

COMMITTEE MEMBERS PRESENT

William J. Keese, Chairman, Presiding Member

Ellen Townsend-Smith, Commissioner Advisor

Terry O'Brien, Commissioner Advisor

Gary Fay, Hearing Officer

STAFF PRESENT

Dick Ratliff

Kae Lewis

Bill Taylor

APPLICANT

Greggory L. Wheatland
Attorney at Law

James R. Leahy
James M. Dunstan
Calpine/Bechtel

INTERVENOR

Roger Beers, Esq.
Counsel for East Bay Regional Park District

PUBLIC ADVISER

Roberta Mendonca

ALSO PRESENT

Jesus Armas, City Manager
City of Hayward

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P R O C E E D I N G S

CHAIRMAN KEESE: We'll call to order the Scheduling Conference on the Application for Certification of the Russell City Energy Center.

Mr. Fay.

HEARING OFFICER FAY: Thank you, Mr. Chairman.

As noted in the notice issued by the Committee on October 25th, this is a Committee Scheduling Conference, and the purpose is to allow the parties to comment on the petition filed by the Commission Staff on October 18th. That petition was to convert this case from the six-month process to the normal traditional 12-month process. And they cite the reasons for asking that. And we've also received a response from Applicant opposing the conversion, but agreeing to a time extension, and also from Intervenor, East Bay Regional Parks, who supports a time extension.

We want to hear from the parties on the petition, and then we want to be sure that before we leave we have some clear understanding of what a workable schedule would be for this case, regardless of which way the Committee rules on the question of whether it's formally a six-month or

1 formally a 12-month process.

2 So, I would also like to note that this
3 hearing is part of a teleconference, and that I've
4 opened the teleconference line. I don't know if
5 anybody has called in, but there may be people who
6 call in during the hearing and wish to participate
7 from the Hayward community. We wanted to be sure
8 to make it accessible to them in case they
9 couldn't come up here.

10 CHAIRMAN KEESE: Do we have anybody at
11 the current time?

12 HEARING OFFICER FAY: Bill Taylor, do we
13 have anybody who has called in?

14 MR. TAYLOR: Not to my knowledge, no.

15 HEARING OFFICER FAY: Okay.

16 CHAIRMAN KEESE: Would you -- if
17 somebody does, would you let us know?

18 MR. TAYLOR: Well, what will happen, if
19 someone -- you'll hear a tone. They will tone in,
20 the caller.

21 HEARING OFFICER FAY: And we can get the
22 caller to identify themselves at that time?

23 MR. TAYLOR: Yes.

24 HEARING OFFICER FAY: Okay, fine. We'll
25 do that.

1 All right. The -- normally we -- we
2 hear from the Applicant first, but since the Staff
3 is the moving party in this petition I'd like to
4 -- to give Staff the opportunity to -- to
5 summarize their petition and -- and offer their
6 schedule recommendations.

7 Mr. Ratliff.

8 MR. RATLIFF: Good morning,
9 Commissioners. Dick -- Dick Ratliff, for the
10 Staff.

11 We have, since the filing of the
12 petition, had discussions both with the Staff and
13 with the Applicant concerning the schedule. And
14 the important thing to the Staff is making sure
15 that we have a schedule that works for -- for
16 everyone, and not necessarily whether the
17 proceeding is called a six-month or a 12-month
18 process. I think we are close to an agreement on
19 what the remainder of the schedule should look
20 like, and I think what we really ought to do is
21 focus on what are the milestone dates that we
22 would use to try to reach the conclusion of the
23 proceeding, and not concentrate on whether it's a
24 six-month or a 12-month process.

25 I think the latter issue is not so very

1 important. There -- there is one possibility, and
2 that is the Staff is -- has, in the Staff
3 Assessment, identified one impact as being
4 significant, and we're still trying to find
5 possible ways to mitigate that impact. It's a
6 visual impact. If that is a mitigable impact,
7 then no adjudication of that issue would be
8 required. If -- if we can't mitigate it to
9 Staff's satisfaction, then we would propose to
10 adjudicate it.

11 But, at least it's my understanding that
12 the Committee thinks, or Mr. Fay has told me that
13 the Committee thinks that that could be
14 adjudicated in the six-month process, and
15 conversion would only occur depending on what the
16 conclusion of the adjudication was, that being if
17 -- if the Committee determined that it were a
18 significant impact you would then convert the
19 proceeding to a 12-month proceeding, and we would
20 go from there.

21 HEARING OFFICER FAY: Let me interrupt
22 you. I just -- I don't want people to
23 misunderstand. I think that is, and I probably
24 shared with you, I think that is a way that the --
25 that the regs can be applied. That is, if you get

1 to the point of -- of actually finding a
2 significant environmental impact, then you are
3 essentially forced to -- to convert the case into
4 a 12-month, or forgo the opportunity to even
5 consider an override finding by the Commission.
6 But I was not pre-judging this question at all, as
7 to whether the Committee should -- should grant
8 your petition on that question, at this time.

9 MR. RATLIFF: The -- I understand. And
10 I agree with you that I don't see anything in the
11 regulations that either requires or prevents
12 adjudication of a significant impact in the six-
13 month process.

14 The Applicant, on Friday, orally
15 proposed some dates, and this morning have given
16 us a list of proposed dates. And we're prepared
17 to react to those, and -- I mean, we -- we aren't
18 in complete agreement about the proposed dates,
19 but I think we can -- we can respond to what the
20 Applicant has proposed and perhaps work out a
21 schedule right here for -- for the rest of the
22 proceeding, if -- if that would be what you would
23 like to do today.

24 CHAIRMAN KEESE: Let -- let me ask you a
25 question. Have we had any movement on the PDOC or

1 the Fish and Wildlife?

2 MR. RATLIFF: I think that's best
3 answered by the Applicant.

4 HEARING OFFICER FAY: Did you want to
5 address that now?

6 MR. WHEATLAND: Good morning. I'm Gregg
7 Wheatland, for the Applicant, Calpine/Bechtel.
8 And with me this morning is Jim Leahy, who is the
9 Development Manager for the project.

10 The best information we have is that we
11 expect that the PDOC will issue from the district
12 today. Based on our discussions with the Staff
13 late last week, we are reasonably certain that the
14 PDOC will be issued as of today.

15 Regarding the U.S. Fish and Wildlife
16 Service, we have received an informal e-mail from
17 them last week, a copy of which we have shared
18 with the Staff, that indicates that Fish and
19 Wildlife Service will not require a Section 7
20 consultation, pending the resolution of one small
21 issue they had a question about. And we submitted
22 that information back to them the same day we
23 received their --their e-mail message.

24 So the latest information we have from
25 them is that they do not expect to require a

1 Section 7 consultation.

2 Doug Davy is also here today, and he can
3 provide you additional information on either of
4 those items, if you -- if you need it.

5 CHAIRMAN KEESE: And then you have
6 suggested dates?

7 MR. WHEATLAND: Yes, we prepared some
8 information that has some suggested dates. We've
9 provided a copy this morning to the Staff and Mr.
10 Beers. We have copies for you, and we have copies
11 for the audience.

12 HEARING OFFICER FAY: Before we move to
13 the Applicant, and I'd like, if you would, to go
14 through the schedule and kind of highlight it,
15 since you initiated it and Staff is really
16 reacting to it, I just wanted to ask Mr. Ratliff
17 if there's any changes since you filed your
18 petition in the substance of those matters? Have
19 any of those things, items been resolved?

20 MR. RATLIFF: Well, again, I think --

21 HEARING OFFICER FAY: I mean, we've
22 heard --

23 MR. RATLIFF: -- I think one of the
24 issues that we identified that was of concern to
25 us was whether or not there was going to be a

1 formal consultation required under the Endangered
2 Species Act. And the Applicant has informed us
3 that that -- they have an indication from the U.S.
4 Fish and Wildlife Service that that will not be
5 necessary. But I feel uncomfortable talking about
6 that, because I haven't talked with U.S. Fish and
7 Wildlife Service about this.

8 But assuming that to be the case, then
9 that is not -- that was one of the problems that
10 we thought we had with the schedule. If that is
11 not a problem, then -- then that is a change since
12 we filed the petition. And that was a very -- to
13 us, a very important issue, because if you have to
14 have a biological opinion that can result in a
15 lengthy delay in the resolution of that issue.

16 The second matter that we indicated in
17 our petition was the PDOC, which at that time we
18 had no indication of when it was going to be
19 received. We're told now that it's going to be
20 issued probably today, or -- or that its issuance,
21 at least, is imminent, and that was a big issue,
22 as well, because that -- we need to have that to
23 complete our analysis.

24 Those are the two most important changes
25 since we filed the petition.

1 HEARING OFFICER FAY: Okay. Everything
2 else is -- is as submitted?

3 MR. RATLIFF: Yes, it is. Although it
4 is our belief that we will be able to address the
5 -- the other two things we -- we have in our
6 petition are -- are the issue of visual resources,
7 and we think that we can, if it's possible to find
8 out what -- whether that issue is going to be
9 mitigated, we think we can -- we're either going
10 to find out we can resolve that issue or we can't
11 in the next couple of weeks.

12 And, likewise, with regard to the -- the
13 other issue that the Staff had outstanding was we
14 believed it was necessary to analyze any
15 environmental impact from the radio towers, the
16 movement of the radio transmission towers. And we
17 believe it will be -- we'll be able to do that in
18 the Staff Assessment that would be issued under
19 this schedule, when -- and I think the Applicant
20 has proposed at the end of December. We -- we
21 would propose in early -- early January. We think
22 we can have it analyzed by that time.

23 HEARING OFFICER FAY: Okay. Thank you.

24 Mr. Wheatland, it looks to me like the
25 schedule you passed me is -- oh, I see. I'm

1 sorry.

2 MR. WHEATLAND: Let -- I --

3 HEARING OFFICER FAY: I wasn't reading
4 it properly. Yes. It looked remarkably familiar
5 to the original one, but I -- I see you've added a
6 column.

7 MR. WHEATLAND: I -- I hope you looked
8 at -- the columns on the left are the original
9 schedule.

10 HEARING OFFICER FAY: Yes. Why don't I
11 let you go through this, bring us all up to speed,
12 then.

13 MR. WHEATLAND: All right. In our
14 motion, we have made a motion to extend the
15 schedule by 60 days, and it's extending the final
16 deadline for a Commission decision on this
17 application from 180 to 240 days. And that motion
18 was premised on the issuance of the PDOC before
19 November -- November 12th, and also for an
20 affirmative decision by the Fish and Wildlife
21 Service that a consultation would not be required,
22 also by November 12th.

23 So what we have done in this schedule is
24 to try, if I can direct your attention to the
25 revised schedule, the columns on the right. The

1 first date we have shown is the date that we
2 anticipate the PDOC being issued. That would be
3 November 5th. The second date below that is the
4 Staff files the Staff Assessment. Here we've
5 entered the actual date that the Staff Assessment
6 was filed.

7 And the following dates that are shown
8 on this schedule are our efforts to identify the
9 milestones that was in the original schedule
10 issued by the Committee, and we've attempted here
11 as closely as we could to maintain the same
12 interval between the milestones, as reflected in
13 the Committee schedule. It's not precise, because
14 we've had to adjust for some holidays and
15 weekends, but as closely as we could, we tried to
16 show the sequence of the -- the events that would
17 follow, using the same intervals that the
18 Committee had used.

19 Under that approach, the Staff
20 Assessment workshops would be held between
21 November 13th and 15th. The -- the FDOC would be
22 issued on the same interval as proposed by the
23 Committee. The new date would be December 17th.
24 That would allow 30 days for the Air District to
25 hold its hearings, and 12 days for them to make

1 any changes or response to comments.

2 The Staff Final -- the Staff's addendums
3 to the Staff Assessment would be 12/28. The Pre-
4 Hearing Conference would be right after the new
5 year, on January 2nd. We provide two days of
6 Evidentiary Hearings, the same as provided in the
7 Committee schedule, for January 7th and 8th.

8 The PMPD would, under the revised
9 schedule that we've proposed, would be issued on
10 February 1st, and the 240th day would fall on
11 March 8th. I believe, if the Commission holds its
12 Business Meetings as it has in past years, the
13 first Business Meeting is likely to fall on March
14 6th.

15 So that, in a nutshell, is the revised
16 schedule that we propose.

17 HEARING OFFICER FAY: All right. Any
18 revisions to your filing that you'd like to call
19 our attention to, on your -- in your response to
20 the Staff petition? Has anything changed since
21 you filed that?

22 MR. WHEATLAND: Well, I -- I've updated
23 you on the status of the PDOC and the U.S. Fish
24 and Wildlife. Apart from those, there are no
25 other changes.

1 HEARING OFFICER FAY: Okay. Mr.
2 Ratliff, what is your reaction to the proposed
3 schedule?

4 MR. RATLIFF: Well --

5 HEARING OFFICER FAY: Or Staff's --

6 MR. RATLIFF: -- the project manager and
7 I discussed this this morning, and the way we
8 would modify the proposed schedule would be to
9 slip the timing of the workshops from the time
10 indicated on the Applicant's schedule for -- for
11 about two weeks, with a workshop, the first
12 workshop -- I'm not sure if there would be more
13 than one workshop -- but the first one occurring
14 on November 28th, and any successive workshop
15 being in early December. And -- and part of the
16 reason for that is -- is the case and -- and the
17 Morro Bay hearings in mid-November, and won't be
18 available for the workshops earlier than -- than
19 November 28th.

20 HEARING OFFICER FAY: That the Morro Bay
21 workshops?

22 MR. RATLIFF: I'm sorry, the Morro Bay
23 hearings.

24 MS. LEWIS: It's -- it's not the
25 hearings, it's the -- it's the Staff Assessment.

1 HEARING OFFICER FAY: It's the what?

2 MS. LEWIS: It's the Staff Assessment

3 for --

4 HEARING OFFICER FAY: Okay.

5 MS. LEWIS: -- for Morro Bay.

6 MR. RATLIFF: Oh, I'm sorry. I

7 misunderstood.

8 HEARING OFFICER FAY: And so those dates
9 again, that you would recommend for Staff
10 Assessment workshops? Was that November 28th?

11 MS. LEWIS: November 28th.

12 HEARING OFFICER FAY: And assuming two
13 days, two or three days in that?

14 MS. LEWIS: The -- the 28th, 29th, and
15 December 4th were the ones proposed.

16 MR. RATLIFF: And, likewise, we --
17 although we don't know when the FDOC would be
18 filed, we -- we find that those dates usually are
19 not the ones that the district commits to. So we
20 think there's a good chance we'll get the DOC
21 later, but in any case, whether we get it later or
22 not, we think we would not propose to issue the
23 addendum to the Staff Assessment on -- on December
24 28th, simply because it's very difficult to issue
25 anything during that week and get it reviewed

1 properly. We would propose to have it issue on
2 January 3rd, instead, which would mean that we
3 would have the likelihood of getting proper review
4 of it before its release.

5 HEARING OFFICER FAY: And then a
6 proportionate slip accordingly?

7 MR. RATLIFF: Yes.

8 HEARING OFFICER FAY: Of the rest of the
9 schedule.

10 Now, I assume that -- that it's critical
11 when the FDOC comes in? If -- if it was late,
12 would that make the Staff Assessment late?

13 MS. LEWIS: Yes, it would.

14 MR. RATLIFF: Yes.

15 HEARING OFFICER FAY: And do we have any
16 way to learn more about that? Or do we just wait
17 until the district decides to --

18 CHAIRMAN KEESE: You're saying if the
19 FDOC is different than the PDOC?

20 MR. RATLIFF: Well, you never know until
21 it issues, and our problem is that we -- we have
22 difficulty actually finding out when these
23 releases will occur. We just, I mean, we ask, and
24 we --

25 CHAIRMAN KEESE: I -- I know your

1 frustration. I share it. With all the assurances
2 we get that they will be timely.

3 HEARING OFFICER FAY: Okay. Anything
4 further, then -- your recommended modifications to
5 Applicant's proposal?

6 MR. RATLIFF: Well, we would slip all of
7 the following dates, I think, as you suggested, by
8 an equal amount of time, through the final
9 decision.

10 Anything else?

11 MS. LEWIS; There's also some additional
12 information that we need from the Applicant, final
13 information on construction laydown and parking
14 areas. We need the final Cal-ISO approval for the
15 mitigation measures, and some resolution on air
16 quality issues.

17 HEARING OFFICER FAY: And --

18 MS. LEWIS: And that would be the
19 complete list.

20 HEARING OFFICER FAY: Is resolution of
21 air quality issues separate from receiving the
22 FDOC?

23 MS. LEWIS: Yes. Yes, it is.

24 HEARING OFFICER FAY: Okay. Is the
25 laydown area question related to the biological

1 resources issues?

2 MS. LEWIS: We're not expecting that
3 there's going to be impacts in that area.

4 MS. TOWNSEND-SMITH: Can I just ask you
5 a quick question. Since the radio towers were
6 added as part of the case, what does that do to
7 the case? Does that add additional technical
8 areas, will that take additional time for you to
9 analyze the project? I don't understand where
10 that came in, since no one's talked about it. And
11 it was noted in the Staff status report that we
12 required some additional time on that, but -- is
13 that a big deal, as part of the case?

14 MR. RATLIFF; The radio towers, I think,
15 as I understand it, Staff originally in pre-filing
16 indicated that the radio towers would not be
17 considered part of the case because there was
18 already a permit for the radio towers, issued by
19 the City of Hayward under a negative declaration.

20 And so originally, we did not set out to
21 address the radio towers in our CEQA analysis.
22 However, on further reflection, we believe that
23 the appropriate thing to do is to include the
24 radio towers in the CEQA analysis, to protect the
25 -- the process from any suggestion that we may

1 have been piece-mealing the project. That does
2 not mean that the Energy Commission has
3 jurisdiction to issue a permit for the radio tower
4 movement. That -- that has already been issues,
5 and that is a valid permit under the law. But we
6 feel that we must address any environmental issues
7 that result from that movement, or could result
8 from that movement, to have a complete CEQA
9 analysis.

10 So we're -- we're including that, and
11 will address it in the Staff Assessment. We -- we
12 feel like we'll have it packaged by -- by the time
13 we issue the Staff Assessment.

14 HEARING OFFICER FAY: So any extra time
15 that takes is compatible with the -- the
16 Applicant's revised schedule as modified by you
17 just now?

18 MR. RATLIFF: Yes.

19 HEARING OFFICER FAY: All right. Mr.
20 Wheatland, the additional things that -- that Ms.
21 Lewis mentioned, the -- the need to get final
22 information on the laydown area, a final report
23 from the ISO, and -- and settling of air quality
24 questions, is that Conditions of Certification,
25 essentially, on air quality?

1 MS. LEWIS: No, it's -- it's a series of
2 other issues that have to do with the BACT level
3 and some modeling issues that have to be resolved
4 between the Applicant and Staff.

5 HEARING OFFICER FAY: But it will not be
6 settled by the FDOC?

7 MS. LEWIS: It should be.

8 HEARING OFFICER FAY: Okay. I'm just
9 trying to understand exactly, you know, what these
10 -- these air quality questions are. Those three
11 points, do you -- can you help us there? What is
12 your anticipation of the -- the time needed to
13 address those?

14 MR. WHEATLAND: We're committed to
15 working with the Staff to provide that information
16 to them in a mutually agreeable schedule, so that
17 they will have plenty of time to include that
18 information in the addendum that would issue. So
19 we would anticipate that we will be able to
20 provide them that information. We committed to
21 doing so, and it should provide them with the time
22 they need to include it in the addendum.

23 HEARING OFFICER FAY: Okay. Of course,
24 the ISO report, presumably you don't have a lot of
25 control over.

1 MR. WHEATLAND: Right. We've been
2 working very hard to -- to get their timely
3 cooperation, as well.

4 HEARING OFFICER FAY: Okay. So do you
5 believe that -- that the revised schedule, as
6 modified by Mr. Ratliff, would allow for all these
7 matters to be addressed, would allow enough time
8 to -- to resolve these, all these questions?

9 MR. WHEATLAND: Well, yes. The
10 suggestions that the Staff is proposing would be
11 acceptable to the Applicant, which I understand
12 would be a Staff Assessment workshops being on
13 11/28, and -- and days following, and the Staff
14 Assessment issuing on January 3rd.

15 We -- we, of course, would -- would like
16 to have the -- the Staff Assessment workshops
17 earlier, just because it would provide us more
18 time to work these issues out with Staff, and to
19 put issues at rest that could perhaps be disposed
20 of fairly easily. And perhaps the Staff would
21 consider at least a workshop on those issues that
22 are not controversial at an earlier date, but if
23 it's impossible to do so, we would understand and
24 accept the dates that are being proposed.

25 HEARING OFFICER FAY: Yeah. And I think

1 to some extent we need to defer to just the way
2 Staff manages the cases. Obviously, you can't
3 have a project manager in two places at one time,
4 and -- and then I guess it's up to the division
5 how they -- how they make the call, whether they
6 assign somebody else to cover less controversial
7 things, or just avoid those dates.

8 But --

9 MS. LEWIS: There are other issues here.
10 First of all, it's too late to notice a meeting
11 for the week of November 13th. The following week
12 is Thanksgiving, and I found it was difficult to
13 get Staff during that week. And also, I -- I
14 don't feel that it's fair to the public. We get
15 negative reaction when we put workshops on holiday
16 weeks. And -- and so the 28th is the very next
17 week.

18 HEARING OFFICER FAY: Yeah, that sounds
19 reasonable. And the Applicant seems to not have a
20 great deal of trouble with your suggestions to
21 modify their schedule.

22 While we're addressing the schedule,
23 then, we've got this in mind, I'd like to ask Mr.
24 Beers if he'd like to comment on that, on behalf
25 of the East Bay Parks.

1 MR. BEERS: Yes, thank you. Roger
2 Beers, representing the East Bay Regional Park
3 District.

4 We support the Staff recommendation that
5 the Staff workshops be put off to the date
6 indicated. I haven't yet received a copy of the
7 Staff Assessment. I would like to have that
8 additional time to review the Staff Assessment in
9 connection with the workshops.

10 I would also request that there be an
11 additional week, at least, added in between the
12 issuance of the Staff addendum to the Staff
13 Assessment, and the first Pre-Hearing Conference,
14 particularly because this is the first occasion in
15 the proceeding in which the Staff will be
16 providing its evaluation of the impact of the
17 radio towers, which is one of the concerns of the
18 Park District. And I think our participation in
19 the Evidentiary Hearings will be framed to some
20 degree by the Staff Assessment that we get at that
21 point.

22 So it -- rather than having the Pre-
23 Hearing Conference scheduled for four to five days
24 after the receipt of the addendum, I would ask
25 that it be 11 days, let's say, or something of

1 that sort.

2 Other than that, the schedule that's
3 been proposed by Mr. Ratliff for Staff, and, as I
4 understand it, otherwise agreed to by Mr.
5 Wheatland, would be acceptable to us.

6 HEARING OFFICER FAY: And, Mr. Beers,
7 before you leave, do you anticipate at least the
8 potential that if adequate time is allowed, that
9 you may be able to resolve some of the matters
10 that are at issue right now between the Park
11 District and the Applicant?

12 MR. BEERS: That's our hope, and, in
13 fact, with respect to the impact of the radio
14 towers, we've been in some conversation with the
15 Applicant. The Applicant has a consultant coming
16 out very shortly to take a look at the site. So
17 it would be my hope that we could reach some
18 agreement with the Applicant on that.

19 But if that doesn't transpire, then I
20 think I would need at least that additional time
21 in order to be able to determine what, if any,
22 testimony we need to present.

23 HEARING OFFICER FAY: When would you --
24 when would you know if you'd reach resolution? Is
25 there some time certain that, for instance, the

1 Committee would -- would know whether that extra
2 week was required or not?

3 MR. BEERS: I don't know how -- I've not
4 been a party to the discussions that have occurred
5 so far. I think they're at a very, very
6 preliminary stage. I -- I don't think anything
7 substantive is likely to happen in that regard
8 until the consultant has been able to go out and
9 take a look at the site on behalf of the
10 Applicant. But, certainly, we would do everything
11 we could to expedite a resolution of that issue.

12 It may well be that that's something
13 that could occur within the next month to six
14 weeks, in which case that additional time wouldn't
15 be needed. But it's really impossible for me to
16 predict with certainty that it could be done in
17 that period of time, or that within that period of
18 time we will, in fact, reach an agreement that
19 would eliminate the necessity for our
20 participating on that particular issue.

21 HEARING OFFICER FAY: Okay. Thank you.

22 And Mr. Armas, the City Manager of
23 Hayward, is here. And since they're an interested
24 agency, I'd like to invite him to comment.

25 MR. ARMAS: Thank you, and I appreciate

1 the opportunity to address you.

2 It appears, from the comments we've
3 heard this morning, that two of the four issues
4 raised in the petition seem to be moving along
5 pretty well. The two outstanding ones with
6 respect to visual and the towers need a few
7 remarks, I think.

8 First, from the City of Hayward's
9 standpoint, we're ready to work with the
10 Applicants and CEC Staff to address the visual
11 issues. We think we understand the -- the nature
12 of those issues, and we think there are ways to
13 address those such that they are not significant
14 in the final analysis.

15 With respect to the towers question, I
16 think it's important to understand a couple of
17 things. First, the City of Hayward did consider
18 an application that the City Council heard on July
19 10th of this year, in which a mitigating neg dec,
20 negative declaration, was approved, so it took
21 into account any potential impacts of relocating
22 the towers from the current site to the proposed
23 site. The council, after due public hearing, did
24 grant the approval, and did approve the negative
25 declaration.

1 In addition, as part of the
2 deliberations, the Park District did testify, and
3 as a result of the comments voiced by the Park
4 District a condition of approval was added to the
5 permit associated with the relocation of the
6 towers, that requires the various issues raised by
7 the district be addressed prior to the issuance of
8 a permit permitting the relocation of the towers.

9 So we think we have a number of steps in
10 place to satisfactorily address the concerns. We
11 take those issues seriously, and the city staff
12 has worked with the Applicant and representatives
13 of the district to try to address those issues at
14 this time.

15 Thank you.

16 HEARING OFFICER FAY: Thank you for
17 coming.

18 CHAIRMAN KEESE: What is the status of
19 the towers?

20 MR. ARMAS: The towers --

21 CHAIRMAN KEESE: The physical status.

22 MR. ARMAS: The towers remain where they
23 presently are. They have not been relocated,
24 because permits have not been received from the
25 federal agencies that would allow any relocation.

1 And as I indicated, before any of that could take
2 place the issues raised by the district have to be
3 satisfactorily addressed. In fact, the conditions
4 of approval cross reference a letter that the
5 district submitted to the city wherein it
6 identified its concerns.

7 HEARING OFFICER FAY: And are those the
8 same issues that are still before us now? I mean,
9 having brought the towers into this case, in terms
10 of environmental evaluation, are the same issues
11 the ones that your city addressed in the neg dec?

12 MR. ARMAS: I'm not sure what issues the
13 district is raising today, so I can't speak for
14 the district. The issues that were raised before
15 the city dealt with frequency interference, dealt
16 with health and safety issues to district
17 employees, issues of concern to visitors to the
18 shoreline, and all of those were acknowledged and
19 all the parties committed to working to resolve
20 those.

21 HEARING OFFICER FAY: The visitors
22 issue, is that a visual one?

23 MR. ARMAS: I'm not sure I understand
24 the district's concerns, so I can't speak to that.

25 HEARING OFFICER FAY: Okay. Thank you.

1 Thank you very much.

2 Mr. Beers, just since this was raised,
3 can you confirm, is there anything in addition to
4 what was previously raised?

5 MR. BEERS: We wouldn't be here if we
6 were satisfied with the conditions that have been
7 imposed in Hayward's review of this matter. The
8 condition essentially just said to the radio
9 station, if a problem occurs, fix it. We have
10 concerns about things that we know at this moment
11 are predictable problems that are going to occur
12 as a result of the relocation of the radio towers.
13 They include the fact that equipment that's used
14 in the Park District's ordinary operations are
15 going to be affected on a daily basis, that
16 structural changes will have to be made to the
17 facilities there in order to prevent impacts from
18 the radio frequency waves from the towers. We
19 have concerns about what impact that's going to
20 have on visitation to the area, et cetera.

21 And despite the fact that Hayward did
22 prepare its own negative declaration, that doesn't
23 relieve the Energy Commission of the obligation
24 under CEQA to consider the relocation of the radio
25 towers as part of its CEQA process, because that's

1 a direct effect of the siting of a power plant at
2 the location at which it's proposed, and I think
3 the law is quite clear that the Commission can't
4 delegate its lead agency responsibility in that
5 regard to another agency, such as Hayward.

6 So, again, these are issues which I hope
7 we will be able to resolve with the Applicant, and
8 with the aid of the evaluation that we get from
9 the Staff. But we are concerned about those, in
10 addition to other issues raised by the facility.

11 HEARING OFFICER FAY: Okay. I -- no
12 question about Staff's decision to bring the
13 towers into the analysis. My only question is
14 just, since we were gathered here today, to try to
15 nail down the difference between the matters that
16 the City of Hayward addressed and the matters, the
17 additional matters that you want addressed. And I
18 -- I just want to be sure that Staff knows how
19 much of a starting point they have with the record
20 on the neg dec, and exactly what further has to be
21 examined.

22 MR. BEERS: There really was no
23 evaluation done in that process of the impact on
24 the Park District's facilities and operations that
25 would occur from the location of the towers there.

1 And we've -- we believe there are going to be very
2 systematic impacts to Park District communications
3 facilities, to their computer equipment, to the
4 corporate yard that they have there in which they
5 conduct operations, and so forth. And those have
6 not been evaluated or any mitigation specifically
7 tailored to prevent impacts to those facilities.

8 HEARING OFFICER FAY: Did -- you know,
9 what I gather, the Park District did appear on the
10 first permit to move the towers?

11 MR. BEERS: Yes, we did.

12 CHAIRMAN KEESE: And you've got a -- if
13 I heard you right, you've got a generic solution,
14 which was you could move them, but you've got to
15 fix any problems there are. And now, what you're
16 asking for in our process is that those generic
17 you fix it solutions should be replaced with
18 specific solutions identifying what the particular
19 impact is, and what's going to be done to take
20 care of that. Is that --

21 MR. BEERS: Yes.

22 CHAIRMAN KEESE: -- what I'm hearing?

23 MR. BEERS: That's correct. In other
24 words, that -- what we'd like is some --

25 CHAIRMAN KEESE:: So it may not be that

1 there's much difference. It's just that -- that
2 the generic solution is not appropriate, and
3 you're asking for a specific solution.

4 MR. BEERS: We -- we don't want to wait
5 until a problem occurs, and -- and discover what
6 the magnitude of that problem is and how much our
7 operations are affected, in order to have
8 something done about it. We'd like to have an
9 assessment done in advance of what problems are
10 likely to occur as a result of this, what fixes
11 are available, and what steps should be taken in
12 order to ensure continued Park District operations
13 of that facility without substantial impact from
14 the radio towers' proximity.

15 CHAIRMAN KEESE: Well, I would hope that
16 on behalf of the Park District, that the -- the
17 generic solution was written well enough that
18 there's an incentive to settle the specific
19 solution, also.

20 MR. BEERS: Well, I guess what I'm --
21 what I'm trying to indicate is that we were not
22 satisfied with the condition that Hayward imposed,
23 because we viewed it as a condition which wasn't
24 very meaningful. I mean, it really just said if a
25 problem arises, fix it. And without any

1 evaluation of what problems might exist out there,
2 and without any attempt to evaluate what
3 precautions should be taken in advance in order to
4 avert problems at the facility. And so we're
5 looking, hopefully, for an evaluation of that sort
6 here, and, again, I hope that that's something
7 that can be worked out with the Applicant, with
8 the aid of their consultant.

9 CHAIRMAN KEESE: That would seem to me
10 to be the best way to handle this.

11 HEARING OFFICER FAY: Thank you. Does
12 anybody else wish to address the schedule as
13 commented upon?

14 It looks to me, with the possible
15 exception of Mr. Beers' request for additional
16 time between the -- the Staff Assessment addendum
17 and the Pre-Hearing Conference, that we have
18 complete agreement. And -- and, Mr. Wheatland, do
19 you have a problem with that additional time, if
20 -- if it were subject to the Committee asking
21 Applicant to -- to tell us if things had been
22 resolved, and so that -- that the time was not
23 really needed?

24 MR. WHEATLAND: We have no problem in
25 building into the schedule the additional time

1 that would be requested by the -- by the Park
2 District. And, as you mentioned, if issues can be
3 resolved prior to that, that time could be
4 shortened in the future. But for the purposes of
5 planning the schedule, we have no problem with
6 that.

7 HEARING OFFICER FAY: Okay. Good.

8 CHAIRMAN KEESE: Let me -- without
9 knowing exactly, I will say that since we probably
10 have at least a dozen of these siting cases in my
11 office, and it could be -- that could be a
12 conservative number, it is beneficial for all of
13 us if we can set a hearing date that won't slip,
14 because slippage, I recognize that Staff works on
15 more than one case, also, and that -- Staff
16 scheduling is important. But Commissioner
17 scheduling is also going to be important here.

18 So I -- when we sit down to try to find
19 the date for the Evidentiary Hearings, I'd like to
20 think that we're getting pretty solid on that.
21 And -- and the degree of flexibility we have could
22 well be limited. It just depends on how the
23 different cases fall in here. But, as you -- are
24 you know, you've got enough of them before the
25 Commission yourself, that -- that can be a problem.

1 MR. WHEATLAND: Yes, I understand.

2 HEARING OFFICER FAY: Apropos of that,
3 adding another week to the -- to the schedule, as
4 per Mr. Beers' request, puts us into the week of
5 January 14th through 18th. And both Ms. Lewis and
6 I are scheduled to be in Morro Bay on Evidentiary
7 Hearings that week.

8 CHAIRMAN KEESE; Which -- which -- all
9 right, you've raised it now. I guess I have a
10 question. Maybe we don't want to answer it here.
11 Is Morro Bay slipping? I have a question here.
12 So let's --

13 HEARING OFFICER FAY: Well, it's
14 probably unfair to Mr. Wheatland to burden him
15 with --

16 CHAIRMAN KEESE: So I --

17 (Laughter.)

18 HEARING OFFICER FAY: Yeah. So -- so
19 these are -- these are things that have to be
20 juggled.

21 However, I'll just mention that, you
22 know, another factor is if this case, by using the
23 time -- the additional time we're talking about,
24 if the parties use this well and thereby reduce
25 the amount of hearing time needed, then we might

1 be able to slip some hearings in in a week when
2 large-scale hearings are going on in Morro Bay, if
3 possible. So we'll have to scratch our heads on
4 that one.

5 What I'd like to do now is sort of set
6 aside the schedule question, because I think we
7 fortunately have agreement on that, and address
8 the question of the -- the argument in the
9 petition that the project be converted from a six-
10 month to a 12-month case.

11 And I'd like to -- to begin by asking
12 everybody to assume that if the Committee does put
13 out a revised schedule, that it intends to enforce
14 that schedule. So it's possible that this could
15 be a distinction without a difference, in terms of
16 when the case is finished.

17 But Staff has raised the matter in their
18 petition. And do you have anything further to add
19 on that question, Mr. Ratliff?

20 MR. RATLIFF: Only to emphasize that the
21 remainder of the schedule depends on the issuance
22 date of the FDOC, which, again, is -- makes it
23 really difficult to know what the remaining
24 schedule will be.

25 HEARING OFFICER FAY: But presumably --

1 CHAIRMAN KEESE: We're done with
2 schedule. We're -- we're accepting the schedule
3 the way it is.

4 MR. RATLIFF: Yes.

5 CHAIRMAN KEESE: Now the question is,
6 you petitioned to move to a 12-month process. I
7 -- and we're saying it's -- it perhaps is a
8 distinction without a difference, because we're
9 going to go with the schedule whether we go six
10 months or 12 months.

11 MR. RATLIFF: It's our view that we
12 should continue within the six-month process,
13 unless --

14 CHAIRMAN KEESE: Unless we reach that
15 threshold --

16 MR. RATLIFF: That's right.

17 CHAIRMAN KEESE: -- where we have to
18 litigate.

19 MR. RATLIFF: Where -- where you must
20 either convert to make findings that are required
21 in the case.

22 HEARING OFFICER FAY: It sounds like
23 you're modifying your petition.

24 MR. RATLIFF: Well, we are. Yes. I
25 mean, if we -- what we're most interested in

1 having is a schedule to get to hearings. And then
2 if -- at that point, that's all that's really
3 important, and I think that's what we're trying to
4 achieve today. And --

5 CHAIRMAN KEESE: Okay. I'm sure
6 Applicant is not going to object to that. I was
7 hoping, because I'm trying to improve our batting
8 average here, I was hoping we were going to make
9 this a 12-month case and do it in eight, and then,
10 you know, look like we're doing real good.
11 Instead -- instead of a six-month case in eight,
12 and -- and we're behind time. But -- but that's
13 all right. I heard what you had to suggest.

14 MR. RATLIFF: We're not opposed to
15 converting it, either. We -- we just -- we're
16 indifferent to whether you convert it.

17 HEARING OFFICER FAY: If -- but let me,
18 since you raised the PDOC question, wasn't it
19 assumed when the Commission recommended this for a
20 six-month process, that -- that government agency
21 reports would come in in a timely manner. Wasn't
22 that a basic assumption?

23 MR. RATLIFF: I think that's a basic
24 assumption of all six-month cases, is that you get
25 prompt federal response. And it's a very

1 questionable assumption, in any case, that you get
2 prompt federal response.

3 HEARING OFFICER FAY: Well, we also have
4 state -- regional agency, with the Air Board. So
5 it's not just the federal agencies.

6 Wasn't it also an assumption that there
7 were no significant environmental impacts, and --
8 and yet Staff has found one in the --

9 MR. RATLIFF: That's correct.

10 HEARING OFFICER FAY: -- in the Staff
11 Assessment. And I assume you also, at the time
12 you made your recommendation to the Commission,
13 did not assume you would be bringing in the towers
14 into the project, because you indicated earlier
15 that that -- the Staff, at the time of acceptance,
16 was satisfied that the City of Hayward had
17 addressed this.

18 MR. RATLIFF: That's correct also. We
19 did not decide to include the towers as part of
20 the project until after we had initiated our
21 analysis.

22 HEARING OFFICER FAY: So it -- it sounds
23 like we not only have some late agency reports,
24 but we have some -- some factors that were not
25 before the Commission at the time that they

1 approved this as a six-month process.

2 (Inaudible asides.)

3 HEARING OFFICER FAY: Okay. Anything
4 further, Mr. Ratliff, on that question?

5 MR. RATLIFF: No.

6 HEARING OFFICER FAY: Okay. Mr.
7 Wheatland.

8 MR. WHEATLAND: I have just a couple of
9 things. We would agree that it was anticipated
10 when the six-month schedule -- when this
11 application was granted, under Article 7, that the
12 PDOC would be coming in in a timely manner. The
13 Committee, though, was very explicit that in its
14 original scheduling order, that a delay by an
15 agency other than the Commission Staff in filing
16 required documents may result in a necessary
17 extension of the Commission schedule. So I think
18 that is the appropriate remedy, rather than
19 converting.

20 I'd also like to point out that in the
21 United Golden Gate four-month process, where there
22 was a delay in the proceeding due to the
23 information, the Commission -- the Committee
24 granted an extension, rather than conversion of
25 that process, as well.

1 So we --

2 HEARING OFFICER FAY: Well, that's a
3 good point. I -- how late was that case? I think
4 it was --

5 MR. WHEATLAND: Two weeks.

6 HEARING OFFICER FAY: Two weeks. So
7 that was a two-week extension on a four-month
8 case, and this is at least a two-month extension
9 on a six-month case. At what point do you have --
10 do you no longer have a six-month case?

11 MR.WHEATLAND: I think the point is, is
12 when the Committee finds that there's substantial
13 evidence in the record that there may be a
14 significant adverse impact that can't be
15 mitigated, because that's what the Commission
16 rules provide. Now, the Commission rules don't
17 provide for conversion of the process merely
18 because of a delay in receipt of agency
19 information. The rules are very explicit that the
20 Committee must make a finding that there's
21 substantial evidence in the record of a
22 significant adverse impact.

23 Now, the Staff may have filed a Staff
24 Assessment, but the Committee hasn't reached the
25 point of holding a hearing on that assessment, or

1 making a determination that the Staff's findings
2 are -- are correct or not. So we believe that the
3 point at which you would make a decision for
4 conversion would be the point in which the
5 Committee has made a determination that there's
6 substantial evidence in the record of a
7 significant adverse impact. And the actual
8 timeline, whether it's a month delay, or a three
9 months' delay, is irrelevant. It's really making
10 those necessary findings.

11 HEARING OFFICER FAY: So if there were a
12 series of delays because of the need to negotiate
13 and/or to receive reports from sister agencies, et
14 cetera, and if all that even took 12 months, you
15 would still say that we should stay in a six-month
16 proceeding?

17 MR. WHEATLAND: We would, yes, until --
18 until the Committee could make the findings
19 regarding the substantial evidence in the record.
20 And for us, I'd like to point out, I think there
21 is a distinction, an important distinction between
22 the six-month and the 12-month process. The six-
23 month is basically streamlining the AFC process by
24 building in some very good reforms to that
25 process, one of which, for example, is the

1 difference between an addendum to the Staff
2 Assessment and an FSA. When the Staff issues an
3 FSA, they basically re-issue the entire document
4 in its entirety.

5 But we're anticipating a different
6 process here. The Staff Assessment has been
7 issued, and the only changes that'll be made are
8 basically in the form of an addendum or supplement
9 to that document, rather than require the issuance
10 of the entire -- entire bulky AFC -- I mean, Final
11 Staff Assessment.

12 So I would suggest that if the Committee
13 were to grant the motion to convert, it would also
14 have to go back, make the comparison between the
15 differences between the six-month and the 12-month
16 process, and account for the elimination of those
17 streamlined --

18 HEARING OFFICER FAY; Mr. Ratliff, do
19 you think we -- if the Committee were to convert,
20 we'd be bound to require an FSA in the traditional
21 meaning of the word, as opposed to just directing
22 Staff to -- to publish an addendum to its
23 assessment, as per the six-month schedule?

24 MR. RATLIFF: No.

25 HEARING OFFICER FAY: So you -- you

1 believe the Staff could go ahead, even with the
2 12-month designation, and -- and publish a more
3 streamlined document?

4 MR. RATLIFF: Yes. I mean, in some
5 siting cases that were 12-month projects, Staff
6 only filed a Staff Assessment with supplementary
7 testimony, which would be similar to what this
8 case would be if it were a 12-month case.

9 HEARING OFFICER FAY: Yeah, I -- I
10 understand your -- your argument, Mr. Wheatland,
11 but I -- I note that the purpose of this process
12 was to streamline superior cases, and this, you
13 know, without making any -- any derogatory
14 judgment on your proposal, it -- it does have some
15 wrinkles at this point that were not there at the
16 time the Commission looked at it. The,
17 specifically, the visual assertion by Staff, and
18 the -- and the towers question.

19 But I also want to address your -- your
20 argument on substantial evidence, because the act
21 also -- or, the regulations also use that term in
22 terms of judging what the Applicant has submitted
23 at the time of -- of the Commission deciding
24 whether it should be in the six-month or 12-month
25 process. And it says that the -- there should be

1 substantial evidence that there's no LORS non-
2 compliance, and no significant environmental
3 impacts.

4 And it seems to me that -- that that
5 quote, substantial evidence, at that time was no
6 more substantial than -- than the assessment that
7 Staff has now filed, and it was presumably
8 prepared by -- by experts, and -- and done in a
9 conscientious manner, but not submitted under --
10 under oath and subject to cross examination.

11 So it seems like you either don't have
12 substantial evidence at the front end, or you do
13 have it at this point, where the Staff is making
14 its comment on -- on the significance of the
15 visual impact. I don't see how the term could be
16 applied to two different meanings prior to the
17 evidentiary stage of the case.

18 MR. WHEATLAND: Well, Section 2023(b) of
19 the Commission rules say that once the Commission
20 accepts the application as data adequate, the
21 application shall be considered to be an initial
22 showing that there is substantial evidence that
23 the project will not cause a significant adverse
24 impact on the environment or electrical system,
25 and will comply with all applicable standards.

1 You're correct that we now have a Staff
2 Assessment, but that Staff Assessment would need
3 to go through some sort of hearing process to
4 overcome the presumption that's been provided by
5 the Commission rule. We certainly -- I think the
6 Committee would have the authority to -- to make
7 that finding, but it would first need to do so
8 through a hearing. And if the Committee were to
9 make a finding that the Staff Assessment, without
10 a hearing, is not -- it would overcome this
11 presumption, we would think that decision would
12 not be proper.

13 That argument is set forth on page five
14 of our -- of our pleading.

15 HEARING OFFICER FAY: Okay.

16 MR. WHEATLAND: Because, I could just
17 add, if the issue is the Commission completing a
18 12-month AFC early, or a six-month AFC late, we --
19 we would suggest that we take off the label of
20 six-month or 12-month, and really use the
21 appropriate label, which was set up in the
22 Commission's rules, which is this is an Article 7
23 proceeding. And an Article 7 proceeding, under
24 the Commission's rules, is a proceeding that is
25 expected to take six months, but may take longer

1 under the appropriate circumstances.

2 We think we, as -- as in the United
3 Golden Gate case, as -- as in other cases that
4 we've cited by the Commission's grant of
5 extension, we've met that showing. And we think
6 that the Commission, for very good -- the other
7 thing I'd like to add, if I could indulge the
8 Committee for just one minute. You also made a
9 very important point that the six-month process,
10 the Article 7 process, is entitled to -- is
11 intended to basically accommodate superior
12 projects. And if I -- if you'd like, we can
13 briefly summarize for you the aspects that let
14 this project in the door as an environmentally
15 superior project, because we believe all of those
16 factors have not changed. And for all of the good
17 reasons that the Commission initially accepted
18 this process under Article 7, we believe those
19 reasons are still existing.

20 HEARING OFFICER FAY: Sure. Let's
21 review that.

22 MR. LEAHY: The -- the project enjoys a
23 -- has worked hard to establish and enjoys a very
24 good relationship with the local government, the
25 City of Hayward that existed at the time of the

1 AFC submittal and continues today.

2 The project is, relatively speaking, not
3 controversial. The project uses recycled water
4 for cooling, which has a variety of -- of other
5 positive effects. Entailed in the project is the
6 project's construction for the city of an advanced
7 water treatment system, which has the effect of
8 not only providing recycled water for the cooling
9 system of the project, but lowers the salinity
10 problem in San Francisco Bay, by virtue of using a
11 percentage of that recycled water. So the water
12 that -- the amount of freshwater that goes into
13 the Bay decreasing salinity is decreased. The
14 system also reduced metals in the -- in the water.

15 The project's located in an industrial
16 corridor, and power generation is a permitted use.
17 The nearest residential area is about a mile away
18 from the project. The -- although conversational,
19 or pretty much conversational at this point, there
20 are no identified significant air quality effects.

21 The project is in essentially an ideal
22 location, in terms of the transmission system, for
23 not only providing generation, supports system
24 stability considerations, and so on. And the
25 project, in cooperation with the city, has

1 developed a -- a benefits package that will
2 benefit the 157,000 citizens of Hayward.

3 There are -- I could go on and on, but
4 they decline from there. Those are the
5 significant positive things that are often --
6 often lost in discussing a project like this.

7 HEARING OFFICER FAY: Thank you. I
8 think that's certainly reason for the Committee to
9 take those into account.

10 Mr. Beers, did you want to address the
11 -- just the narrow question of the appropriateness
12 of conversion?

13 MR. BEERS: I think we're really
14 concerned just to have enough time, and not
15 concerned about what labels are attached to the
16 process.

17 HEARING OFFICER FAY: Okay. Thank you.
18 Appreciate that.

19 Mr. Armas, is this a matter of concern
20 to the city at all?

21 MR. ARMAS: No.

22 HEARING OFFICER FAY: All right. Okay.
23 Any last remarks, then, before we wrap this up?

24 MR. WHEATLAND: No, we have nothing
25 further. Thank you.

1 HEARING OFFICER FAY: Okay. I think,
2 since you've heard agreement on -- on the schedule
3 as revised by the Applicant, and amended by the
4 Staff, and further amended by the Park District,
5 all of which was agreed to by the Applicant, that
6 we can assume that that expression of the schedule
7 will be reflected in the Committee order. And the
8 Committee will give serious thought to the
9 question of conversion. But I truly believe it
10 will not have much effect on this case. It is the
11 schedule that's going to control this case, and
12 whether it's called Article 7, or a six-month or a
13 12-month case, we intend to focus on the schedule
14 and get it done as expeditiously as possible.

15 So if there's no further comments -- are
16 there? Last call.

17 Okay. Thank you. We are adjourned.

18 (Thereupon the Committee Conference
19 was concluded at 10:10 a.m.)

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CERTIFICATE OF REPORTER

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

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

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of November, 2001.

VALORIE PHILLIPS

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