HEARING ON MOTION TO COMPEL

BEFORE THE

CALIFORNIA ENERGY RESOURCES CONSERVATION

AND DEVELOPMENT COMMISSION

In the Matter of:	)	
	)	
Application for	)	
Certification for the	)	Docket No. 98-AFC-4
SUNRISE COGENERATION	)	
AND POWER PROJECT	)	
	)	
_____	)	

CALIFORNIA ENERGY COMMISSION

FIRST FLOOR HEARING ROOM B

1516 NINTH STREET

SACRAMENTO, CALIFORNIA

THURSDAY, AUGUST 12, 1999

1:30 P. M.

Reported by:
Debi Baker
Contract No. 170-99-001

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P R O C E E D I N G S

PRESIDING MEMBER MOORE: I'm Michael Moore. I'm a Commissioner here at the Energy Commission and I'm the Presiding Member on the Sunrise Application. I'm joined at the dias today by my attorney, Gary Fay, Shawn Pittard, my aid and the aid to Commissioner Rohy, Bob Eller, who is on the far left. Commissioner Rohy is out of town and can't attend this meeting, but will be briefed on it and will have access to the transcripts prior to any Committee decision on this matter.

I'm going to ask the parties to introduce themselves in just a moment. Let me just say that, as far as I know, my attorney has informed me that this is, at this point in time, an unprecedented event. We have never had this kind of a hearing actually come to the Commission before. Everything has always been worked out ahead of time.

So, in that sense, I don't have what you'd think of as a precedent for procedures. I'm going to, hopefully, describe a procedure that will be consistent with what everyone needs in order to get their points on the floor in order to

provide an informed decision-making record prior to us coming to a decision.

The way I intend to proceed is to ask each party to present their overall position, kind of a synopsis of it, get that out on the table. I'd like to imagine that there are fairly big groupings of the issues that can be addressed and to remind everyone that, in a sense, what I have to fall back on is the blueprint that was agreed to before, that the Committee has agreed to before, in order to establish, or in order to make ruling.

So, I would appreciate it if, it is possible, that you keep in mind, I'm not asking you to address it specifically, but you keep in mind when you're making points that the blueprint, in a sense, provides the skeleton on which I'm trying to hang things in order to see them in context. It makes it easy. It's not conclusive, but it certainly provides the data that I'll need in order to move forward.

With that, I'm going ask CURE to identify themselves for the record, and then I'll turn to the Applicants and finally to staff.

Ms. Poole.

MS. POOLE: Good afternoon, Kate Poole, for CURE.

PRESIDING MEMBER MOORE: Thank you. Anyone else from Poole --

MS. POOLE: Not from Poole or from CURE.

(Laughter.)

PRESIDING MEMBER MOORE: Anyone else from CURE here?

MS. POOLE: No, there's not.

PRESIDING MEMBER MOORE: Applicant.

MR. GRATTAN: And I'm John Grattan. I'm here on behalf of Sunrise and if I can introduce the rest of the Sunrise team, I'd be pleased to.

On my right is my partner Scott Galati. On my left, and he's familiar to the Committee here, is Steve Kostka, who is our CEQA expert. And now from Sunrise we have Don Muroaka from Radian. We have Julie Way, who I believe you know, is the Project Manager. Paul Dinkel, also from Sunrise, project management and Scott Blek, who is counsel. And seated in the audience we have brought Craig Jackson from TCI who is here to answer specific questions as they may come up.

And also, I've forgot -- and I always forget someone, Mervin Soares from TCI sitting

right there.

MR. SOARES: I'm with Sunrise.

MR. GRATTAN: Excuse me, excuse me, Sunrise.

PRESIDING MEMBER MOORE: TCI, being -- can you for the record?

MR. GRATTAN: TCI is the oil exploration and production company of Texaco.

PRESIDING MEMBER MOORE: Are there other intervenors in the audience who would like to participate today?

MR. MILLER: I'm Taylor Miller representing the Elk Hills Power Project.

PRESIDING MEMBER MOORE: And do you plan to testify on this today?

MR. MILLER: I'd only like to make a very very brief statement. I don't want to add to your burden of time.

PRESIDING MEMBER MOORE: Well, of course, my burden of time -- I'll come back to you. My burden of time is yours, because I work for you, but if you'd stay at the table then and we'll take a general statement from you after we ask everyone else to make a statement. Taylor Miller.

MR. MILLER: Thank you for the opportunity.

PRESIDING MEMBER MOORE: Thank you. And staff.

STAFF COUNSEL HOLMES: My name is Caryn Holmes. I'm staff counsel. On my right is Kristina Bergquist. There's a couple members of staff from the Biology Unit here and I think some other people will be coming and will be available to answer any questions if anybody has them.

PRESIDING MEMBER MOORE: And Kristina, I'll come back to you for a statement on the staff position in just a moment.

Anyone else here who intends to testify before this hearing?

All right. Ms. Poole, I'm going to turn to you and I'm going to ask for your opening and general statement about what brings you to have filed this and that's not to preclude going through the detail, which I'd like to come back to. So with that, and then I'll turn to the Applicants.

MS. POOLE: Thank you, Commissioner.

First of all I'd like to thank the Committee for hearing this matter so quickly.

There is some time pressure involved in this and I appreciate your prompt response.

This Commission has a fantastic record of allowing public participation. And the Commission rules give intervenors rights to ensure that that public participation is meaningful. One of these rights is the right to obtain data from the Applicant, whether or not the Applicant wants to volunteer the information.

We submitted data requests in this case, just like we have in many other cases and for the first time we've been stonewalled. We've been stonewalled, despite the fact that all of the information that we've asked for concerns impacts or the mitigation of impacts, that all of the parties agreed were relevant during the Committee's development of its CEQA blueprint.

For example, the parties agreed and the blueprint recognizes that indirect effects of the project include the construction and operation of oil wells that will be fed by steam from the plant. Now Texaco claims that steam from the plant will only serve wells within a three-quarter mile radius.

So we've asked Texaco to provide us with

information that will allow us to verify that the plant's steam will not extend beyond this three-quarter mile radius, that's a data request 52. Because it defines the scope of the indirect impact analysis we believe that this increase is a necessary one under CEQA.

We've also asked a series of questions about whether areas impacted by Texaco's oil field expansion activities have been surveyed for sensitive species. These are data requests 37 to 42. These are simply yes or no questions. If yes, we've asked for the survey results. If no, we've asked why not.

The questions don't require Texaco to perform any surveys, although Texaco's biologist has indicated that they've already done at least some of these surveys. If information exists that demonstrates that sensitive species do or do not use the oil field habitat then that information unquestionably affects the biological impacts of the Sunrise plant.

We've also asked a series of questions at data request 96 through 112 about Texaco's proposed transmission line and how it will impact or be impacted by other power plants

interconnecting in the region. Right now several projects, including this one, plan to interconnect to the same substation and build transmission lines across the same area of western Kern County. These proposals will undoubtedly cause cumulative environmental and transmission related impacts.

In fact, staff has already held a workshop on the issue of cumulative transmission related impacts in Kern County. Texaco's contribution to these impacts is unquestionably relevant and a necessary inquiry under CEQA.

Now, Texaco has laid out three basic arguments for why it's refused to answer our questions. First it argues that the Commission's regulations don't demand a particular method of LORS compliance so that all of our questions concerning alternative control methods are irrelevant.

This misses the point of our questions, which is to explore the feasibility of different methods for mitigating impacts under CEQA. Even if Texaco is complying the LORS requirement, it still may be necessary and possible for it to further mitigate its impacts under CEQA.

Second, Texaco argues that the project's

cumulative impacts don't have to be analyzed to the same extent as the project's direct and indirect impacts. We don't disagree with that statement, but it doesn't tell you anything about the type of information that does have to be looked at to analyze cumulative impacts. The CEQA guidelines provide that type of information and they require at 15130(b) "A list of probable future projects that will produce related or cumulative impacts, the expected environmental effects of those projects and feasible options for mitigating the project's contribution to any significant cumulative effect."

All of the information that we've requested regarding cumulative impacts relates to these requirements. For example, we've asked Texaco whether its oil field expansion plans have changed since the AFC was submitted so that additional oil wells or steam generators are now planned for the oil field. These were asked in data request 54 to 56.

This information is necessary to identify probable future projects for the cumulative impacts analysis. We've also asked about the expected environmental effects of these

projects. For example, what the biological impacts may be at data requests 48 and 49, what the air quality impacts may be at data requests 56 to 68 and what the water quality impacts may be at data requests 83 through 87. All of this information is necessary to perform CEQA's cumulative impacts analysis.

Finally, Texaco argues that much of the information that we've requested is in TCI's hands. But it acknowledges that it's reasonable for a thermal host to provide information that is relevant and necessary to the Commission's analysis. That's all we're asking for, but we need your help.

This is a very complex project. We're trying to sort it out now at the discovery stage. If we have to do it later during hearings it will be a much longer and more cumbersome process. And if there was any way we could have avoided embroiling in this dispute we would have.

We initiated discusses with Texaco to see if we could resolve this and didn't hear back until about two minutes before this hearing started, with this supplement, which I haven't had a chance to review yet.

The bottom line is that we need the information that we've requested in order to perform our analysis of Texaco's proposal and Texaco won't give it to us.

I'd be happy to answer any questions you have about specific requests.

PRESIDING MEMBER MOORE: I think, Kate, what I'll do is come back to the specific questions after we get the other general statements on the table and then we'll proceed that way.

So, John, I'm going to turn to you and ask for an overview of your response, not your specifics, but an overview of how you categorize this.

MR. GRATTAN: First, it's nice to be back here again. I have to react first, counsel, to your characterization of our stonewalling up to the very end. We each had an opportunity to submit a filing in which we would take things off the table. We took things off the table, you had every opportunity to do the same.

Next, our introduction. We have submitted a supplement. I apologize for the lateness of this. We were working right up until

the Committee Meeting to attempt to answer any question relating to the project as defined in the blueprint, where we had information.

I would like to address the issue of relevance. And this Committee has great discretion, I think, in determining what relevance is. And I would submit that what is relevant is something reasonably necessary to make a decision -- excuse me, it's something that is relating to a material issue, in this case, significant environmental impacts. And then it would tend to prove or disprove significance in a manner contemplated by CEQA and in a manner which is not disruptive of the process or the Energy Commission's overall mission.

CURE is seeking to compel from Sunrise -- and I want to focus on the issue, again, of cumulative impacts. I think we can probably address the other two issues in our --

PRESIDING MEMBER MOORE: Those other two issues being?

MR. GRATTAN: I'm sorry, the other two issues being that it is unreasonable for a party to the process to request information as to why an Applicant did not select a particular mitigation

measure, when, in fact, there has been no demonstration, no foundation that a significant impact would result from the way the Applicant chose to go, i.e., in compliance with the law.

And the next issue was the fact that many of these -- and this ties over to the cumulative impacts, many of these questions are asking information of a party not present, not before the Commission.

The issue of cumulative impacts, the vast majority of the questions addressed to us by CURE ask for a microanalysis, they ask for a project analysis of impacts that were clearly set out in the blueprint to be cumulative impacts.

CURE, the transcript is riddled with CURE stressing the importance that the oil field impacts be part of the project description, be part of the project direct impacts. They stressed it was critical. They lost that issue and now CURE is back here saying it doesn't make any difference, we'll get this under cumulative impacts.

They have asked for -- we have a list, perhaps, of some of the specifics they have asked for. I would suggest that it would be quite

productive to the issue of whether there are significant cumulative impacts out there, and remember the realm of cumulative impacts. They were the entire oil field impacts and they were the impacts which could be expected from three anticipated projects, this project, La Paloma and Elk Hills.

Aside from putting an reasonable burden on the Applicant, what their request does is skew an analysis, skew an appropriate analysis of cumulative impacts. The way I view cumulative impacts is a swarm of bees. The way to analyze the impacts of a swarm of bees is to step back and look at the swarm, to look at the plans, to look at the projections, to look at things that are readily available in the public domain, as opposed to taking a microscope and examining a single bee under that microscope.

I would suggest that if CURE were sincere about finding out about the cumulative impacts, that they would ask questions regarding attainment plans, regarding habitat conservation plans, regarding TCI's commitment under habitat conservation plans and programmatic opinions. That would be quite productive.

I would also urge that in this Committee's task of analyzing what is relevant, what is reasonably available and what is calculated to assist the Commission or to assist a party in making a decision, that the Commission utilize its resources in its staff. Staff has released a preliminary staff assessment, while Applicant -- while we're still reviewing that, and we by no means commit to embracing every single sentence and recommendation of it, it appears that staff was able to provide a coherent analysis of cumulative impacts relying on a body of existing information. And a body of information that much of which it obtained through data requests or in the application from this Applicant.

So, I would suggest, we have a vested interest, CURE has a vested interest. I would suggest that staff is A, neutral at least between us and B, while all parties are equal before the Commission, staff is the only one with a role in the regulations, 1749, I think, to produce an objective report addressing all impacts including cumulative impacts and to provide for recommendations for mitigations under that report.

So, having said that, we're at your

service here.

PRESIDING MEMBER MOORE: Thank you and I neglected to ask, Ms. Poole, do we have a complete copy at this point of the recommendations that you're making, the requests that you're making, so your written comments are complete at this point?

MS. POOLE: Yes, they are. They may be changed to some extent, given this supplemental filing that I just received, but, again, I haven't had a chance to look it over.

PRESIDING MEMBER MOORE: I understand. Mr. Grattan, are your comments to this point in time complete? In other words we do have a complete set of your written responses?

MR. GRATTAN: Yes, we do.

PRESIDING MEMBER MOORE: And that includes the update of the document Ms. Poole just referred to which is the supplemental responses?

MR. GRATTAN: That's correct.

PRESIDING MEMBER MOORE: Thank you.

Kristina, I'm going to turn to you for an overview of staff's role in this.

PROJECT MANAGER BERGQUIST: Commissioner Moore, I'd planned on our counsel, Caryn Holmes, to make this presentation.

SENIOR STAFF COUNSEL HOLMES: Thank you, Commissioner Moore, I actually hadn't planned to make a presentation at all, since staff has the luxury, which is rare in a siting case, of not having to take the position as between two parties, nonetheless --

PRESIDING MEMBER MOORE: Could you -- what I'd really like you to do, Caryn, if you could, is just put on the record the role of staff in this, in terms of providing the independent and --

SENIOR STAFF COUNSEL HOLMES: Do you mean in terms of this specific issue or do you mean in terms of our staff assessment?

PRESIDING MEMBER MOORE: In terms of this specific issue here before us today.

SENIOR STAFF COUNSEL HOLMES: We did not make any formal filing. We did not take a position on this issue, nonetheless, we remain ready to assist the Committee, if they so desire. I do have a couple of comments based on my familiarity with the siting regulations and with the CEQA regulations that haven't yet been covered by the parties, so if you think that those might be helpful, I'd be happy to offer those.

PRESIDING MEMBER MOORE: That's appropriate, yes, thank you.

SENIOR STAFF COUNSEL HOLMES: First of all, I think that the parties have appropriately discussed the question of relevance of certain information to indirect and direct impacts versus cumulative impacts. In order words, there is a question about how much detail is needed for the different kinds of impacts. I won't go back over that.

I think there has been, based on some of the written filings, some confusion about what Sunrise referred to as LORS compliance options. And I think it may have been cleared up today, but just to summarize. Staff is in agreement with what, I believe, we heard CURE to say in that if there is an environmental impact as a result of the project, regardless of whether or not it's complying with LORS, we look at alternative methods of LORS compliance to see if we can't reduce that impact.

If there is no impact that we identify as a result of the project, when it's complying with LORS, we do not look at alternatives in that situation.

HEARING OFFICER FAY: Does it have to rise to the level of a significant before you -- before that triggers your examination of --

SENIOR STAFF COUNSEL HOLMES: Well, we have to find out whether or not it is a significant impact to begin with, so there's probably two layers of analysis we look at. One is more general. We say is there a potential for a significant impact, notwithstanding that the project is going to provide habitat compensation or offsets or something like that.

If we think there is a possibility that there may be a significant impact, under some methods of LORS compliance we will look at alternatives to see if we can pick a method of compliance that will, at the same time, reduce that level of impact to an insignificant one.

There's also a third issue having to do with relevance that I haven't heard discussed today and that has to do with how relevant is information in light of the fact that there are other agencies that deal with some of these issues?

For example, is it relevant to ask information about various reliability impacts when

the independent system operator is preparing a review of that very issue? That's one question. Another question comes up in the area of wastewater treatment. In this particular case, Valley Waste is going to be taking care of the wastewater from this project. They have a permit they've been operating. There is a question about whether or not information, about how they operate and what they do, is relevant to a CEQA analysis or not. It's a question of whether or not this Commission should appropriately, or could appropriately, defer to another agency to address environmental facts.

In addition to relevance issues, there are a couple of other issues that I think you're going to have to address to come up with an answer to the motion to compel. The first is to what extent should the Commission order an Applicant to provide publicly available data. There are permits that are publicly available that I believe CURE has requested. There is information about various entities that CURE has asked for that staff, for example, has obtained by picking up the phone and calling.

So there is a question about where the

burden lies. Does the Applicant, in bearing, in assuming the burden of making its case have that burden of providing publicly available information or does the intervenor, who's seeking that information, is it more appropriate for that entity to bear the burden?

HEARING OFFICER FAY: May I interrupt for just a second? What is your view of, if, on the question of, if the answer to some of CURE's questions are presently held by staff and not subject to any determination of confidentiality, is that something that staff can freely share with any party?

SENIOR STAFF COUNSEL HOLMES: Yes, there is information to some of the -- at least what my staff tells me is that there is information that has been sought by CURE that the Applicant has provided to staff. I'm assuming that CURE has it as well and so that's why there's some puzzlement on my part about whether or not we're actually talking about the same information.

But, yes, we would be willing to make information available, if there is information that we have that they don't. Some of the information may have come up in other siting

cases, but I think that CURE is a party to most of the other siting cases, so they would presumably have that as well.

HEARING OFFICER FAY: And staff is available and willing to make that --

SENIOR STAFF COUNSEL HOLMES: Yes, yes and would be happy to identify as well.

A secondary, outside of the relevant question has to do with the extent to which the Commission should direct an Applicant to put together data to create new documents. For example, I think CURE asks for maps in one of its data requests. The maps would be based on information that's already been provided, a narrative discussion by the Applicant.

And then lastly, a third area outside of the relevance issue has to do with timing. Some of the information that CURE has requested is information that we typically require in some of the compliance plans that are mandated by the Commission decision six months before construction, 60 days before operation at various different times in the proceeding, but down the road, --

PRESIDING MEMBER MOORE: So that's a

timing issue.

SENIOR STAFF COUNSEL HOLMES: That is a timing issue. Typically the way staff has looked at that is that if there is a range of available options to meet the condition of certification, there's no question that they're all available and they all work. We don't require specification of that until after certification.

So that's my take on some of the issues that weren't discussed in the presentations by the other two parties. If you've got questions I'd be happy to answer them.

PRESIDING MEMBER MOORE: I may as we go through this, Caryn.

HEARING OFFICER FAY: On that point, Ms. Holmes, isn't there a point at which that subject of timing can get into the Commission's discretion on whether they've adequately fulfilled their duties under CEQA and the Warren-Alquist Act, that is enough information to make an informed decision.

SENIOR STAFF COUNSEL HOLMES: Yeah, there is a question. There's a requirement in the law that you -- at least at some level specify the mitigation that's going to be required to

ameliorate impacts prior to the decision, otherwise it would be difficult to have an informed decision that you can, in fact, do that.

However, as I said, when we have a situation where there are a number of options available for mitigation, and they have been specified and there's testimony in the record that supports a finding that those methods are all available and that they're all effective, we don't require them to be selected until post-certification.

HEARING OFFICER FAY: And what if they're not specified, but because of the agency's history and experience you know that a sister agency has experience and appropriate jurisdiction, and this kind of gets back to one of your earlier points, is that something that the Commission should properly rely on?

SENIOR STAFF COUNSEL HOLMES: I think it's something the Commission can properly rely on. Staff tries to, I hope it's successful in identifying why they think the other agency will be affected and will be successful in imposing that mitigation measure. Or, for example, why staff believes that the range of mitigation

measures that are available can be relied upon and do not need to be selected prior to the decision.

In other words, we like our testimony that goes into the record to have a basis for finding that the mitigation is available and effective and will be implemented.

PRESIDING MEMBER MOORE: Well, the operative phrase is can rely on, or could, I mean we don't have to, we're not compelled rely on.

SENIOR STAFF COUNSEL HOLMES: You could have a 5,000-page decision that specified every single little detail that comes up in post-certification, but pre-operation compliance if you wanted to.

PRESIDING MEMBER MOORE: Thank you. Mr. Miller.

MR. MILLER: Thank you. I will be very brief.

PRESIDING MEMBER MOORE: And identify yourself and the company, please.

MR. MILLER: I'm Taylor Miller, representing the Elk Hills Project. I'll be very brief, I'll say that again.

The Elk Hills Project has an interest in the matters before you today because we expect we

may have similar issues arise in our case. As you may know we have received our set of data requests from CURE that run 146 separate requests, each of which has multiple sub-components. We calculate that there are somewhere over 800 questions we think, all together, in the filing.

We haven't had a chance to review them in detail and we'll certainly do our best to respond in good faith to them, however, at first blush we think there may be some issues that are fairly far afield in our view and a level of detail requested that may be questionable.

We would simply like to make the Committee aware of that today and also urge that in resolving the issue before you, which we will not comment on in detail, that some reasonable limits on data requests be imposed to establish a balance between irrelevant discovery and overdrawn and burdensome requests. And we recognize that presents a line drawing problem as to what is relevant and necessary, and, in that regard, we would offer that the touchstone question might be simply is this information truly necessary to support the licensing decision.

Many questions are capable of being

asked, creatively asked. But just because they can be asked doesn't mean that it's reasonable, necessarily, to have to answer them, answer them all. And that, again, does pose a line drawing problem, we understand, and that puts you in a difficult position.

We would suggest, perhaps, that when other parties not only ask for more, but substantially more information than staff has requested and found sufficient to perform their analysis, that that would then put the burden on the requester to convincingly demonstrate that that information is, in fact, truly necessary to support a reasoned licensing decision.

With that, I would like to close and perhaps request if it would be proper an opportunity to submit a further comment in writing at an early date following the conclusion of your meeting today.

PRESIDING MEMBER MOORE: I accept and would ask you to do it expeditiously. I expect to be in caucus with my attorney and staff members early next week, so if you could possibly have it to us, even if it's in a rough out form by Monday, I'd appreciate that. It will allow us to debate

this intelligently. So I accept your request and we'll look forward to your comments.

MR. MILLER: Thanks very much.

PRESIDING MEMBER MOORE: Thank you.

Ms. Poole, I'm going to turn back to you and say that you've heard the categorization of your requests in three broad areas, questions of relevance, questions of proving or disproving significance and then, I think, what I would call a narrower area of just cumulative impacts. Is that a fair categorization or are there broad categories that you would pull these into and then can we start to talk about the unique ones that you think merit extra focus, because obviously have your written submittal, so I want to spend as much time as we need to try and get to the ones that are really unique and bear extra attention.

MS. POOLE: I certainly agree with the categories of relevance, which is one of the requirements under the rule for data requests, and with the distinction between cumulative impacts and direct and indirect impacts, as I tried to explain earlier.

The significance questions is a tough one because we're in the discovery stage or very

close to the discovery stage here and the significance question isn't answered until the Committee makes that determination. So if there's an impact now that may not appear significant, but, as further information comes out becomes significant, we think it's a better approach to explore mitigation measures for that impact at this stage, and, in fact, would expect arguments that were precluded from raising it later if we don't explore it at this stage.

So, as far as the mitigation question goes, the questions that we've asked about are in topic areas that we anticipate, at this point, there will be significant impacts, and that's why we're exploring.

PRESIDING MEMBER MOORE: Let me take you in one slightly different place and ask for your opinion on this because it's one that, now in the two siting cases that I have been a party to, it's loomed up as large and, if not intractable, but certainly difficult, and that's air quality. Try as hard as they could and even with what I would consider to be some severe whipping from the Chair, parties were not able to come up with air quality information that could be used, at least

in it's final form, until really late in the hearings.

A lot of that difficulty was in terms of different levels of analysis, either on the part of our staff or the Applicant or the air district. But, in the end, the air district proved to be the weakest link in the process.

The same thing might occur in terms of cumulative impacts that involve other agencies, for instance, water quality agencies, federal versus state jurisdiction. When you've asked a set of questions or data requests that fall into areas like that, and again I don't mean these to be definitive, just illustrative, how would you counsel the Committee to respond when we can't compel someone to get information that won't be forthcoming, as a practical matter, just won't be forthcoming from another agency? Do we call time out? Do we tread water until it comes up, until the data request can be satisfied? What's your counsel on that, when you've asked for a set of data, that, as a practical matter may not be able to be obtained?

MS. POOLE: Well, let me make sure I understand your question. Are you asking about

agency determinations that have to be made that aren't yet made and do we deal with that question?

PRESIDING MEMBER MOORE: That, and also I could even get down to the area, at least in the last two experiences, where you look at data that, literally data that simply was not forthcoming, that precluded an analysis, and we couldn't get it. The Applicant couldn't get it. The staff couldn't get it. Or we got the wrong stuff or we got an incomplete set. Because, in a sense, underneath it all, our ability to analyze is all dependent on the quality of the data that we get.

MS. POOLE: Right. Well, I agree with that last characterization. The data is very important. And I think that in most of these siting cases, the Applicant and its consultants generate a great deal of the data. And much of what we've asked for here is what could be characterized as the raw data, so that we can look at that and come to our own conclusions and see if we agree with what the Applicant has concluded about what the data demonstrates.

If the data is only in the hands of an agency and the agency will not supply that data I simply don't know how to get around that problem.

Typically what we do is ask for information from the Applicant in the form of data requests and also go to agencies and seek information through the Public Records Act. And we can obtain a lot of information that way, including some of the things which Mr. Grattan referred to, like biological opinions and the like.

But our focus here, I guess, is on information that the Applicant controls and that's what we're trying to get.

PRESIDING MEMBER MOORE: Okay, having said that, then our -- now I have a copy in front of me, as does everyone else I believe here, which are your data requests. Are there items in here that we need to expand on or explore more than what you have put down so that the Committee Members -- do we need more detail on any of these that you want to get in front of us for a particular focus?

I mean what I don't want to do is to deny you the opportunity, if you need it, to go through these one by one and say what you have in mind. On the other hand, I'm not trying to over burden the record. But I want to make absolutely sure that you are confident that we have the

information we need to make a decision, that your materials are as expositive as possible.

MS. POOLE: I believe we have supplied you with that information and I would ask -- I realize that this is a lot of information and that none of us should be spending our time doing this, but unfortunately we're in this situation. And I think that Sunrise has mischaracterized what we've asked for in many cases.

For example, the survey data, which I mentioned earlier, we've asked for that survey data, if it exists. Sunrise is claiming that we're asking them to perform the surveys. That's not what we're asking for. We just want it if it's out there. And in many of our requests I think that's the situation.

We just want a straight answer about whether this information is out there with Sunrise, Texaco or its consultants and, if it is, we'd like a copy of it. And if there are concerns that -- or questions that the Committee has as they go through this, I'd be happy to provide you with more information on any specific request about what we're trying to get at or what the intention behind the request is. But, I'm not

sure, other than going through each one and explaining what we're looking for, whether it's worth our time to do that today.

PRESIDING MEMBER MOORE: Well, I'll tell you what might be worthwhile. On the question of whether or not they're clear enough, as I read them, they seemed to me to be pretty straightforward. I don't have -- there's no ambiguity in my mind about what you're asking for, but there might be ambiguity in either mine or Commissioner Rohy's mind about whether or not any one of these questions is the binary event you just talked about. Do you it have it, yes, no? If you do, can we have your raw data files?

If it would not impose a tremendous burden on you, I would like to ask if you might not go through, almost in a columnar format, where you said, question, data request one, in this data request 14. Are we asking for, do you have it, yes, no, and just make a check box.

So of all the data requests that are in here, let's say 50 percent of them fall in that category. They're a binary event. We want to know, do you have it or not. And if the answer is yes, then we'd like to have it. If the answer is

no, then we accede that we can't get it and you don't have it, staff doesn't have it, so let's move to the next question, kind of categorization.

If you gave me -- I guess my icon for that is a kind of a Cliff Notes for the data request. That might allow Commissioner Rohy and I to literally bifurcate our list and deal with the set of questions in two different ways, so that might make things a little clearer.

MS. POOLE: I'd be happy to provide that information.

PRESIDING MEMBER MOORE: And, of course, Applicant would like to see how you categorize that as well. I think that would probably smooth our task out quite a bit.

MS. POOLE: Let me just follow up briefly on one point that I think relates to this. At some places in here we do ask for information.

PRESIDING MEMBER MOORE: Give me an example, Kate, and then we'll go there --

MS. POOLE: Well, for example, I'm not sure I can put my finger on the number, but we asked in one request for a Phase 2 ESA, which is an analysis of soil contamination at the site. The Applicant has already done a Phase 1 ESA.

We originally asked a question about whether the Applicant intended to do a Phase 2 ESA because there's soil contamination. And they gave us a very ambiguous response. So we came back and said we think a Phase 2 ESA is necessary, will you prepare one? And I'm not under any illusions that we can force the Applicant to perform studies, but I would like a straight answer about whether or not they plan to prepare a Phase 2 ESA, whether there are soil analyses out there that they just simply haven't provided because they don't want to submit the information.

PRESIDING MEMBER MOORE: So in that case --

MR. GRATTAN: If I may -- I never interrupt a Commissioner, but I guess I just did. Our supplement answered that question and we have commissioned a Phase 2 ESA and we committed that if warranted, we'll incorporate it into a contingency plan to protect worker safety.

PRESIDING MEMBER MOORE: Okay. I accept, John, and I accept the interruption.

MR. GRATTAN: Thank you.

PRESIDING MEMBER MOORE: I guess, let me just see if I can climb to a higher plane, though,

for a second, to go back to Kate's point. There are questions in here then, you're letting us know that you're asking, that are the nature of did you do it, yes, no, and if you didn't do it, how come, what's your reasoning. Or, conversely, you're saying that there are a set of questions in here that say if you didn't do it, why not and is there a substitute for it?

MS. POOLE: That's correct.

PRESIDING MEMBER MOORE: Okay, so that's -- question, John?

MR. GRATTAN: Comment. Our issue is not so much did you do it. Our problem is that they are asking if somebody else did it.

PRESIDING MEMBER MOORE: Well, actually I heard it a little bit differently than that. What I heard was is it available somewhere else? Which incorporates did someone else do it, but implies if it's available can we have it, can we see it, do you know about it? And it seems to me that in many cases, in order to have a complete decision-making record, -- John, if you were sitting in this seat, it's the kind of thing you'd ask, has anybody done one of those before? I mean it's kind of like doing a good literature search.

Who has been down this road before? I mean it's the right nature of question to ask.

Now, whether in any specific case or not it's relevant --

MR. GRATTAN: Fair enough.

PRESIDING MEMBER MOORE: -- that's why I'm here. But it's the right kind of question to ask. Anybody who has been down this road before, anybody uncork that particular sandhill and looked at its parts, don't know, but -- and it may not be relevant, I don't know. But it's the right kind of question to ask.

Okay. So, with that -- and I realize that in a sense it reminds me of being in forensic's class where things happen fairly rapidly and we don't always have a chance to repost with adequate information. But you have a supplemental response in front of you which you have not had a chance to read, and that's unfortunate, because I haven't had a chance to read it either. Which puts all of us -- maybe it's fortunate because it puts all of us, except John, who knows all the secret words in this thing, so far, on a --

MR. GRATTAN: I haven't had a chance to

read it either.

PRESIDING MEMBER MOORE: Oh, no, that's a terrible admission -- on a kind of a level playing field.

So, I'm going to just ask that we set the supplemental information aside for a moment and assume that it may, in fact, answer -- may, in fact, answer some of what CURE has proposed. And I'm also going to, I think, indicate that since Ms. Poole is going to send in some supplemental materials next week anyway that, if there is some violent disagreement or agreement on the part of CURE with regard to these, that I'm going to take those into account at that same time, and I'll use those in the ruling.

Having said that, for right now, I can't deal with them other than to turn back to Mr. Grattan and ask would you like to expand on these and/or go through and indicate any specifics in CURE that you feel are not dealt with adequately in your submittal?

MR. GRATTAN: I'm to say what's not adequate about --

PRESIDING MEMBER MOORE: Well, not adequate, now that you've heard --

MR. GRATTAN: No, I understand.

PRESIDING MEMBER MOORE: -- now that you've heard what's going on today are there things that you'd like to expound on or amplify or would you like to say, look, we took point X seriously and we've incorporated that in our supplemental response so that we know ahead of time where you've gone with that.

MR. GRATTAN: I propose in terms of time here, which is at a premium, to let the document speak for itself. We attempted to answer project specific questions. I would, if I had some time, I would like to respond to a couple of things that staff brought up --

PRESIDING MEMBER MOORE: Of course.

MR. GRATTAN: -- and CURE has commented on, I believe.

PRESIDING MEMBER MOORE: Of course.

MR. GRATTAN: And the issue is significance and mitigation measures and the relevance of questions on mitigation measures prior to some demonstration of the significant adverse impact.

PRESIDING MEMBER MOORE: Okay.

MR. GRATTAN: First, I would submit that

a project which is, as proposed, is in compliance with LORS until there is some other evidence in the record brought up about significant adverse impact, that it presumed to be without a significant adverse impact. And on the issue of timing, we are quite comfortable, and I think the process works this way, has worked this way, that if a party to the proceeding wants to challenge the significance of an impact that it is appropriate to do that at the hearing. It is appropriate for staff to do it at the staff assessment level certainly, and I believe it would be appropriate for another party to file something at the docket.

Also, we have the prehearing conference statement, which generally indicates where folks are going to go. And at that time it would behoove the Applicant to do or to review feasibility analysis about alternative mitigation measures. And I think that is the most efficacious way for this public process and on the record process to work.

Let's see, the one thing where we are still at, where CURE and the Applicant still have a disagreement is the relevance of project level

inquiries into a cumulative level analysis. And I think after we put our sifter through the questions, after we look at the supplement and see how responsive that is, after CURE clarifies some request, we're going to be left with that on some issues.

I think a good example for the Committee to look at, and CURE and the Applicant obviously don't see the world the same way and that's what makes life a ball game I guess, is the CURE request, I think it's 51, which CURE cited -- 52, as a reason -- the reason I believe in looking at the reach, the possible reach of the cumulative impacts, the request on the TNAP utility corridor. And I think that would be -- I would leave that before the Commission as the paradigm of this type of question.

MS. POOLE: May I respond to that?

PRESIDING MEMBER MOORE: Of course.

MS. POOLE: Question 52, I don't agree addresses cumulative impacts. In fact, question 52 contains questions straight out of an engineering source book about how to calculate how far steam can travel through a pipeline. And that question defines the scope of indirect impacts

from the plant and that's what this question is trying to get at.

PRESIDING MEMBER MOORE: Okay. I appreciate the clarification. I have to say we've gone through a similar exercise here at the Commission with contracts, a lot of difficulty trying to get the economist member of the Commission to understand the language in some of the contracts. The economist member of the Commission continually asks is there not a way to put this in English so that it can be kind of identified and then dealt with.

And it seems to me, Kate, you might have just translated something into English. There might have been an easier way to ask this. Sometimes we get a little bit more convoluted than we need to. I've got a good snapshot of what you're after. I bet the Applicant has a whole different snapshot of what you're intending than what they you were intending. That's a good clarification. Thank you.

So now you're going to need another example, John, to try --

MR. GRATTAN: But I understand --

PRESIDING MEMBER MOORE: -- or maybe

another question.

MR. GRATTAN: Or another question. But I understand the paradigm that you're trying to ask me to look at that. I get that. That was clearly placed under a cumulative impact that the construction and operation of the --

PRESIDING MEMBER MOORE: Okay, well Gary has got a question.

HEARING OFFICER FAY: I have a few questions. I was going to ask this of Ms. Poole to begin with, but since staff opined on this I think I'll start with Ms. Holmes. Using the first few questions regarding ammonia storage facilities, as an example, if an Applicant's proposal does not trigger a finding by staff or a potential finding of significant impact and complies with LORS, is there any concern about alternative mitigation measures. Isn't the burden of proof on the Applicant and if they're willing to go forward with that, does staff need to look any further?

SENIOR STAFF COUNSEL HOLMES: Are you talking about 14 through 16?

HEARING OFFICER FAY: Yes.

SENIOR STAFF COUNSEL HOLMES: Yeah.

HEARING OFFICER FAY: This is as an example of this concern.

SENIOR STAFF COUNSEL HOLMES: Right, well the staff assessment is out and it discusses the question of ammonia handling and I think it's fairly straightforward. In the staff assessment it says that we don't think that there's a potential for significant impact based on what the Applicant has proposed. Now, as a result we did not look at alternative ways of meeting LORS that have to do with ammonia handling systems.

PRESIDING MEMBER MOORE: In other words, your significance question didn't get triggered, therefore you didn't go to the next step?

SENIOR STAFF COUNSEL HOLMES: It gets triggered -- well, we looked at the question of whether or not there was a potential for a significant impact. When we say no at that point we back off and say as long as it complies with LORS there's not a problem.

HEARING OFFICER FAY: And is it irrelevant that another project chooses to do it differently, perhaps more elaborately?

PRESIDING MEMBER MOORE: No, no, can I reword that, Caryn?

SENIOR STAFF COUNSEL HOLMES: Yes.

PRESIDING MEMBER MOORE: Let me try and ask that in economist's speak. If another project imposed a standard that was as strict as anything in the entire United States today, does that -- and it's a similar kind of project, does that dictate the design that ought to be followed in this case?

SENIOR STAFF COUNSEL HOLMES: No. From staff's perspective, as long as there's not a significant adverse impact, a proposal is acceptable to us. There is another level of review that the Commission ultimately gets to when it deals with the ultimate question of should we or should we not license the power plant? Is this a good idea or not? And we typically haven't filed testimony on that particular subject. It's come up in a couple of other cases.

PRESIDING MEMBER MOORE: So the bottom line is if there is a best available control technology somewhere it does not necessarily have to be applied in this case as long as the --

SENIOR STAFF COUNSEL HOLMES: As long as the one that's being proposed doesn't cause a significant impact.

HEARING OFFICER FAY: And if I could just rephrase that for my own benefit. With the exception of that term, best available control technology, which is statutorily required for emission reduction, is it correct that we don't have to identify the best project under CEQA as long as we identify a project that when fully mitigated causes no significant environmental impacts or if it does, those are articulated.

SENIOR STAFF COUNSEL HOLMES: Not only is that correct, but, of course, the specific design of a project that meets that standard is going to vary dependent upon the type of technology, the project's location and a host of other issues that staff and the Commission ultimately have to address in a project specific analysis.

HEARING OFFICER FAY: And let me ask, are you available for questions, I hope?

MR. KOSTKA: Steve Kostka, yes.

HEARING OFFICER FAY: Pardon me?

MR. KOSTKA: Steve Kostka, yes, I am.

HEARING OFFICER FAY: Do you have anything to add to this? Are we correct in assuming that, you know, with most projects the

Applicant bears the burden of going forward and presenting something that is deemed acceptable under the law. And if he cuts it a little too skinny he's going to be required to beef up his mitigation and if he chooses to overdo it, he may have spent extra money, but that's perfectly acceptable.

MR. KOSTKA: I think staff's view is consistent with my interpretation of CEQA and that is that CEQA would require this agency to ensure that feasible mitigation measures are adopted which will mitigate impacts to a less than significant level. And this agency need only look at alternative mitigation measures if the measures the Applicant has proposed are insufficient to mitigate impacts to a less than significant level.

So in the absence of evidence in this record, that there will be unmitigated significant impacts, there is no need to look at alternative mitigation measures to the ones that the Applicant has incorporated in the project.

MS. POOLE: May I address that question as well?

PRESIDING MEMBER MOORE: Certainly.

MS. POOLE: I don't disagree that under

CEQA you need to have a significant impact in order to look at alternative mitigation measures, but this is discovery, this is not -- we're just asking about whether certain mitigation measures may be feasible for this project or may not be. Presumably they are feasible because other projects have used them in the past.

Staff, in its PSA, may have determined that ammonia impacts are not significant. I haven't looked at the PSA that closely yet, but we're going to have some comments to provide on that. And assuming that we may actually have some valuable input and may change staff and the Committee's mind on that issue, then I think it behooves the Committee to have this information gathered about alternative mitigation measures before we get to the hearing stage.

I don't see how that's workable to wait until we get to the hearings, stop everything cold so that mitigation measures can be explored and come back.

PRESIDING MEMBER MOORE: All right. As a practical matter, of course, one of the things that we're going to weigh is has it gotten to -- I mean there are probably -- define what N is, but

your N factorial number of mitigation measures out there for any number of circumstances that might arise until we've identified those set of issues that are likely to rise to some sort of significance. I'm not using the sequel words again, but some testable significant level, it's probably not possible to do anything except sift and try and get the highest level ones ahead of time.

So I'm sensitive to your point but I also -- I can't have the world's biggest grab bag of options out there until I've started to narrow the field down to know what really is going to be something that we need to hit.

Mr. Grattan, you have a response?

MR. GRATTAN: Yes, I would submit that, yes, CURE does have a right and will perform actually a very legitimate role and comments on the preliminary staff assessment and we look forward to it. I don't necessarily think that CURE has to get the information for its comments on the feasibility or on the thought process that went into selecting a particular option in compliance with the LORS. I don't know that it is appropriate to get it from the Applicant at this

stage.

PRESIDING MEMBER MOORE: Okay. Your point or your contention is noted. I take it seriously.

Mr. Fay has a couple more questions.

HEARING OFFICER FAY: Yeah, I guess, Ms. Poole. On data request 39, just again, using it as an example, you ask will areas impacted by -- and I'll put this in quotes, "Texaco's associated oil field expansion activities," unquote, be surveyed for the San Joaquin Kit Fox. Now that term appears in a number of places, and this is just to help me understand the bounds here. Is it possible that the Applicant's view of that term, "Texaco's associated oil field expansion," is bounded by the blueprint and that your view of that term is broader than the bounds of the blueprint?

I just sense that there's a disagreement here on what that range is, what the scope is.

MS. POOLE: Well, we've used that shorthand and because you don't have the full set of data requests, this is probably not very clear, but if you look at data request 37 we have laid out specific activities which we consider to be

part of the oil field expansion activities and then put in the parenthetical that that's what we'll it from there forward.

PRESIDING MEMBER MOORE: So that's the subphrase that says it is impacted by 1300 new 20 inch, etcetera?

MS. POOLE: Right.

PRESIDING MEMBER MOORE: Okay.

HEARING OFFICER FAY: And isn't that a greater number of oil wells than the blueprint identified?

MS. POOLE: Well, the 1300 wells, the blueprint has 700 wells identified under indirect impacts. Now that's the number of wells that presumably will be -- of new wells that will be fed by the plant. But in the AFC, Sunrise has stated that Texaco plans to build at least 1300 new wells in the oil field. So that's where that discrepancy comes from.

PRESIDING MEMBER MOORE: You know I have to concede the number strikes me as higher than what I read, so I'm going to back and reread it myself.

MS. POOLE: I wish I could give you the page number of the AFC.

PRESIDING MEMBER MOORE: I'll find it.

HEARING OFFICER FAY: I just wondered, just in the hierarchy of CEQA then where does this 1300 number fit in. If the indirect impacts have sort of artificially, I'll give you that, been defined by the Committee as 700 oil wells, then why should we agree with you that we should look into impacts out to 1300 new oil wells, as well as the other aspects of the --

MS. POOLE: I would characterize most of these -- if you look at the blueprint, the blueprint identifies some of these items, such as the, what I call the TNAP utility corridor, but it's called on the blueprint the TCI utility corridor, under cumulative impacts. And expansion of the wastewater treatment plant was eventually classified under indirect impacts. And then there's a catchall under the cumulative impact category that says "Overall expansion by all developers of the Midway Sunset oil field," so the things that aren't specifically enumerated in the blueprint I would put under the catchall as a cumulative impact.

HEARING OFFICER FAY: Thank you.

PRESIDING MEMBER MOORE: Okay. Let me

propose a system here and see if it's going to work for everyone. Clearly, time is of the essence. I'm aware of that. I would, I guess, state so that we have it on the record, our interest at the Committee level is to get the most complete decision-making document that we can. That means that where there are facts that need to be uncovered, where someone just didn't supply them or we misinterpreted them, that's where we depend on having the loyal opposition, if you will, call it to our attention that those facts need to be supplemented or augmented or changed or otherwise modified so that we can use them in the decision process.

So, in that sense, my only objective in going through this is to have the most complete record possible so that I can get smart in the end and try and make the best decision that I can.

Having said that I have to be fair. I cannot use the Applicant endlessly as a free pool of labor for every request that comes in, only those that should be reasonably accounted for by their efforts in submitting a complete proposal, or where they can intelligently respond or where they already own facts that we really should be

able to use in the public sector.

I can't require products that are unique and don't add to the decision-making process. I can't do that.

Having said that, I intend to take the supplemental document that was submitted and any additional comments that are sent to us by Monday and I'll use those in rendering a decision that we'll try and have out by the 26th of this month. So, it's not that I'm drawing some sort of line in the sand, if you've got something really important that we have to read and you don't submit it by Monday I'm not going to read it. But you're going to make my life a lot easier if you do give it to me by Monday so that I can process it and try and get it in the mill.

So, if there are supplements or responses to anything that we have heard today, I'd like to know about them. Please be as colloquial as you can, that also helps, and that will expedite this process. And I should say that really in my mind there's nothing in going through this that's going to preclude a good or relevant question that simply didn't get dealt with at this stage from being answered or dealt with in the

hearing process.

I think I've demonstrated that in the past that when people raise an issue that doesn't seem to get dealt with thoroughly enough, either through the PSA or in whatever testimony that we've heard, that I'm not averse to calling time out and asking for it to be developed. I will have a complete a record, I simply will.

And so if my colleague on the Committee has questions that he feels are not answered, then I'll make sure that they get answered in due course. If necessary, I'll hold extra hearings to make sure that we go through this with due process and that everyone is accorded a chance to speak.

So, if that means eight o'clock in the morning, until ten at night, they want to get everything on the record and get everything answered, well, then, we're in for some long hearings. I hope not, but I'll make sure that everyone's concerns get addressed one way or the other and I'll certainly take them into account.

Anyone like to make any closing remarks, things you want me to think about before Monday, as I'm going through this?

HEARING OFFICER FAY: Just a question

first. Ms. Holmes and I discussed a contribution from staff --

SENIOR STAFF COUNSEL HOLMES: I think we talked about next Friday, Hearing Officer Fay, not next Monday.

HEARING OFFICER FAY: That's right. And so I just wondered how this timeframe fits with your abilities to respond?

SENIOR STAFF COUNSEL HOLMES: I'd be -- unless I could get people to work over the weekend I would be reluctant to commit to providing you something that I felt comfortable with on Monday. What I did was contact a number of staff people and ask for their reactions. Some of them raised more questions in my mind and I would not feel comfortable submitting that information to you until those questions were answered and I don't know that I'll be able to do that by Monday.

PRESIDING MEMBER MOORE: All right. I accept that. And again, I'm not trying to draw a line in the sand, I'm really just trying to set a goal that's workable. I'm traveling next week is part of the problem, and the unfortunate thing I found out is that they have fax machines and E-Mail where I'm going and my staff is not reluctant

to move that stuff over to me electronically. So no matter when it comes in I'll get and I'll deal with it as rapidly as I can as it comes in.

I'm still shooting for the 26th, though, for the release date. So I'll tax myself at the end to produce the product.

Other comments, anyone else -- something they may want to make sure that I have in my mind as I go through this?

Mr. Kostka, any words of wisdom on CEQA that we can ignore or forget --

MR. KOSTKA: No parting words.

PRESIDING MEMBER MOORE: No parting words.

Thank you all. We're adjourned and I appreciate your help.

(Thereupon the Hearing was adjourned at 2:55 p.m.)

CERTIFICATE OF REPORTER

I, DEBI BAKER, an Electronic Reporter, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Motion to Compel 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 the outcome of said Hearing.

IN WITNESS WHEREOF, I have hereunto set my hand this 17th day of August, 1999.

DEBI BAKER