission's Modesto decision does include a  
16 statement from the decision that the fair argument  
17 standard does not include, and I'm quoting, it's  
18 not referenced what the quotation refers to, but  
19 it apparently is taken from the decision of the  
20 Commission, "it does not include argument,  
21 speculation, unsubstantiated opinion or narrative,  
22 evidence that is clearly inaccurate or erroneous,  
23 or evidence of social or economic impacts that do  
24 not contribute to or are not caused by physical  
25 impacts on the environment."

1           And I presume that were we to subject  
2           the filings of your witnesses to cross-examination  
3           the applicant and the staff may have an  
4           opportunity, through cross-examination, to  
5           establish that your filings are, in fact, the way  
6           in which this language specifies would not apply  
7           to the fair argument standard.

8           So, is there not some value in providing  
9           the applicant and the staff the opportunity to  
10          cross-examine your witnesses on the filings that  
11          you've made?

12          MR. JOSEPH: You're looking at exactly  
13          the right question here. And I think the key here  
14          is unsubstantiated opinion. And we're, you know,  
15          keenly aware of that standard, which is why this  
16          is as fully documented as it is, to show the  
17          substantiation that we've got.

18          You know, this is a very low threshold  
19          to get over because all it says is, yes, indeed,  
20          you have to do the environmental analysis.

21          I think it may be appropriate to allow  
22          other parties to file a response to the motion.  
23          We certainly think that would be consistent with  
24          the Commission's rules and perhaps would address  
25          any issues. If the Commission wants to have

1        declarations, we can do that.  If you're more  
2        comfortable that that establishes the record.  I  
3        don't think it's necessary, but we could do that.

4                But, you know, the last thing I want to  
5        be accused of is trying to delay this for delay's  
6        sake, itself.  And that's why we suggested  
7        immediately converting this to an AFC proceeding.  
8        And if you do that, you know, clearly the  
9        Commission is off and running.  And, you know,  
10       much of what normally happens in the first several  
11       months in the AFC proceeding could be compressed  
12       into a very short timeframe, because obviously the  
13       staff is well versed.  There's a substantial  
14       amount of evidence that has been filed.  I would  
15       expect the adequacy of the application would be an  
16       extremely fast exercise, and we'd get right into  
17       the substance of what it's going to take to  
18       evaluate the impacts.

19               COMMISSIONER GEESMAN:  Well, I  
20       understand that your view is that this is more  
21       appropriately addressed in an AFC process rather  
22       than an SPPE one.  But isn't the appropriate  
23       remedy then our denial of the request for  
24       exemption?  Do we have the authority on your  
25       motion to convert the applicant's filing into an

1 AFC? It seems to me that's the prerogative of the  
2 applicant.

3 MR. JOSEPH: I'm not going to twist your  
4 arm and say please don't deny the exemption. I'm  
5 trying to be as pragmatic and open to the  
6 applicant proceeding with the project as possible.

7 As a technical matter I think you're  
8 right. You say we deny or you indicate we are  
9 going to deny, the applicant opportunity to file a  
10 motion to convert, you know. I'm simply trying to  
11 compress those steps.

12 COMMISSIONER GEESMAN: I appreciate  
13 that.

14 HEARING OFFICER FAY: Okay, anything  
15 further on the motion, Mr. Joseph?

16 MR. JOSEPH: No.

17 HEARING OFFICER FAY: All right.  
18 Applicant's response?

19 MR. THOMPSON: Yeah, I'll try and be  
20 brief. First of all, if the motion should be  
21 considered at all, it's premature. There is no  
22 showing by CURE to support this. There are no  
23 exhibits. There is no testimony in the record.  
24 We have not seen the testimony. To date we have  
25 not been provided with the exhibits.

1           And while assertions of counsel are  
2 nice, I don't think that that along should be the  
3 basis of a decision by the Commission.

4           Second of all, Mr. Joseph says, merely  
5 something spoken by him that will be echoed,  
6 apparently, by one of his witnesses as a basis, I  
7 think, denies the right of the other parties to  
8 get behind the opinion of the expert.

9           Let me give you an example. In CURE's  
10 motion at VII, Roman VII, one of their 12 points,  
11 the project as a whole will include four units,  
12 not simply two. They base that upon material that  
13 we have put in. The only material that we have  
14 put in was in response to some of their data  
15 requests where we said there are no specific plans  
16 or commitments to units 3 and 4. We don't have  
17 units 3 and 4. We don't know if they'll be  
18 combined cycle or simple cycle. We go on and on,  
19 and yet apparently they use that to support an  
20 expert, in quotes, opinion that there will be a  
21 unit 3 and 4.

22           What that leads me to believe is that  
23 there may not be anything behind any of the 12  
24 assertions, because I do not think that the  
25 statements that we have made can support an

1 opinion that units 3 and 4 are contemplated.

2 So that, by way of example, is the  
3 applicant's position. That if this should be  
4 entertained at all, it is premature.

5 HEARING OFFICER FAY: Okay.

6 MR. THOMPSON: Thank you.

7 HEARING OFFICER FAY: Mr. --

8 Commissioner.

9 COMMISSIONER GEESMAN: Do you agree that  
10 the standard that we are to apply -- this is a  
11 little bit broader question than merely whether we  
12 should grant the motion or not, but in ultimately  
13 determining whether your project is entitled to an  
14 exemption, do you agree that the standard we  
15 should apply is the fair argument standard?

16 MR. THOMPSON: We are looking at that,  
17 but I don't think that that's the whole of the  
18 standard. I think that the Commission does have  
19 the authority and the responsibility to go behind  
20 the assertions of the fair argument test.

21 They have to be supported. They have to  
22 be supported by facts, not by merely opinion, it  
23 is my feeling. And I think that there is some  
24 discretion on the part of the Commission to decide  
25 whether or not the basis of an expert opinion

1 passes a blush test.

2 COMMISSIONER GEESMAN: Have you had an  
3 opportunity to review CURE's quote from our  
4 Modesto decision?

5 MR. THOMPSON: We are familiar with the  
6 Modesto decision, yes.

7 COMMISSIONER GEESMAN: And do you think  
8 that that language in the decision accurately  
9 reflects the standard that we should apply in an  
10 SPPE case?

11 MR. THOMPSON: I don't think that we are  
12 at the point where we can comment on that yet,  
13 sir.

14 COMMISSIONER GEESMAN: Okay, thank you.

15 HEARING OFFICER FAY: Okay. Does the  
16 staff have a response?

17 MS. DeCARLO: Yes, thank you. I  
18 disagree with Mr. Joseph's assertion that simply  
19 the submittal of their arguments prevents us from  
20 going forward with a negative declaration. Under  
21 the fair argument standard one looks to the whole  
22 of the record. Evidence that rebuts, contradicts  
23 or diminishes the reliability or credibility of a  
24 witness is properly considered in determining  
25 whether or not there is substantial evidence

1 supporting their arguments.

2 Argument, speculation, unsubstantiated  
3 opinion or narrative, and evidence which is  
4 clearly inaccurate or erroneous is not substantial  
5 evidence. And staff is prepared to show in the  
6 hearings, both through our testimony and through  
7 cross-examination, that CURE's testimony does not  
8 rise to the level of substantial evidence of a  
9 potential for significant impact.

10 HEARING OFFICER FAY: Now, Mr. Joseph  
11 pointed out that he is alleging 12 different areas  
12 of significant impact. Is it staff's position  
13 that in all 12 of those areas there is no  
14 substantial evidence of a significant impact?

15 MS. DeCARLO: Yes, that is our position.  
16 That the facts relied upon by CURE in their  
17 assertions are inaccurate, erroneous and otherwise  
18 not credible.

19 HEARING OFFICER FAY: Okay.

20 MR. JOSEPH: Mr. Fay.

21 HEARING OFFICER FAY: Yes, Mr. Joseph.

22 MR. JOSEPH: You know, perhaps because  
23 of the timing of the service; the service was by  
24 email; it didn't include the attachments. Neither  
25 the applicant nor staff has had the benefit of

1 actually seeing the substantiation, and for that  
2 matter, neither have you.

3 And because you don't have copies  
4 physically I thought I'd actually (inaudible). If  
5 you'll take a look at it you'll see this is not  
6 unsubstantiated fact; it's wildly over-  
7 substantiated. Far more substantiation than CEQA  
8 requires.

9 HEARING OFFICER FAY: Okay. Given that  
10 you're able to present these today, it's a little  
11 premature but does that suggest that you'd be  
12 ready to file testimony in a fairly soon period?  
13 We have the staff's testimony, in a sense, coming  
14 in tomorrow. And the applicant informed me  
15 that -- Allan, when did you say you could file?

16 MR. THOMPSON: Well, it depends on when  
17 you would like to start hearings, but I think we  
18 can -- all of our exhibits are in the record. So  
19 we are not going to try and sabotage anybody with  
20 late exhibits such as this. And really our  
21 testimony will reflect those exhibits.

22 And so if we have early hearing dates we  
23 will do our best to get it in this week.

24 HEARING OFFICER FAY: What about your  
25 folks, Mr. Joseph? And I don't mean all or

1 nothing. Don't lock it into the last testimony  
2 that would have to be filed because, you know, if  
3 we've got a lot of subject areas to cover they  
4 don't all have to be covered in one day.

5 MR. JOSEPH: I think we need to think  
6 about the sequence of events here. The way the  
7 schedule is set up, comments were due today on the  
8 staff's draft initial study. And staff's final  
9 study, final initial study was supposed to be  
10 tomorrow.

11 Now, obviously that doesn't give staff  
12 enough time to do what Ms. DeCarlo said they can  
13 do, even without having the benefit of having seen  
14 the comments.

15 So, you know, I don't think the  
16 Commissioners can be well served by having the  
17 staff have a 24-hour turnaround on 80 pages of  
18 comments, which are highly detailed and highly  
19 technical.

20 So I think the sequence of events is  
21 something we need to think about first. Give the  
22 staff an opportunity to actually consider what  
23 we've said. We hope we convince the staff on a  
24 number of these issues. And we hope they'll take  
25 these seriously and that staff will agree with us.

1 And when their technical people get to look at it  
2 and we get past the lawyers, like, you know, this  
3 is right. You know, the applicant really did make  
4 a mistake because they copied numbers wrong,  
5 incorrectly, when they did their calculations, you  
6 know,. CURE is really right because, you know  
7 what, they actually did evaluate the emissions at  
8 the wrong temperature.

9 We hope that staff will keep an open  
10 mind to do that. And we think the Commission  
11 would be benefitted by giving staff an  
12 opportunity. Then, after staff has had a chance  
13 to meaningfully digest these, then we'd like to  
14 see the initial study. And then provide you  
15 testimony, if that's the course you decide to  
16 take.

17 HEARING OFFICER FAY: And --

18 MR. JOSEPH: I have to see the initial  
19 study, you know, I --

20 HEARING OFFICER FAY: So until you see  
21 the final initial study you can't answer my  
22 question?

23 MR. JOSEPH: That's really right because  
24 I don't know how many of these points I'm going to  
25 end up saying, yes, we agree with staff.

1 HEARING OFFICER FAY: All right.

2 MR. JOSEPH: I hope it's all of them.

3 MS. DeCARLO: In terms of responding to  
4 CURE's comments, staff has started since  
5 yesterday, since we received the document,  
6 attempting to -- Monday -- augment our testimony  
7 in order to respond to it.

8 We believe we will be able to include  
9 all responses in our FIS file tomorrow to CURE's  
10 comments. In the event that we are unable to, we  
11 will definitely be prepared to address the issues  
12 in our direct testimony at the hearings.

13 HEARING OFFICER FAY: Okay. Well,  
14 anything further on CURE's motion to convert to an  
15 AFC?

16 All right, let's move along then. We  
17 have a motion from the applicant, and then one  
18 filed today by the staff, to produce exhibits.  
19 CURE has filed 113 exhibits. And what I understand  
20 from the applicant's motion is that not all of  
21 them are readily available.

22 Mr. Thompson, have you attempted, for  
23 instance where an exhibit you're concerned about  
24 is a Commission document that's available on the  
25 web, have you included that on your list? Or have

1 you attempted to shorten the list by things that  
2 are truly not available?

3 MR. THOMPSON: What I attempted to do is  
4 have number one, documents that were readily  
5 available that I had or a witness had, see if we  
6 could determine which parts of those documents --  
7 well, first of all, if we have the documents we  
8 didn't include them in our list.

9 Second of all, if documents were parts  
10 of -- it was clear that parts of larger documents  
11 are what CURE's going to be relied on, we asked  
12 that just the relevant parts be given to us.

13 But there are other -- but we asked our  
14 witnesses --

15 HEARING OFFICER FAY: Could I stop you  
16 there?

17 MR. THOMPSON: Yes.

18 HEARING OFFICER FAY: Forgive me, but  
19 relevant parts. If it's something, for instance,  
20 that's on the Commission website, I can understand  
21 you need the reference to the relevant parts, but  
22 you don't really need the relevant parts produced,  
23 do you, just to know --

24 MR. THOMPSON: No, just --

25 HEARING OFFICER FAY: -- what pages or

1 something like that?

2 MR. THOMPSON: Exactly.

3 HEARING OFFICER FAY: Okay.

4 MR. THOMPSON: But, for example, they  
5 cite DOCs, determinations of compliance, that have  
6 been submitted by air quality management districts  
7 in various projects up here. Those are no longer  
8 on the website. And rather than have us send  
9 someone up here and go through your files, or go  
10 to Monterey or whatever, these documents are  
11 clearly in the hands of CURE's witnesses and  
12 they're relying on them.

13 It doesn't strike me that it's  
14 burdensome to ask them to serve those document.

15 MR. JOSEPH: Mr. Fay, maybe I can short-  
16 circuit this.

17 HEARING OFFICER FAY: Sure.

18 MR. JOSEPH: When the time comes that we  
19 file testimony we'll include all the documents  
20 that we're relying on. We're not going to hold  
21 anything back. It will all be there for you. And  
22 we're perfectly happy to provide everything we  
23 rely on with our testimony.

24 HEARING OFFICER FAY: Well, if I may  
25 just comment on your comment, I've had the

1 pleasure of having Dr. Fox before me in the past.  
2 And it often takes a file cabinet to accompany her  
3 testimony because of the size of the exhibits.

4 So I think for everybody's benefit you  
5 should try to limit it to portions that are agreed  
6 upon as not otherwise available. In other words,  
7 if she cites the Warren Alquist Act, she doesn't  
8 have to include a copy of that with her testimony.

9 But, obviously the parties will need  
10 access to the documents; and those that are not  
11 readily available you'll have to include.

12 MR. JOSEPH: And to the extent the  
13 Commission is willing to be flexible on the  
14 availability, we'd just as soon not make a  
15 thousand copies and drag them in here. If they're  
16 available on the website or some other website or  
17 some other publicly available place, you know. We  
18 just want to be as accommodating -- we don't ever  
19 want to be accused of, well, you didn't provide us  
20 this document.

21 HEARING OFFICER FAY: Okay, yeah. And I  
22 think there's sort of a real reason here, if it's  
23 only available down at the Monterey Air District,  
24 well, that's not readily available. If it's  
25 available on a website, that's readily available.

1           So, the parties should be able to get  
2           access to these without going through a lot of  
3           extra work.

4           MR. THOMPSON: Mr. Fay, if I may, I'm  
5           assuming that there are no games being played  
6           here, and the 113 exhibits that CURE labeled and  
7           identified are going to be the exhibits that they  
8           are going to be relying on.

9           And it doesn't seem to me to make much  
10          difference whether they provide them now or they  
11          provide them at some future point with their  
12          testimony. We would sure like to be able to see  
13          what these exhibits are. It doesn't take them  
14          writing anything. These are documents that are  
15          already complete and they're relying on.

16          MR. JOSEPH: Mr. Fay, there will not be  
17          113 documents. As we discussed, the timing of the  
18          prehearing conference statement was a little cart-  
19          before-the-horse-ish because it wasn't until  
20          yesterday when we completed our comments on the  
21          draft initial study. And so, you know, out of an  
22          abundance of caution, released everything which  
23          was possible for us to be relying on.

24          As it turns out, of course, you know,  
25          everything that we might rely on we didn't have to

1       rely on. And so, you know, what's really  
2       important for Mr. Thompson, and he deserves to get  
3       and see, is any documents that we actually end up  
4       relying on. And we will, I assure you, do our  
5       best to provide everything. If we believe  
6       something is reasonably available, readily  
7       available and it turns out that Mr. Thompson has  
8       trouble getting it, all he has to do is call and  
9       we'll give him a copy. There are no games here;  
10      we're happy to provide it.

11               HEARING OFFICER FAY: I think the same  
12      would go for the staff, too. I think in light of  
13      the pace at which this case must evolve, it might  
14      be more practical to require the exhibits to be  
15      either precisely identified, if it's a portion of  
16      something like an AFC, or literally included with  
17      the testimony when it's filed.

18               Because my guess is right now if your  
19      request, Mr. Thompson, were to be granted, it  
20      would be over-inclusive just because of the nature  
21      of things. I mean if the staff has made any  
22      changes whatsoever in its final initial study from  
23      the draft, that could in turn change some of  
24      CURE's positions.

25               And if we've allowed enough preparation

1 time from the time testimony is filed until the  
2 hearing occurs, presumably that would allow enough  
3 time to look at the exhibits.

4 I think we might have to just do it that  
5 way. It's somewhat of an inconvenience, but I  
6 think it also is a practical approach to this.  
7 Any strenuous objection to that approach?

8 MR. THOMPSON: No, just one final note.  
9 We take these proceedings very seriously and when  
10 we are asked what our exhibits are we identify  
11 them. They're all in the record already. And we  
12 would hope that CURE would take this pretty  
13 seriously, as well. And if they're going to rely  
14 on an exhibit they put it in the prehearing  
15 conference and they provide it.

16 HEARING OFFICER FAY: I understand. But  
17 I also understand Mr. Joseph's situation, that  
18 until things are refined more they are taking a  
19 worst case look. And perhaps more things seem at  
20 issue to them early on than later, as the case is  
21 refined.

22 Ms. DeCarlo, would that solve your  
23 problem as well, if you had, you know, a week in  
24 advance, along with the testimony or something  
25 like that?

1 MS. DeCARLO: Given the pace of the  
2 proceedings, yes. However, if CURE does know now  
3 that they are definitely going to be relying on  
4 certain documents that the soon that they could  
5 get those to us, or they're readily available,  
6 just identify what portions they'll be relying on,  
7 that would be really helpful.

8 MR. JOSEPH: Mr. Fay, that's been done.  
9 Tabs 1 through 14 attached to our comments are the  
10 documents which are not readily available which  
11 support the comments that we just filed. So, both  
12 counsel for intervenor and -- I'm sorry, counsel  
13 for the applicant and staff have those documents.

14 MR. THOMPSON: I'm sorry, so the tabs  
15 that, instead of 113 there's 14? Did I get that  
16 correctly?

17 MR. JOSEPH: The documents which are not  
18 readily available that we bought, had to be  
19 provided because they were not easily obtainable,  
20 are the documents that are attached to that  
21 motion, yes.

22 Dr. Reede has said that these are  
23 r, sum, s. Yes, indeed, the first three tabs are  
24 r, sum, s of the consultants. And the rest are  
25 documents which we didn't believe other parties

1 would easily have access to.

2 HEARING OFFICER FAY: So 11 of the 113  
3 exhibits that were identified in your prehearing  
4 conference statement.

5 MR. JOSEPH: There are many many many  
6 documents cited in the document. And the  
7 footnotes are replete with citations to a variety  
8 of documents. But we weren't certain that we had  
9 to provide hard copies of them.

10 The listing in the prehearing conference  
11 didn't distinguish between what was easily  
12 available and was not. As you've noted many of  
13 them are Commission decisions, and other  
14 documents, you know, DOCs and things which have  
15 been -- are sitting in the docket office or were,  
16 at one point.

17 MS. DeCARLO: If I may, Mr. Fay, my  
18 concern is that our definition of readily  
19 available may not comport with Mr. Joseph's  
20 definition.

21 HEARING OFFICER FAY: Can you give me an  
22 example?

23 MS. DeCARLO: I don't know what he  
24 considers readily available. We've identified  
25 those documents that we've gone on the website,

1 can't obtain through the web; that we've attempted  
2 to obtain in-house. We've eliminated those from  
3 our list.

4           However, there are certain documents, as  
5 you've said, that are possibly at an air  
6 district's location that we can't easily get to.  
7 We would claim that those aren't readily  
8 obtainable. I don't know what Mr. Joseph would  
9 claim that those would be.

10           MR. JOSEPH: Mr. Fay, the horse is not  
11 even twitching on the floor it's been beaten so  
12 much right now. If Ms. DeCarlo sees any documents  
13 when she reviews our comments that she can't put  
14 her hands on, call me. I'll provide them.

15           HEARING OFFICER FAY: Okay. I think we  
16 ought to move on, and if we can just leave it,  
17 that when the parties have a moment and look over  
18 these lists compared to their own lists placed in  
19 the motion, and to the extent that there's still  
20 some documents not readily available, convey a  
21 request to Mr. Joseph. And I would expect a  
22 prompt response.

23           And to that extent -- hold on just a  
24 minute.

25           (Pause.)

1 HEARING OFFICER FAY: So based on our  
2 discussion here, and to that extent, the two  
3 motions to produce exhibits is granted, in that  
4 we, you know, trust counsel's good faith to look  
5 over what Mr. Joseph has provided. And to the  
6 extent they see something still missing, please be  
7 in contact with him. You know, if for some reason  
8 a subject drops out because of things that we  
9 learn in the next few days, obviously he wouldn't  
10 be providing na exhibit on that topic. Therefore,  
11 he wouldn't need to provide it to counsel.

12 So, we want to be practical about this.  
13 But the bottomline is that applicant and staff  
14 must have all the supporting exhibits, either  
15 achievable on their own, or through you.

16 MR. JOSEPH: Absolutely.

17 HEARING OFFICER FAY: All right. Glad  
18 we have resolved that.

19 Now, I'd like to move to a question of  
20 the intervals for filing testimony, what the  
21 parties think they can live with. Ms. DeCarlo has  
22 told me she can manage seven days before hearings.  
23 Mr. Thompson, is that something you could live  
24 with if you --

25 MR. THOMPSON: It help, Mr. Fay, if I

1 knew when the hearings were so I could count back  
2 seven days.

3 COMMISSIONER GEESMAN: I'd like to spend  
4 next Thursday and next Friday -- rather, a week  
5 from this Thursday and Friday in hearings.

6 I recognize that may not be sufficient  
7 to completely discharge our hearing schedule in  
8 this proceeding, but I'd like to spend two good  
9 days next week.

10 MR. THOMPSON: That's tomorrow --

11 COMMISSIONER GEESMAN: No, it's --

12 MR. THOMPSON: No, I mean seven days  
13 from testimony would be tomorrow.

14 COMMISSIONER GEESMAN: But I thought you  
15 said your exhibits have been in the record since  
16 your initial filing.

17 MR. THOMPSON: All the exhibits are in  
18 the record, that's exactly right. It's getting  
19 declarations signed by the witnesses and getting  
20 that testimony together.

21 I think that if we do not file  
22 everything tomorrow, all of the testimony of our  
23 witnesses, it will -- there may be a supplemental  
24 package that comes in Friday. You know, our  
25 witnesses are kind of scattered all over. But I

1 can make a commitment that we will do our best,  
2 and we believe that a substantial number, if not  
3 all, can be filed tomorrow.

4 MR. JOSEPH: So, Mr. Fay, I  
5 misunderstood Commissioner Geesman, were you  
6 referring to August 12th and 13th, or August 5th  
7 and 6th?

8 COMMISSIONER GEESMAN: Fifth and 6th, I  
9 believe.

10 HEARING OFFICER FAY: Yeah, 5th and 6th.

11 MR. JOSEPH: Well, --

12 HEARING OFFICER FAY: Now, I realize  
13 that CURE has not told us anything about it's  
14 preparation to file, and to try to stay on  
15 schedule, if at all possible, and use August 5th  
16 and 6th as hearing days, I've spoken to the staff  
17 about this, and they would be ready to go forward  
18 based on what they're filing tomorrow.

19 And we would address, to the extent  
20 possible, all the staff topics and take their  
21 testimony in on declaration. And use it also, on  
22 those topics for which the applicant could file,  
23 in a timely way.

24 If CURE was able to file, certainly in  
25 the undisputed areas, if they even choose to file

1 anything in those areas, we could address their  
2 testimony, as well.

3 What we'd like to do, though, is use the  
4 available hearing time as much as possible. And I  
5 know this is very short turnaround. Mr. Thompson,  
6 you wanted to make a comment?

7 MR. THOMPSON: No, I was just going to  
8 say there are two things, Mr. Fay, thank you.

9 One, part of what I like to do is that  
10 when you assign exhibit numbers, have those  
11 exhibit numbers ground into the testimony, so that  
12 when witnesses take the stand they're referring to  
13 kind of a common number. And I would still prefer  
14 to do that if I can get exhibit numbers for my  
15 exhibits today, I will be working on that tonight.  
16 And I don't think that that would be a substantial  
17 holdup.

18 The other thing is that I don't know how  
19 easy it would be to email our testimony, since  
20 it's going to be in a number of discrete parts.  
21 So what it may end up doing is filing up here  
22 tomorrow with an overnight to CURE.

23 HEARING OFFICER FAY: Are there portions  
24 that could be emailed, as well?

25 MR. THOMPSON: Oh, I think we can email

1 the whole thing. It's just, you know, someone is  
2 going to come in and have a lot of attachments  
3 because they're separate documents, you know what  
4 I mean?

5 HEARING OFFICER FAY: Um-hum. Well, --

6 MR. JOSEPH: Could I address the  
7 scheduling question before we get too far down the  
8 road?

9 HEARING OFFICER FAY: Um-hum.

10 MR. JOSEPH: Staff says that they're  
11 going to have their final initial study Thursday  
12 or maybe Friday.

13 Putting aside my questions as to whether  
14 that's enough time to meaningfully consider this  
15 information that we've provided, that leave three  
16 working days to prepare for hearings. That's not  
17 a reasonable amount of time. Particularly if, at  
18 the same time, you are also expecting us to be  
19 preparing our testimony.

20 That's not the kind of process that is  
21 normal for the Commission in terms of its  
22 scheduling. And that's not going to produce the  
23 kind of record that you need.

24 You know, I think -- we have a motion  
25 pending; I think it's appropriate for the

1 applicant and the staff to respond to that motion.  
2 You know, so far all we've heard from them are,  
3 you know, based on 20-second perusals of this  
4 motion, we think we can undercut it all so it all  
5 goes away.

6 But, you know, I understand that those  
7 hearing dates are available, but that doesn't mean  
8 it's a wise use of time to spend those hearing  
9 days there. Particularly, you know, we still have  
10 data requests that are outstanding. They're not  
11 even due till the end of next week.

12 This doesn't make sense because, you  
13 know, you're heading down a path which is going to  
14 produce an utter jumble, a semi-coherent hearing  
15 at best.

16 (Pause.)

17 HEARING OFFICER FAY: I've been  
18 discussing with the Commission the possibilities  
19 of using the available time as effectively as  
20 possible. We heard what you said, Mr. Joseph, and  
21 I'm not ignoring that.

22 But I do see on page 2 of staff's  
23 statement that there are a number of topics that  
24 they believe are not in dispute that could be  
25 taken on declaration. And what I told the

1 Commission is I didn't see anything in either the  
2 applicant's or CURE's prehearing conference  
3 statement that disagreed with this  
4 characterization that staff made.

5 So, for instance, on August 5th we could  
6 take on declaration these topics from the staff  
7 and applicant and have a record on those. Now,  
8 that record would be available for the Committee  
9 or the Commission to use regardless of what kind  
10 of proceeding moves forward, whether it's to look  
11 at an SPPE or to take notice of in an AFC. And  
12 therefore, I think that would be a good use of our  
13 time.

14 The next question is, since that  
15 probably wouldn't take two days, which topics that  
16 are in controversy we could move forward on with  
17 at least the staff and applicant witnesses. I  
18 don't think it would be fair to expect CURE to  
19 produce testimony ready in time for those. But it  
20 seems to me they could probably be prepared to  
21 cross-examine on those things.

22 So I guess just informally the question  
23 would be what topics in that first section, air  
24 quality all the way down through socioeconomics,  
25 do the parties feel that we could constructively

1 take up next week, August 5th and 6th.

2 Mr. Thompson, do you have any  
3 suggestions?

4 MR. THOMPSON: Yeah, let me try this.  
5 Certainly I agree with you on the declarations,  
6 and I think we'll only have five, due to what  
7 we've seen from CURE already. And those should be  
8 pretty easy and pretty straightforward.

9 We also have witnesses that will be  
10 offering testimony and exhibits that a) should not  
11 be controversial and I think that we can put on  
12 without damaging anybody else's presentations.  
13 And b) are in areas that we think are pretty  
14 discrete. Let me give some meat on that.

15 Steve Badgett is an executive with the  
16 Public Utilities Department, and we have him  
17 testifying as to the policy of the City of  
18 Riverside in putting this project forth. We can  
19 put Mr. Badgett on.

20 Kevin Lincoln has ag, soils, traffic and  
21 transportation, and water supply. He also has  
22 responded to certain other data requests of CURE.  
23 But certainly those first three areas, even if  
24 it's not by declaration, because he will be on the  
25 stand before other things we can handle --

1 HEARING OFFICER FAY: The first three  
2 areas being air quality, noise and biology?

3 MR. THOMPSON: Ag, soil, traffic and  
4 water supply.

5 HEARING OFFICER FAY: Yeah, we're  
6 obviously looking at different lists. I was  
7 looking at page 2 of the staff's prehearing  
8 conference statement. They segregated the matters  
9 in controversy from those that are not.

10 MR. THOMPSON: My apologies. Of those  
11 areas, the block of subjects that start air  
12 quality?

13 HEARING OFFICER FAY: Um-hum.

14 MR. THOMPSON: Those that we think we  
15 can take early, hazardous materials management,  
16 energy resources and socioeconomics.

17 MS. DeCARLO: If I may interject  
18 quickly, because of staff's unavailability instead  
19 of socioeconomics, we'll be presenting a witness  
20 in the area of project description. The only item  
21 that CURE had identified with regards to  
22 socioeconomics is the identification of the  
23 demographics, the EJ. And we can properly handle  
24 that in project description; Dr. James Reede will  
25 be the witness available to testify for that.

1 HEARING OFFICER FAY: Okay, so you will  
2 have a witness who can sponsor the testimony?

3 MS. DeCARLO: Correct.

4 HEARING OFFICER FAY: Even if it's not  
5 the same name, but somebody who supervised it --

6 MS. DeCARLO: Correct.

7 HEARING OFFICER FAY: -- and can respond  
8 to cross-examination questions?

9 MS. DeCARLO: On the issue of the  
10 demographics and the census block, yes.

11 HEARING OFFICER FAY: Okay.

12 MR. JOSEPH: Sorry, Mr. Fay, I want to  
13 be sure I just understood the last colloquy.  
14 We're talking, first of all the things at the  
15 bottom of the list, the bottom of page 2, would be  
16 what we would kick off with on August 5th and 6th  
17 as being the uncontested areas?

18 HEARING OFFICER FAY: Correct.

19 MR. JOSEPH: And --

20 HEARING OFFICER FAY: Do you anticipate  
21 offering any testimony in those areas?

22 MR. JOSEPH: I think it is unlikely. I  
23 don't want to foreclose the possibility entirely.  
24 But we would not have objection to the staff's  
25 witnesses or the applicant's witnesses in these

1 topic areas going on, beginning on the 5th and  
2 6th.

3 HEARING OFFICER FAY: And, frankly, I'm  
4 assuming that with the exception of the Project  
5 Manager, there would be no live witnesses. This  
6 would be offered on declaration.

7 MR. JOSEPH: And that would be fine.  
8 The EJ issue is a little hard to discover which  
9 topic area is its home. If Dr. Reede is going to  
10 be the witness on that topic, and obviously, you  
11 know, he will be available at all times, then we  
12 just need to segregate that topic and hold that  
13 off separate from any other socioeconomic or land  
14 use issues that go in early.

15 HEARING OFFICER FAY: So there's other  
16 socioeconomic issues that you're filing testimony  
17 on?

18 MR. JOSEPH: No, no, --

19 HEARING OFFICER FAY: I had the  
20 impression it was just EJ.

21 MR. JOSEPH: -- I'm saying the opposite.  
22 I'm saying the opposite. Only the EJ issue is the  
23 only socioeconomic issue that we expect to  
24 address.

25 HEARING OFFICER FAY: If it's not --

1       yeah.  If it's not an issue we're not going to  
2       take time with it.  So, if, for instance, staff  
3       wants to submit socioeconomics on declaration,  
4       reserving the portion of it described on page X  
5       through Y that addresses EJ, I assume you'd have  
6       no objection to that?

7               MR. JOSEPH:  Correct.

8               HEARING OFFICER FAY:  Okay.  Good.

9               MS. DeCARLO:  And what I foresee  
10       happening is we'll actually enter socioeconomics  
11       in its entirety because we have the identical  
12       testimony included in the project description.

13              HEARING OFFICER FAY:  Right.  Right.

14              MS. DeCARLO:  So we'll reserve project  
15       description --

16              HEARING OFFICER FAY:  We have it in the  
17       record, but Mr. Reede will sponsor the portion and  
18       be available for cross-examination on --

19              MS. DeCARLO:  Right, for project  
20       description.

21              HEARING OFFICER FAY:  -- okay, on EJ.  
22       Good.

23              MS. DeCARLO:  And I just want to make  
24       sure it's clear that our EJ analysis is conducted  
25       in each technical area, the issue of impacts.  So

1 Dr. Reede will be testifying as to the  
2 demographics, the numbers identified in the  
3 census. As far as impacts are concerned, if Mr.  
4 Joseph has any questions with regards to our  
5 determination if there was an EJ impact he'll need  
6 to direct those questions to say, air quality or  
7 hydrology.

8 HEARING OFFICER FAY: Right, and that  
9 just goes to the question of significance.

10 MS. DeCARLO: Right, correct.

11 HEARING OFFICER FAY: -- population,  
12 okay. So, back to you, Mr. Thompson. So,  
13 hazardous materials, energy resources and  
14 socioeconomics or EJ, you think you'd be prepared  
15 to put witnesses on next week?

16 MR. THOMPSON: Yes, I think so. And,  
17 you know, keep in mind we haven't seen anything  
18 from CURE, and we got a bunch of stuff today. But  
19 it may well be that the direct testimony is  
20 adopting the exhibits that that witness is  
21 sponsoring, and that may be it.

22 It may encompass, you know, some  
23 corrections or modifications. We don't know yet.  
24 But I would anticipate at least with those three  
25 items that our prepared testimony would not take

1 all that much time.

2 But to answer your question, yes, we  
3 would be prepared to put those witnesses on.

4 HEARING OFFICER FAY: Any other subject  
5 areas?

6 MR. THOMPSON: Well, as I started to say  
7 while we were on different pages, we have  
8 witnesses that we're going to identify such as a  
9 policy witness for the City; and possibly a  
10 witness, Mr. McCann, on operation of the facility,  
11 operating hours, those kinds of things that may be  
12 appropriate to put in at that time, as well.

13 HEARING OFFICER FAY: And does that go  
14 to the noise? I guess that goes to a number of  
15 issues --

16 MR. THOMPSON: It goes to a number of  
17 issues, yes.

18 HEARING OFFICER FAY: Okay. Anything  
19 further that you think you could file --

20 MR. THOMPSON: No, what I was trying to  
21 do here is -- and it's based upon incomplete  
22 information, but we have been viewing the CURE  
23 presentation that has yet to come in as really  
24 encompassing three main issues. One being air  
25 quality and the other being water transport off

1 the site; and the third being the noise-dash-  
2 biology issue.

3 And I guess to phrase what I had been  
4 saying earlier in another way it would be helpful  
5 for us to take other issues before those issues.

6 HEARING OFFICER FAY: Staff?

7 MS. DeCARLO: We are pretty much  
8 available to present our live witnesses on the 5th  
9 and the 6th. We haven't yet heard from the  
10 witnesses for hazardous materials management. The  
11 main witness has been on vacation. He just  
12 returned today. We haven't had a chance to  
13 consult with him, however I don't anticipate any  
14 problems. We have two witnesses identified under  
15 that topic, and either one should be available on  
16 the 5th or the 6th, as well as the 12th and 13th,  
17 if it should come down to that. And I will  
18 definitely let all the parties know if that  
19 changes for some reason.

20 HEARING OFFICER FAY: Okay.

21 MS. DeCARLO: Under air quality if we do  
22 do that I just have a request from my consultant  
23 that if possible we retain that to just a one-day  
24 event. He has a sick cat he has to take care of,  
25 so he would like to be able to get home that

1 evening.

2 HEARING OFFICER FAY: Which day are you  
3 talking about?

4 MS. DeCARLO: Any day. He's available  
5 the 5th and 6th, 12th and 13th, however if  
6 possible if we could condense air quality into one  
7 day. I know sometimes topics tend to go over  
8 days.

9 HEARING OFFICER FAY: Okay.

10 MS. DeCARLO: Air quality seems to be  
11 the brunt of CURE's comments, so I don't know how  
12 possible that is, but --

13 HEARING OFFICER FAY: Okay.

14 MS. DeCARLO: And as far as having  
15 hearings on the 5th and the 6th, while staff is  
16 available there is the concern that has been  
17 raised about noticing requirements.

18 I don't know your position on this  
19 matter, however there is that stated ten-day  
20 requirement for noticing hearings. There's a  
21 possibility that this could -- the hearing on the  
22 5th could be considered a continuation of today's  
23 hearing; however, I don't know.

24 HEARING OFFICER FAY: I mean we have all  
25 the parties right here, and there has been no

1 demonstration of public interest. Is this  
2 something that the parties would be willing to  
3 waive in the interest of accomplishing what we can  
4 in the limited time available?

5 MS. DeCARLO: Staff is certainly willing  
6 to waive that requirement.

7 MR. THOMPSON: As are we. And I guess I  
8 would point out that if there are -- I think  
9 everybody contemplates there will be a later set  
10 of hearings, and those could be noticed so that  
11 the public would have an opportunity to input.

12 HEARING OFFICER FAY: Mr. Joseph?

13 MR. JOSEPH: In the spirit of  
14 cooperation we're willing to waive the ten-day  
15 notice, but at the same time I would point out  
16 that the Commission's regulations with respect to  
17 testimony before evidentiary hearings in AFC  
18 proceedings require 14 days, availability of  
19 testimony 14 days before the hearings.

20 And I think we're going to be much more  
21 resistant to moving faster than the merits would  
22 justify on the guts of the case, which are the big  
23 three or four, depending on how you count.

24 HEARING OFFICER FAY: Okay, well, it  
25 sounds to me like we have an opportunity beginning

1 on August 5th to take by declaration, and now I'm  
2 again referring to page 2 of the staff's  
3 prehearing conference statement, that group of  
4 topics identified in the lower list beginning with  
5 agriculture and soil resources, take those on  
6 declaration.

7 And then also take up the applicant's  
8 and staff's witnesses on hazmat, energy resources,  
9 socioeconomics and the applicant's policy witness  
10 and witness on operating hours.

11 Is there anything additional that we  
12 might be able to do on those two days without  
13 disadvantaging any party? Okay. No indication --

14 MR. JOSEPH: Mr. Fay, just so the record  
15 is clear, we don't anticipate testimony in any of  
16 the topic areas that you've identified. But I  
17 want to make it clear that it's conceivable -- I  
18 don't have anything specific in mind -- but it's  
19 conceivable that testimony in the big three or  
20 four will somehow touch on these other areas. And  
21 I don't want that to be precluded.

22 HEARING OFFICER FAY: Yeah, and that's  
23 kind of always a practical problem, I think. Ms.  
24 DeCarlo pointed out, you know, that the EJ  
25 question can sort of revive, et cetera.

1           What I would like to do though is make  
2           it clear that the topics that we take early, to  
3           the extent that the witnesses have not had any  
4           access to CURE's testimony on this, they would  
5           have an opportunity to rebut later, come back and  
6           do that, since CURE would certainly have time to  
7           rebut their testimony by the time they initially  
8           got on the stand.

9           And I think that would cure that  
10          problem.

11          MS. DeCARLO: I'm sorry. If we could  
12          also reserve the right to submit further exhibits,  
13          should the need arise, in response to CURE's  
14          testimony. All of our exhibits are docketed  
15          already and served. So it would just be a matter  
16          of identifying which exhibits we would  
17          specifically be relying on.

18          HEARING OFFICER FAY: Right, with  
19          adequate advance notice.

20          MS. DeCARLO: Yes, definitely.

21          HEARING OFFICER FAY: We don't want any  
22          party to discover the day of the hearing that  
23          there's a large exhibit that's being relied on and  
24          they haven't had a chance to look at it.

25          MS. DeCARLO: No, right, I anticipate a

1 few days after receiving CURE's testimony we would  
2 be able to submit a final exhibit list if we  
3 needed to add any to the one we already  
4 identified.

5 HEARING OFFICER FAY: Okay.

6 MR. JOSEPH: Mr. Fay, that actually  
7 raises an interesting question, and that is when  
8 each party's testimony will be provided and  
9 whether there will be opportunity for rebuttal by  
10 any party to any party. I'm not sure we've  
11 clearly addressed that question yet at all.

12 HEARING OFFICER FAY: We normally allow  
13 rebuttal. It's usually possible for the witness  
14 to do so on the stand when everybody's  
15 simultaneously filing testimony. And we would  
16 expect the witnesses to do that as they can.

17 But if, for instance, the parties are  
18 testifying on hydrology or hazmat, for instance,  
19 on August 5th, and CURE has some testimony on this  
20 that's yet to come, and the witnesses haven't seen  
21 that, we'd give those witnesses a chance to  
22 return.

23 CURE, on the other hand, if it comes up  
24 a week later can, in addition to summarizing its  
25 written testimony, reflect by way of rebuttal on

1 what the parties had previously put into the  
2 record. Does that answer --

3 MR. JOSEPH: Yes, it does.

4 HEARING OFFICER FAY: Yes. You know, I  
5 think that will be workable. What we won't  
6 tolerate, though, is surprise at the last minute.  
7 And if there's rebuttal that is going to rely on,  
8 you know, a new direction or exhibits not in the  
9 record that the parties haven't had, the rebutting  
10 party is going to have to make that available in  
11 advance. Okay.

12 Now, what the Committee would like to do  
13 is receive the rest of the record on August 12th  
14 and 13th, if at all possible. And we'd like to  
15 explore whether the parties could respond to that.

16 That would mean receiving testimony --  
17 well, Ms. DeCarlo and the applicant indicated  
18 seven days in advance. That would be a bare  
19 minimum. So, let's just explore that. Is that  
20 even possible from your perspective, Mr. Thompson?

21 MR. THOMPSON: I apologize for listening  
22 with one ear, Mr. Fay, I was talking to my --

23 HEARING OFFICER FAY: I can repeat it,  
24 but --

25 MR. THOMPSON: -- client with the other,

1 but --

2 HEARING OFFICER FAY: Your big three  
3 topics, air quality, noise-bio as a related topic,  
4 and hydrology, what's the possibility for you  
5 making timely filings and to be prepared to take  
6 that up on August 12th and/or 13th?

7 MR. THOMPSON: I think we can do that.  
8 If you're talking about timely filings being a  
9 week, that would give us eight days. Again, we  
10 don't know when we're going to be receiving CURE's  
11 material. But we are responding to some of the  
12 CURE data requests that came in extremely late and  
13 we were gracious enough to respond to those. End  
14 of parens.

15 So the long and short of it is that I  
16 think we can make a pretty good try. I think we  
17 can do that.

18 HEARING OFFICER FAY: And when you say  
19 pretty good try, you mean filing, you said eight  
20 days, filing --

21 MR. THOMPSON: We'd file --

22 HEARING OFFICER FAY: -- on or before  
23 August 4th?

24 MR. THOMPSON: File on or before a week  
25 from tomorrow.

1 HEARING OFFICER FAY: A week from  
2 tomorrow; that would be August 5th. So that would  
3 be one week before the hearings started. All  
4 right.

5 Ms. DeCarlo, your testimony would  
6 already be in the record.

7 MS. DeCARLO: Yes, in terms of  
8 witnesses, if we have the hearings up here in  
9 Sacramento, the 12th and 13th is not a problem for  
10 our noise testimony. However, our witness does  
11 have some childcare issues, so if it were in Los  
12 Angeles that would become a problem, or in  
13 Riverside.

14 HEARING OFFICER FAY: Okay, let me shift  
15 gears just for a moment. Ms. Kim, are you aware  
16 of any strong local interest that would cause you  
17 to recommend we move the hearings down to  
18 Riverside as opposed to holding them here?

19 MS. KIM: No. My only concern is  
20 looking at section 1710, and in no case less than  
21 ten days in advance. And I'm aware of the fact  
22 that they have just waived, but I couldn't find  
23 the, unless otherwise waived language. That was  
24 the only concern I had.

25 Unless, of course, you consider this to

1 be a continued hearing.

2 HEARING OFFICER FAY: Well, you know, I  
3 think in light of the parties' acquiescence, there  
4 would be no real prejudice to those involved in  
5 the case. And the Committee could consider, you  
6 know, terming it a continuance. And then just,  
7 you know, get the order out as soon as possible  
8 that would identify the times.

9 But, we're sensitive to that. Point  
10 well taken.

11 MS. KIM: That's all.

12 HEARING OFFICER FAY: All right, Ms.  
13 DeCarlo, anything further on availability to take  
14 up the big three topics on August 12th and 13th?

15 MS. DeCARLO: No, nothing other than  
16 that. However one side note, Mr. Thompson just  
17 brought up a good point with regards to the  
18 applicant's responses to CURE's data requests. We  
19 simply reserve the right to submit an addendum to  
20 our testimony, if warranted, based upon any  
21 responses submitted by the applicant.

22 HEARING OFFICER FAY: All right.

23 MR. THOMPSON: Mr. Fay.

24 HEARING OFFICER FAY: Um-hum.

25 MR. THOMPSON: We heard staff's concern

1 about some of their witnesses, and in talking to  
2 our folks here we would prefer to have the  
3 hearings in Riverside. That's where the Air  
4 Quality Management District is; that's where our  
5 citizens are, and we've had a decent turnout of  
6 our citizens.

7           However, having said that, we would  
8 encourage a date and time certain for staff  
9 witnesses that they would like. And we would be  
10 prepared to accommodate staff's schedules in that  
11 regard if staff would agree.

12           MS. DeCARLO: And on that note, actually  
13 it would be preferable to have air quality in  
14 Riverside, since there wouldn't be the -- our  
15 witness is actually located in the area, so it  
16 would be more of a convenience.

17           And then if we have noise and vibration  
18 up here, those would be the two critical areas.

19           HEARING OFFICER FAY: So staff's  
20 preference is to have air quality hearing in  
21 Riverside and the other hearings up here?

22           MS. DeCARLO: That would be ideal.

23           HEARING OFFICER FAY: And, again, we're  
24 talking about the matters in greatest controversy,  
25 the hydrology, noise-biology, and air quality.

1 MS. DeCARLO: Correct.

2 HEARING OFFICER FAY: Okay. And the  
3 applicant, I understand, would prefer that all  
4 three of those topics be dealt with down in  
5 Riverside?

6 MR. THOMPSON: Yeah, we would, yes.

7 HEARING OFFICER FAY: Okay. Well,  
8 that's the easy part. Mr. Joseph, how --

9 MR. JOSEPH: No. It's completely  
10 impossible for us to receive the staff's final  
11 staff assessment on Friday and have three days to  
12 prepare testimony before we've even gotten all the  
13 responses to our data requests. That's not enough  
14 time. You deserve better. That won't work.

15 I would also note that our lead witness,  
16 Dr. Fox, whom you're familiar with, will be out of  
17 state testifying in another proceeding at that  
18 same time period.

19 HEARING OFFICER FAY: August 12th and  
20 13th?

21 MR. JOSEPH: The first week, the first  
22 week of August. She's testifying in another case.  
23 She returns some time in the second week,  
24 depending on how that hearing goes. She has to be  
25 available to work on this testimony, it's her

1 testimony. And she has to be able to have time,  
2 as do we all, to actually review the staff's final  
3 initial study.

4 Section 1747 of your regulations exists  
5 for a reason. Fourteen days is the minimum amount  
6 of time necessary to be able to review a staff  
7 presentation before hearings.

8 HEARING OFFICER FAY: Yeah, there's a  
9 lot of numbers in the regs. Unfortunately they  
10 don't take into account the SPPE numbers. For  
11 instance, discovery is a minimum of 180 days. But  
12 the entire SPPE process is a mandatory 135 days  
13 start to finish. So we have a number of  
14 incompatibilities that we have to deal with.

15 MR. JOSEPH: I said it before and I'll  
16 try again, because I think this is relevant. Both  
17 the applicant and staff, without actually having  
18 reviewed our motion, have claimed they can  
19 eliminate all the substantial evidence of a fair  
20 argument of a significant impact, all of it.

21 Give them a chance to respond to the  
22 motion, put them to the test. If they don't come  
23 up with it, then all of this hearing and  
24 scheduling stuff doesn't matter. The burden is  
25 now on them to go through and identify for each of

1 the 12 impacts why nothing, there's no evidence to  
2 support any of those impacts, why all 80 pages of  
3 our comments are nonsense.

4 Have them put it forward. Then decide  
5 whether you actually need to have a hearing or  
6 not. Because, frankly there is no chance, zero  
7 chance they can meet the legal standard. None.

8 HEARING OFFICER FAY: Well, I appreciate  
9 your argument and the Committee is going to have  
10 to consider that as it considers your motion. But  
11 it also has to consider the point that there is no  
12 record as of yet. And whether or not the  
13 Committee could make, or the Commission could make  
14 a negative determination on an SPPE without taking  
15 any evidence, we're going to have to wait --

16 MR. JOSEPH: There is a motion pending.  
17 There is something for them to respond to. Ask  
18 them to respond, and then decide whether you  
19 actually need to have just the formality of a  
20 hearing, having somebody enter this as a  
21 declaration, or you actually are going to put them  
22 to the test in hearings of identifying why not a  
23 single piece of evidence in 80 pages is right.  
24 Why not one single element of that is right.

25 Otherwise, you know,, you --

1 HEARING OFFICER FAY: All right, we --

2 MR. JOSEPH: -- you avoid all of the  
3 logistical problems and you get yourself on a path  
4 where you can actually consider the merits of this  
5 case.

6 Because the path you're on now is you're  
7 going to have the hearings; you're going to have  
8 disputed evidence; and you're going to have to  
9 rule in a negative fashion.

10 And two months will go by and we're  
11 going to get accused of delay.

12 MR. THOMPSON: I'm already doing that,  
13 by the way.

14 HEARING OFFICER FAY: I appreciate your  
15 argument. I think we've heard enough on the  
16 motion to convert it. Let me get back -- just  
17 bear with me, let me get back to if we go forward,  
18 when CURE could be prepared to put on its case.

19 Well, first of all, my first question  
20 would be if the other parties to perform as  
21 they've said is there any reason that CURE could  
22 not be available on the 12th and 13th to cross-  
23 examine the staff and applicant's witnesses on  
24 those topic areas?

25 MR. JOSEPH: Not if we're supposed to be

1 preparing testimony at the same time, and  
2 particularly not if we're also traveling to  
3 Riverside to do it. That's not possible. You can  
4 only do one thing at a time.

5 HEARING OFFICER FAY: Right, okay. But  
6 you could do that one thing?

7 MR. JOSEPH: If you want us to spend the  
8 time preparing testimony, then that's what we'll  
9 be doing.

10 HEARING OFFICER FAY: But you could, if  
11 the other parties can put on their direct case on  
12 the 12th and 13th you could be prepared and  
13 available to conduct your cross-examination on  
14 those days?

15 MR. JOSEPH: Probably so.

16 HEARING OFFICER FAY: Okay. If that  
17 were the case then, when could you be available to  
18 put on your affirmative case?

19 MR. JOSEPH: Well, I think the first  
20 question is --

21 HEARING OFFICER FAY: Well, to file the  
22 testimony.

23 MR. JOSEPH: -- when do we provide our  
24 testimony.

25 HEARING OFFICER FAY: Yeah.

1 MR. JOSEPH: Let me ask a procedural  
2 question first. Are you expecting the applicant  
3 and the staff to demonstrate in their testimony  
4 why nothing in our comments on the initial study  
5 has any merit whatsoever?

6 HEARING OFFICER FAY: Well, I am  
7 assuming that they will attempt in their direct  
8 testimony to counter the claims that you made in  
9 your motion. I don't know why they wouldn't try  
10 to do that. Now that doesn't dispose of the point  
11 you made as to whether this should be a successful  
12 SPPE or not. And that would, you know, await  
13 hearing your direct testimony, and subject to  
14 cross-examination.

15 MR. JOSEPH: When would you expect the  
16 applicant and staff to be required to respond to  
17 our motion?

18 (Pause.)

19 HEARING OFFICER FAY: All right, I guess  
20 we are prepared, without asking a response, other  
21 than the response we've heard today, and that is  
22 to deny the motion on the basis that without an  
23 evidentiary record the Commission cannot make that  
24 determination. And, you know, with all due  
25 respect to your argument, and we understand it,

1 the pattern of practice at the Energy Commission  
2 is to base its decisions on substantial evidence  
3 of record. And we do not yet have a record, nor  
4 will we have until we take the evidence.

5 So we will try to conserve parties' time  
6 as much as possible, but I don't see how we avoid  
7 the fact that if we can't make the decision that  
8 we have to make without an evidentiary record, so  
9 the motion is denied.

10 Having said that, it obviously puts into  
11 issue the fundamental questions of CURE's case;  
12 and the parties will be expected to respond to  
13 that in their direct testimony.

14 COMMISSIONER GEESMAN: I think you've  
15 also pointed out that as the Commission identified  
16 in the Modesto case, this is a breathtakingly low  
17 threshold. And both the staff and the applicant  
18 have indicated their intention to keep your case  
19 from coming across that threshold.

20 So we're simply going to have to go  
21 through the evidentiary process to determine if  
22 they're capable of doing that or not.

23 HEARING OFFICER FAY: Now, if we may,  
24 returning to just the mundane aspects of filing  
25 and hearing the evidence, I note that you, in your

1 prehearing conference statement, said you believe  
2 that you shouldn't have to file testimony sooner  
3 than 21 days after the initial study.

4 Is there anything to add to that? I  
5 mean that's certainly longer than any of the other  
6 parties have requested.

7 MR. JOSEPH: Well, sure, because they're  
8 in a different position. I think that's --

9 HEARING OFFICER FAY: Well, I mean the  
10 applicant certainly has to look at the staff's  
11 initial study, as well.

12 MR. JOSEPH: Well, based on the draft  
13 they're happy with it.

14 HEARING OFFICER FAY: Right, but you  
15 also have the draft. Whether you're happy or not,  
16 I mean I don't know if it's wild speculation to  
17 imagine how radically the draft is going to  
18 change. But you can certainly get an idea from  
19 the staff and anticipate, you know, what the swing  
20 would be. Instead of anticipating worst case  
21 filing situation, maybe something that might be a  
22 little more realistic.

23 MR. JOSEPH: Well, let's see. Looking  
24 at the calendar we'll receive applicant's  
25 testimony on August 5th. The initial study at the

1 end of next week.

2 MS. DeCARLO: Tomorrow.

3 MR. JOSEPH: I'm sorry, the end of this  
4 week. We'll have hearings on the 12th and  
5 presumably 13th, so the beginning of that week  
6 will be preparation for hearings; the end of that  
7 week will be the hearings, themselves.

8 I think at that point we'll be able to  
9 turn to putting our testimony in final form. And  
10 I would say that the August 20th would be the  
11 logical time for that.

12 I'm now going to raise my analog to the  
13 cat issue. That week contains my 20th wedding  
14 anniversary, and I'd really like to be away that  
15 week.

16 COMMISSIONER GEESMAN: The whole week?

17 MR. JOSEPH: Well, the anniversary is on  
18 the 18th. You know, you got to stick it with one  
19 end or the other. This is a time of family values  
20 in this country, right?

21 HEARING OFFICER FAY: You know, since  
22 this is a transcribed record you'd be a fool not  
23 to make a good pitch for preserving that.

24 (Laughter.)

25 (Pause.)

1 MR. THOMPSON: Mr. Fay, if I may make a  
2 comment. I don't know if this will help or not.  
3 Hopefully it will.

4 HEARING OFFICER FAY: Sure.

5 MR. THOMPSON: While our bucket of  
6 sympathy for CURE is not very large, we recognize  
7 the difficulty that you are in with regard to the  
8 135-day schedule requirement. And we also think  
9 that it would probably do everyone more good to  
10 have all of the testimony in on a topic before we  
11 have hearings on the topic, specifically the three  
12 big topics.

13 We are prepared to agree to a 30-day  
14 extension on the 135 days if that helps you  
15 schedule our testimony, the testimony of CURE, and  
16 any additional testimony of staff so that we can  
17 have all of that testimony before tackling live  
18 the three issues of air quality, noise-biology and  
19 water.

20 HEARING OFFICER FAY: Thank you. Mr.  
21 Joseph, in a perfect world where we all get to  
22 have a week for our 20th anniversary, and perhaps  
23 if we all did we'd be celebrating anniversaries  
24 beyond the 20th.

25 (Laughter.)

1 HEARING OFFICER FAY: I do have my 30th  
2 coming up, though. We would -- what date would  
3 you be prepared to file your testimony?

4 MR. JOSEPH: If we could push it one  
5 week --

6 HEARING OFFICER FAY: Or would you seek,  
7 what date would you seek?

8 MR. JOSEPH: August 26th.

9 MR. THOMPSON: I'm sorry, Mr. Fay, I  
10 didn't understand. I was under the impression  
11 that CURE would get its testimony in before the  
12 week vacation, which I think is around the 20th.  
13 And that when Mr. Joseph is enjoying the  
14 highlights of Hawaii or wherever he goes, that  
15 that would be the time when we would be reviewing  
16 that testimony.

17 I'd also point out Ms. Peesapati has  
18 been present at most of these proceedings and has  
19 done an admirable job, as well, so they do have  
20 backup.

21 HEARING OFFICER FAY: Right, they have  
22 two counsel on this.

23 MR. JOSEPH: If I could --

24 HEARING OFFICER FAY: You said Dr. Fox  
25 would be available that second week in August.

1 MR. JOSEPH: At some point during that  
2 second week the hearings out of state will end.  
3 Perhaps if we go off the record for a minute we  
4 could make a phone call and see if we can nail  
5 that down a little better.

6 HEARING OFFICER FAY: Okay, let's go off  
7 the record and we'll -- why don't we take a ten-  
8 minute break. The parties can talk to each other  
9 and make any calls they need to make, because we'd  
10 like to make this workable. So we're off the  
11 record.

12 (Brief recess.)

13 HEARING OFFICER FAY: I've spoken to  
14 Commissioner Geesman and I've spoken to the  
15 parties. And my impression is that if we required  
16 the applicant and CURE to file their testimony on  
17 air quality, noise-biology, and hydrology -- well,  
18 for CURE to file all its testimony, and the  
19 applicant to file in those areas that I just  
20 mentioned, on August 13th, that CURE could do  
21 that; the applicant could do that. And we could  
22 hold evidentiary hearings on August 26th and 27th.

23 Is my impression correct, or --

24 (Pause.)

25 HEARING OFFICER FAY: Okay, so we don't

1 have Commissioners available, but we're looking at  
2 probably two days between the 30th, 31st and  
3 September 1st.

4 MR. JOSEPH: That's fine with CURE.

5 HEARING OFFICER FAY: Staff?

6 MS. DeCARLO: I'm sorry, can you repeat  
7 that? Is it hearings on the 26th and --

8 HEARING OFFICER FAY: Well, we will have  
9 to notice it, but it will probably be not the 26th  
10 and 27th, but rather two or three days, August 30,  
11 31 and September 1.

12 MS. DeCARLO: I have to confirm that  
13 with staff. Their calendars (inaudible).

14 HEARING OFFICER FAY: Okay.

15 MS. DeCARLO: I'm sorry. Yes, I would  
16 have to confirm that with staff to insure that  
17 they would be available on those days.

18 HEARING OFFICER FAY: Okay. Mr.  
19 Thompson, do you know if that would work?

20 MR. THOMPSON: One of our team is out  
21 right now seeing if the 26th, 27th would work,  
22 so --

23 HEARING OFFICER FAY: Why don't you go  
24 catch him.

25 MR. THOMPSON: So, I'll be right back.

1 HEARING OFFICER FAY: Because we know  
2 that's not available right now.

3 (Pause.)

4 HEARING OFFICER FAY: We're off the  
5 record now.

6 (Off the record.)

7 HEARING OFFICER FAY: Okay, Mr.  
8 Thompson.

9 MR. THOMPSON: Thank you, Mr. Fay. We  
10 have checked with our witnesses and the dates that  
11 have been proposed while we were off the record,  
12 August 30, 31 and September 1, are dates that we  
13 can provide our witnesses on. They're acceptable  
14 to us.

15 We would, again, like to have those in  
16 Riverside, if possible.

17 HEARING OFFICER FAY: Okay. And staff?

18 MS. DeCARLO: Air quality and noise  
19 witnesses will definitely be available those days.  
20 However, we were unable to get ahold of our  
21 biology and hydrology witnesses, so I'll have to  
22 get back to you on that.

23 HEARING OFFICER FAY: Okay. All right,  
24 maybe that's the best we can do right now. And  
25 CURE?

1 MR. JOSEPH: Those dates are fine with  
2 us.

3 HEARING OFFICER FAY: Okay, so let me  
4 attempt to wrap this up and summarize. And I hope  
5 everybody will focus closely in case we have a  
6 misunderstanding.

7 We're talking about filings that will  
8 occur as follows: the staff would file the  
9 initial study tomorrow, July 29th. And the  
10 applicant would file most of its testimony one  
11 week later on July 12th, with the exception of  
12 testimony on air quality, noise vibration --

13 MR. JOSEPH: Excuse me, Mr. Fay, I think  
14 you misspoke.

15 HEARING OFFICER FAY: I'm sorry, August  
16 12th, yeah. Correction. Applicant would file on  
17 July 12th -- I'm sorry, I said it again -- August  
18 12th. Got to move on --

19 MR. JOSEPH: Before you try to get it  
20 right on the third try, I think the date we were  
21 talking about for testimony was the 13th.

22 HEARING OFFICER FAY: You're right, Mr.  
23 Joseph. We talked about that because Dr. Fox is  
24 unavailable. Okay.

25 So that date of August 13th would be --

1 well, yeah, we have two different things going on  
2 because the applicant will be prepared to file  
3 earlier on most topics.

4 The applicant would file on most topics  
5 on August 5th, correct, Mr. Thompson?

6 MR. THOMPSON: Now I'm confused, and my  
7 apologies. I was under the impression that we  
8 were filing tomorrow for 5th and 6th. Are those  
9 off?

10 HEARING OFFICER FAY: Filing -- I'm  
11 sorry, you're right. Yes, you're filing tomorrow  
12 for most topics for hearings on the 5th and 6th.

13 MR. THOMPSON: Good, thank you.

14 HEARING OFFICER FAY: And you can do  
15 that?

16 MR. THOMPSON: Yes.

17 HEARING OFFICER FAY: Okay.

18 COMMISSIONER GEESMAN: Those hearings  
19 are where?

20 HEARING OFFICER FAY: Here. The August  
21 5th and 6th hearings will be here.

22 Now, by most topics I mean everything on  
23 page 2 of staff's prehearing conference statement  
24 with the exception of the first four topics, air  
25 quality, noise-biology, hydrology.

1 MR. THOMPSON: That's correct, and there  
2 may be witnesses that testify in both if they have  
3 an area that's uncontested and an area that lends  
4 itself to those four topics, that's correct.

5 HEARING OFFICER FAY: Right.

6 MR. JOSEPH: And, Mr. Fay, maybe I can  
7 ask through you to Mr. Thompson, he identified  
8 also perhaps a policy witness and an operations  
9 witness. Would those also be part of the --

10 HEARING OFFICER FAY: In the first set  
11 of hearings, correct, Mr. Thompson?

12 MR. THOMPSON: That's correct.

13 HEARING OFFICER FAY: Yeah. Okay, and  
14 then the later filing would be August 13th. And  
15 that would include all of staff's, all of CURE's  
16 testimony and applicant's testimony in the areas  
17 of air quality, noise-biology, and hydrology and  
18 water quality.

19 MR. THOMPSON: Correct.

20 HEARING OFFICER FAY: Okay. In terms of  
21 evidentiary hearings the first set of hearings  
22 would be on August 5th and 6th here at the  
23 Commission. And the second set would be down in  
24 Riverside on August 30th, 31 and September 1. Any  
25 concerns about that?

1           Okay, I think I've got that right now.

2           Now, I did have a couple other --

3           MR. JOSEPH:   Could I ask --

4           HEARING OFFICER FAY:  -- questions.

5           Staff indicated witnesses, I believe, for hazmat  
6           and energy resources.  And I just wanted to be  
7           sure I understood to what extent you think that is  
8           at issue.  In your prehearing conference statement  
9           it --

10          MS. DeCARLO:  Well, these were  
11          identified in CURE's prehearing conference  
12          statement as issues that they were.  They didn't  
13          identify them as such.  Hazmat they identified  
14          under public health with regards to the ammonia  
15          spill concern and the EJ population.

16          We analyze ammonia spill and potential  
17          for it and potential impacts under hazardous  
18          materials management.

19          Energy resources, we were making staff  
20          available in terms of whether or not the project  
21          satisfied the 100 megawatts or less requirement  
22          for the SPPE.

23          HEARING OFFICER FAY:  Okay.  So we will  
24          address those topics in the first set of hearings,  
25          and CURE will cross-examine on those.

1 MS. DeCARLO: Now I just want to get  
2 confirmation of whether or not CURE wants to  
3 cross-examine staff on the demographics issue.

4 MR. JOSEPH: I'm not, at this moment,  
5 based on the draft initial study, I don't think  
6 there is any dispute about the demographic facts.

7 MS. DeCARLO: Okay.

8 MR. JOSEPH: The consequences that flow  
9 from that are different topics, but the facts of  
10 the demographics, that's census data.

11 HEARING OFFICER FAY: Okay. Fine. So,  
12 do you therefore, Ms. DeCarlo, not anticipate  
13 having a witness available -- well, you said it  
14 was Dr. Reede, so --

15 MS. DeCARLO: Right.

16 HEARING OFFICER FAY: -- he'd be here  
17 anyway. But, I suppose that means we just won't  
18 anticipate dealing with that --

19 MS. DeCARLO: Right, we could just --

20 HEARING OFFICER FAY: -- other than on  
21 declaration.

22 MS. DeCARLO: Correct.

23 HEARING OFFICER FAY: Okay.

24 MS. DeCARLO: And if CURE changes its  
25 mind with regard to that, I would just appreciate

1 a phone call so we could then prepare a little  
2 bit.

3 MR. JOSEPH: Okay. Can we return --

4 HEARING OFFICER FAY: Well, I just won't  
5 schedule it, except to come up on declaration.

6 MR. JOSEPH: Well, that's right. We --

7 MS. DeCARLO: Okay.

8 MR. JOSEPH: -- we have no questions at  
9 this moment on demographic facts.

10 HEARING OFFICER FAY: Okay, so to be  
11 sure that I've got your list of matters at issue,  
12 Mr. Joseph, on air quality it's pretty much  
13 questions of PM10 and VOCs and also construction  
14 particulate emissions. And then --

15 MR. JOSEPH: The list is a little longer  
16 than that. Construction PM10 and PM2.5 and VOCs  
17 and NOx.

18 HEARING OFFICER FAY: This is all  
19 construction?

20 MR. JOSEPH: All construction.  
21 Operation PM10, VOCs and perhaps SOx offsets, my  
22 memory's a little fuzzy on that one at this  
23 moment. And issues of the locality of the  
24 offsets. And actually, I mean the best  
25 description is actually in the motion and comments

1 that we filed. I mean I could try to recite all  
2 those, but you have them.

3 HEARING OFFICER FAY: Yeah, okay. No,  
4 you don't really need to go through that all. I'm  
5 just trying to wrap up just because of the  
6 question about EJ.

7 And the generation capacity, is that  
8 still at issue?

9 MR. JOSEPH: Absolutely.

10 HEARING OFFICER FAY: Okay.

11 MR. JOSEPH: You'll see at the very end  
12 of the comments --

13 HEARING OFFICER FAY: Okay. All right.  
14 Then the question came up, we were asked if staff  
15 could produce a redline/strikeout version of the  
16 initial study, and I understand that it's too late  
17 to create that, based on the work that's already  
18 been done.

19 Can you comment on how you might be able  
20 to sort of flag for the parties where the changes  
21 are?

22 MS. DeCARLO: Well, I spoke with Mr.  
23 Joseph right before we went back on the record and  
24 they would be happy with just a final word  
25 document. And they would be able to do the Word

1 compare, it's my understanding.

2 MR. JOSEPH: If we have Word documents  
3 of the draft and the final, then we'll do the  
4 compare.

5 HEARING OFFICER FAY: I see. And can  
6 you provide that?

7 DR. REEDE: Excuse me. The original  
8 draft initial study was converted to PDF. We  
9 still have the Word documents to that. However,  
10 the final initial study documents have been  
11 converted to PDF for the most part because we're  
12 going to produce our testimony tomorrow.

13 Now, it is possible to use merge and  
14 compare under the Acrobat programs. And staff  
15 would be willing to make sure they get fresh  
16 copies; in other words, not redistilled copies of  
17 the PDF files.

18 However, the Word documents are  
19 typically our working documents. And as such, we  
20 don't normally send those out. And it would be  
21 difficult to reconstruct at this point, because  
22 they've been formatted, all the changes have been  
23 lost --

24 HEARING OFFICER FAY: Okay, rather than  
25 get into all the technical aspects, what we would

1       like to do is direct staff to do what it can  
2       within the reasonable use of its resources -- we  
3       understand there's a lot going on -- to try to get  
4       flags to the parties, the applicant and CURE, as  
5       to where the changes are.

6                 Now, you know, whether that's a side-by-  
7       side comparison, or Word file or PDF or just a  
8       memo that says check out the following sections,  
9       because, you know, these are where the changes  
10      are. But, that's what we'd like done, okay?

11                MR. JOSEPH: Can I make one more  
12      procedural inquiry?

13                HEARING OFFICER FAY: Yes.

14                MR. JOSEPH: With respect to the August  
15      5th and 6th hearings, at this moment the only  
16      cross-examination I could anticipate would be on  
17      the two live witnesses that Mr. Thompson's  
18      identified, the policy witness and the operation  
19      witness. I'm not sure if that's the case, but  
20      when I see their testimony it may be that we have  
21      a few questions.

22                And I would just request that we  
23      identify in advance exactly when they will appear.  
24      Because the entering of declarations, you know, I  
25      don't know, even know we need to be here for that.

1 HEARING OFFICER FAY: No, you don't. I  
2 assume we'll do that first. It's going to be hard  
3 to anticipate exactly how long it will take, but  
4 it won't be more than a couple hours.

5 MR. JOSEPH: If it's first thing on the  
6 5th, then that's fine, that's enough, all we need  
7 to know.

8 HEARING OFFICER FAY: Yeah. And we  
9 haven't segregated availability of parties between  
10 the two days. But I assume that the Committee  
11 will just schedule first all the declarations, and  
12 then start moving through the other essentially  
13 three topic areas, plus the applicant's two  
14 witnesses.

15 MR. THOMPSON: When I volunteered those  
16 two witnesses, who are both employees of the City  
17 of Riverside, I thought that the hearings would be  
18 down there. And not knowing if anyone has any  
19 cross, I'm a bit reluctant to bring them up here  
20 for just a return flight.

21 If we honestly believe that there's just  
22 a few questions for the policy and ops witnesses,  
23 maybe I could put them on during the 30, 31 and 1  
24 hearings down there.

25 MR. JOSEPH: I'll make two offers.

1 HEARING OFFICER FAY: Yeah.

2 MR. JOSEPH: One, I would be happy to  
3 notify Mr. Thompson before the 5th as to whether  
4 we actually have any questions, after we've seen  
5 the testimony, if that would be helpful.

6 Alternatively, if you want to put it off  
7 till the second set of hearings, that's okay, too.

8 HEARING OFFICER FAY: Does that work for  
9 you? In other words, if there is cross-  
10 examination then you could put that witness over  
11 to the second set of hearings.

12 MR. THOMPSON: Yes. That works.

13 HEARING OFFICER FAY: Any objection, Ms.  
14 DeCarlo?

15 MS. DeCARLO: No. I was just curious,  
16 does that mean that CURE does not have any cross-  
17 examination for our hazmat or energy resources  
18 witnesses then?

19 HEARING OFFICER FAY: That's not what I  
20 heard, but --

21 MR. JOSEPH: No, we definitely do  
22 anticipate cross-examination --

23 MS. DeCARLO: Okay.

24 MR. JOSEPH: -- on energy resources --

25 MS. DeCARLO: I just wanted to clarify.

1 HEARING OFFICER FAY: My understanding  
2 was, Mr. Joseph, that you were addressing the  
3 policy witness on the overall plan of Riverside,  
4 the need for the resource, that sort of thing.  
5 And I suppose also the witness on what, the  
6 operating hours?

7 MR. THOMPSON: Yeah, operational  
8 profile, that kind of thing.

9 HEARING OFFICER FAY: Um-hum. And so in  
10 the interest of conserving everybody's time and  
11 energy, Mr. Joseph will inform you after he sees  
12 the testimony whether there's cross. If there is  
13 cross, you'll let me know that you're going to  
14 bring those witnesses later instead of as we will  
15 schedule.

16 MR. THOMPSON: Very good.

17 HEARING OFFICER FAY: Any other comments  
18 or concerns before we conclude?

19 MR. THOMPSON: Did you give a date for  
20 CURE's testimony filing?

21 HEARING OFFICER FAY: CURE would file  
22 all its testimony on August 13th.

23 MR. THOMPSON: Got it.

24 MR. JOSEPH: And, Mr. Fay, when do we  
25 anticipate that the energy resources witnesses for

1 the staff will be on?

2 MS. DeCARLO: I was anticipating the 5th  
3 or the 6th.

4 HEARING OFFICER FAY: Yeah. The 5th or  
5 the 6th, I don't have anything in mind more  
6 specific than that.

7 MR. JOSEPH: Okay, so it's definitely in  
8 the first group?

9 HEARING OFFICER FAY: Yes.

10 MR. JOSEPH: Could we pick one of those  
11 two days?

12 HEARING OFFICER FAY: The 5th.

13 MR. JOSEPH: Okay.

14 HEARING OFFICER FAY: Anything further?

15 MS. DeCARLO: Oh, one minor thing. With  
16 regards to the documents, the exhibits that CURE  
17 will be providing and has provided in this  
18 submittal that they handed out today, if we could  
19 get those in an electronic format where possible,  
20 as well, that would be helpful.

21 MR. JOSEPH: The text was emailed  
22 yesterday.

23 MS. DeCARLO: Okay.

24 MR. JOSEPH: That's right, and most of  
25 the exhibits we don't have in electronic format.

1           MS. DeCARLO: Okay, just in the future  
2 if you provide more exhibits, as well, you could  
3 provide those in electronic, if possible, that  
4 would be great.

5           MR. JOSEPH: If we have them, you can  
6 get them. The spreadsheets, obviously, we  
7 provided disks, or a CD.

8           DR. REEDE: We have received none of  
9 that, and we're asked to address their exhibits.  
10 We have received no electronic copies other than  
11 the actual text, and we're asked to examine their  
12 exhibits when we haven't received those, either,  
13 in neither electronic form, and they were just  
14 given this morning.

15           You know, I'm asking or presenting a  
16 fair argument standard that if we're being asked  
17 to go above and beyond the call of duty, we should  
18 at least get the same courtesy of receiving  
19 documents in a timely manner in an electronic  
20 format.

21           HEARING OFFICER FAY: Well, I don't know  
22 if it's all available in electronic format. I  
23 mean, if the party doesn't have it that way, they  
24 can't provide it. But we made clear they have to  
25 provide it with the testimony, or a reference to

1 where it's readily available.

2 MR. JOSEPH: Yeah, and actually we  
3 provided the electronic copy a day early. The  
4 comments were due today; they've been, I'm sure,  
5 delivered by FedEx to the docket office, all the  
6 hard copies are sitting wherever they sit when  
7 they arrive there.

8 So, it's all here. And, as you recall,  
9 I did say early on that I thought it might be a  
10 good thing to tell staff that it would take a few  
11 days to actually try to digest this and not  
12 pretend you can do it in 24 hours. No one took me  
13 up on that suggestion.

14 HEARING OFFICER FAY: Right. Well,  
15 it's, I know they're trying to meet the schedule,  
16 they're trying mightily to meet it. And as the  
17 Committee we just have to balance this with some  
18 of the real limitations that we all have.

19 Okay, is there any question about how  
20 we're going to proceed? We'll produce an order  
21 that will reflect all this, but I think the  
22 parties have their direction.

23 Any last comments?

24 MR. THOMPSON: One final comment, and  
25 that is with the close of the prehearing

1 conference I am operating on the assumption that  
2 we will have no more intervenors, absent  
3 extraordinary circumstances.

4 HEARING OFFICER FAY: That is true.

5 Okay. All right, thank you, all. We're  
6 adjourned.

7 (Off the record.)

8 HEARING OFFICER FAY: We will continue  
9 this hearing on August 5th.

10 (Whereupon, at 12:24 p.m., the hearing  
11 was adjourned, to reconvene Thursday,  
12 August 5, 2004, at this same location.)

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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 Commission Hearing; 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 3rd day of August, 2004.

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