

COMMITTEE HEARING OF ORAL ARGUMENTS
BEFORE THE
CALIFORNIA ENERGY RESOURCES CONSERVATION
AND DEVELOPMENT COMMISSION

In the Matter of:)
)
Application for Certification for the) Docket No.
Ridgecrest Solar Power Project) 09-AFC-9
_____)

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

MONDAY, JULY 25, 2011
10:00 a.m.

Reported by:
John Cota
Contract No. 170-09-002

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Lisa Belenky
Center for Biological Diversity

Sidney Silliman
Desert Tortoise Council

Michael J. Connor, Ph.D.
Western Watersheds Project

INTERESTED AGENCIES (All Present Via WebEx)

Craig Murphy
Kern County Planning and Community Development

Janet Eubanks
U.S. Department of the Interior
Bureau of Land Management
California Desert District

MEMBERS OF THE PUBLIC (All Present Via WebEx)

Judy Decker
Ridgecrest, California

I N D E X

	<u>Page</u>
Proceedings	1
Call to Order and Introductions	1
Purpose of the Committee Hearing	5
Oral Arguments on Solar Trust of America's Motion for Order Affirming Application of Jurisdictional Waiver Comments by the Parties	
Mr. Galati, Applicant	6
Mr. Babula, CEC Staff	30
Dr. Connor, Western Watershed Project	36
Mr. Silliman, Desert Tortoise Council	39
Ms. Belenky, Center for Biological Diversity	42
Ms. Klebaner, CURE	43
Applicant's Response	44
Public Comment	
Craig Murphy, Kern County	49
Judy Decker	59
Closing Remarks by Presiding Member Boyd	61
Adjournment	63
Reporter's Certificate	64

1 to the intervenors. So applicant, good morning.

2 MR. GALATI: Good morning, Commissioner Boyd,
3 Hearing Advisor Kourtney Vaccaro and Mr. Olson. Scott
4 Galati on behalf of STA Development. Also with us, working
5 on this today, who you will hear from today is Bob
6 Therkelsen. I also am assisted by my colleague, David
7 Wiseman.

8 PRESIDING MEMBER BOYD: Okay. Staff.

9 MR. BABULA: Hi, I'm Jared Babula, staff counsel,
10 and I'm with --

11 MR. GALATI: Oh.

12 MR. BABULA: -- Eric Solorio, the project manager.

13 PRESIDING MEMBER BOYD: I moved too quick,
14 apparently. I was looking down instead of up. We didn't
15 finish the applicant, I'm sorry.

16 MR. OWENS: It's all right, Commissioner. It's
17 Billy Owens with STA Development.

18 PRESIDING MEMBER BOYD: Welcome back, Mr. Owens.

19 MR. OWENS: And I have one other colleague here,
20 the president of STA Development, Alice Harron, behind me.

21 PRESIDING MEMBER BOYD: Good morning. Nice to see
22 you again. All right, we did get all or part of the
23 applicant, Mr. Babula and Mr. Solorio. Any other
24 introductions that I cut you off from providing?

25 MR. BABULA: No, that's it, thanks.

1 PRESIDING MEMBER BOYD: Okay, thank you. Now
2 we'll go through intervenors. CURE, are you on the phone?

3 MS. KLEBANER: Yes, we are. This is Elizabeth
4 Klebaner for California Unions for Reliable Energy.

5 PRESIDING MEMBER BOYD: Thank you, Elizabeth, I
6 see your name on our computer log here, good morning.

7 MS. KLEBANER: Good morning.

8 PRESIDING MEMBER BOYD: How about the Desert
9 Tortoise Council?

10 MR. SILLIMAN: Yes, this is Sid Silliman from the
11 Desert Tortoise Council.

12 PRESIDING MEMBER BOYD: Good morning,
13 Mr. Silliman. I see you are logged in as well. Western
14 Watershed Project?

15 DR. CONNOR: Good morning, this is Michael Connor
16 for Western Watersheds Project.

17 PRESIDING MEMBER BOYD: Good morning, Michael.
18 You too are logged in on our computer. Basin and Range
19 Watch?

20 (No response.)

21 PRESIDING MEMBER BOYD: Basin and Range Watch?
22 Okay, I'm assuming they are not there. We have quite a
23 number of callers who are not identified by name, they are
24 just logged in by numbers. The Kerncrest Audubon Society?

25 (No response.)

1 PRESIDING MEMBER BOYD: All right. Center for
2 Biological Diversity?

3 MS. BELENKY: Good morning, this is Lisa Belenky
4 for the Center for Biological Diversity.

5 PRESIDING MEMBER BOYD: Good morning, Lisa.

6 And do we have any state, local or federal
7 agencies on the phone or in person in the room who would
8 want to identify themselves?

9 MR. MURPHY: This is Craig Murphy, Division Chief
10 for Kern County Planning and Community Development.

11 PRESIDING MEMBER BOYD: Welcome, Mr. Murphy.

12 MS. EUBANKS: This is Janet Eubanks with the
13 Bureau of Land Management, California Desert District.

14 PRESIDING MEMBER BOYD: Good morning. I see you
15 logged in. Any other local, federal, state agencies
16 represented on the phone who would like to introduce
17 themselves?

18 (No response.)

19 PRESIDING MEMBER BOYD: Okay. So now we have the
20 identity of the cast of folks who, until we get to public
21 presentations, at least we have them identified. So with
22 that, Ms. Vaccaro, I am going to turn this over to you,
23 since I seem to be losing my voice anyway.

24 HEARING OFFICER VACCARO: Thank you. Again as
25 Commissioner Boyd initially indicated, we are here today to

1 hear oral arguments on the applicant's motion.

2 I think we need some ground rules, though, for
3 today's proceeding because we do have a number of parties in
4 this action and it appears a number of members of the public
5 and other interested individuals who might wish to make
6 comment.

7 We did invite the parties to submit briefing in
8 response to the motion and it appears that only a handful of
9 written briefs were submitted. That doesn't end the
10 discussion, of course.

11 I think all of the parties to this action are
12 welcome in today's proceeding to make a comment on the
13 motion but what we will do is we'll first start with the
14 individuals and entities that actually filed written
15 documents. We will then move to the remainder of the
16 parties to hear whether or not they have any comments; then
17 we'll move to the public comment section. That, of course,
18 includes the government entities that might be on the line
19 as well as any other organizations or individuals.

20 So I think one admonition, again, those of you on
21 the telephone line. I have said this a few times this
22 morning and I know I sound like a broken record. It is very
23 important that you hit the mute button on your telephone as
24 we are going through today's discussion. When it is your
25 opportunity to speak, of course, please take the phone off

1 of mute. We would ask that you actually speak into your
2 headset and not on a speaker phone. But no matter what you
3 do please do not put us on hold because that would be very
4 disruptive to the proceedings.

5 I would like to remind everybody before you speak,
6 just for the benefit of those who are on the telephone, and
7 it seems like most everyone is, identify yourself before you
8 speak and your affiliation. I think that makes the record a
9 little more clear but it also helps people to understand who
10 is speaking.

11 And point of fact, I just heard some background
12 noise from a caller. Again, every single caller, it is
13 extremely important that you hit the mute button, otherwise
14 these proceedings are not going to go as smoothly and
15 efficiently, I think, as everyone would like them to.

16 I think with that, Mr. Galati, since you are the
17 moving party, if you would like to go ahead and explain to
18 the Committee a bit more about your motion.

19 MR. GALATI: Thank you. I am going to apologize
20 in advance. I normally can keep my opening remarks to a
21 couple of minutes but I am going to have to go a little bit
22 longer than that in order to set the framework for this
23 particular issue. And I also have Mr. Therkelsen that I
24 would like to cede a little bit of time to address one of
25 the issues that I think is important to the Committee. So I

1 will move very quickly but it would be a little bit longer
2 than a couple of minutes. Thank you.

3 First of all I want to just make sure that
4 everybody understands what we are not doing today. I think
5 that's important.

6 The first thing is, you are not approving the
7 Ridgecrest project. Something else that you are not doing
8 is you are not requiring PV projects, by ruling on this
9 motion you are not requiring PV projects to come to the
10 Energy Commission --

11 (Telephone line interference.)

12 MR. GALATI: You are not requiring PV projects to
13 come to the Energy Commission and file an application here.
14 They are exempt, they are excluded, they do not have to
15 file here. And we acknowledge that.

16 I notice that there was a letter by the PV
17 industry, maybe we didn't make that clear. What we are
18 asking for is acknowledgement of an existing provision of
19 the Warren-Alquist Act that allows, we believe, a project
20 that would be a PV project to voluntarily decide to come
21 here. But there would be no requirement that they would
22 have to.

23 We believe that our interpretation of this waiver
24 provision that I'll go into in more detail, is the only
25 reasonable interpretation for the following reasons. We

1 think it's supported by the plain meaning of the statute.
2 It's supported by the legislative direction on how you're
3 supposed to read the statute. It's supported by legislative
4 history. And not just some of the legislative history, all
5 of the legislative history from 1974 through 1994
6 amendments.

7 We believe that it's supported by the Attorney
8 General Opinion that is cited by staff from 1974. We
9 believe that it is also supported by the Legislative Council
10 opinion that we included in our papers. And I think most
11 importantly, it's supported by the 1994 amendment which
12 chose to leave this provision exactly in place as an opt-in
13 provision.

14 There was some confusion early on about what is a
15 waiver so I just want to describe what it is we're doing.
16 Again, we are not saying that the Energy Commission has
17 mandatory exclusive jurisdiction over PV. It's not what we
18 are saying. What we are saying is, projects that are
19 excluded, i.e., would normally have to file with the Energy
20 Commission, those that are excluded, those projects can use
21 this wavier to come to the Energy Commission voluntarily.

22 So we make a distinction between the Warren-
23 Alquist Act that provides for mandatory exclusive
24 jurisdiction, you can only come here, and permissive
25 exclusive jurisdiction where you may elect to come here.

1 In order to understand the waiver we need to
2 understand what kind of projects are excluded or exempted.
3 What people don't have to come to the Energy Commission to
4 get their license. And I think historically there are five
5 types.

6 Projects that had a Certificate of Public
7 Convenience and Necessity, a CPCN from the Public Utilities
8 Commission, were exempted in 1974 from having to come to the
9 Commission because they had their approval.

10 Projects that were going to commence construction
11 within three years from the date of the Warren-Alquist Act,
12 they're excluded. Because it would be fundamentally unfair
13 to make them start over.

14 Projects that were on a particular list were
15 exempted and excluded from Energy Commission jurisdiction.

16 And lastly there's two others that we need to talk
17 about, one just to dispense with, is you have a Small Power
18 Plant exemption, which is a way in which somebody could come
19 with a project 100 megawatts or less and ask to be exempted
20 from the Energy Commission.

21 And then lastly there are definitional exclusions,
22 projects that do not have to file at the Energy Commission
23 because they don't meet the definitions of facility.

24 Historically there were three types of waivers and
25 they are three exclusive waivers. The first we'll dispense

1 with very quickly. It's a wavier for the small power plant
2 exemption. It's under Public Resources Code 25541.

3 And how you would invoke that waiver was you don't
4 file for an exemption. In fact, you could have. For
5 example, you're a 90 megawatt project. You could qualify
6 for a small power plant exemption but you choose not to.
7 You choose, as an applicant, to file an AFC. That's a
8 waiver of that exemption. You cannot go back later and say,
9 I need to be exempt. You have elected to be covered by the
10 Energy Commission, you are waiving that exemption.

11 The next is a very specific waiver that was
12 intended for projects that were grandfathered. That's under
13 25501.7. That's not the waiver we are talking about here
14 either. We are talking about a waiver under 25502.3 that we
15 consider to be a large general waiver, a big circle, if you
16 will. The specific wavier that I mentioned, 25501.7 for the
17 grandfathered projects, is a smaller, specific waiver within
18 the bigger general waiver and I'll get to that more
19 specifically.

20 The waiver we're talking about uses the following
21 terms, except as provided in Section 25501.7. Remember I
22 mentioned that's the grandfathering provision waiver. Any
23 person proposing to construct a facility excluded from the
24 provisions of the chapter may waive such exclusion. And the
25 rest of the chapter says how you do that and what it means.

1 So one of our disagreements with staff has to do
2 with how do we interpret the specific language of facility
3 excluded. And I think reasonable minds can differ and
4 that's exactly what we have here.

5 We think it's important to understand a couple of
6 things about the use of the word "facility." The Warren-
7 Alquist Act itself, the Energy Commission regulations and
8 our general vernacular often use the word "facility" both
9 generally and specifically. Not always when we use the word
10 "facility" or does the Warren-Alquist Act when it uses the
11 word "facility" does it mean the definition in 25510 -- 110,
12 or 255120 -- excuse me, 25120 and 25110. Those are specific
13 definitions. And like anyone who has read this provision
14 you would start there.

15 25100 is a prelude to the definitions and it says:
16 "Unless the context otherwise requires you shall use the
17 following definitions." We think the Legislature has given
18 you direction that there are some times, and we'll point
19 them out in our brief, in the Warren-Alquist Act where they
20 use the word "facility" when it doesn't make any sense and
21 doesn't accomplish the legislative intent or purpose to use
22 the definitions in 25110 and 25120. We submit to you that
23 our waiver under 25502.3 is another example of that.

24 What is covered by the Energy Commission's
25 mandatory exclusive jurisdiction is a power plant that uses

1 thermal energy and greater than 50 megawatts. If it's a
2 thermal power plant, if it's a project that uses thermal
3 energy and was 49 megawatts it's excluded from the Energy
4 Commission jurisdiction. Just in the same way that 255120
5 (sic) excludes PV. Specifically it's excluded from Energy
6 Commission exclusive mandatory jurisdiction.

7 If you insert the definitions of facility and
8 thermal power plant into 25502.3, the waiver provision we're
9 talking about, you end up with something that doesn't make
10 sense. What you end up with is it says, if you are a
11 thermal power plant greater than 50 megawatts you can
12 voluntarily elect to come to the Energy Commission. Now we
13 all know that if you are a thermal power plant greater than
14 50 megawatts you already have to come to the Energy
15 Commission so what is the reason for a waiver to voluntarily
16 come to the Energy Commission if you must be here? And that
17 is our fundamental reason why it doesn't make any sense to
18 insert the definitions into 25502.3.

19 So in trying to find out what does 25502.3 mean,
20 staff went in one direction. It must have been an old
21 provision that used to make sense a long time ago and
22 doesn't make sense now. And be believe that the legislative
23 history is such that you really can't come to that
24 conclusion.

25 We believe that there is case law -- in fact,

1 staff cites a long string of cases and we cite a string of
2 different cases but they all say the same thing. And that
3 is, the plain meaning of the statute is to be given
4 preference.

5 And here we believe that "facility excluded" means
6 what projects don't have to come to the Commission
7 mandatorily as opposed to thermal power plants that already
8 have to be there. Our support for that, again, is 25100
9 that says, if the context doesn't require you don't have to
10 use the definition. The case law which says you try to
11 harmonize the statutes.

12 A couple of other examples of where the word
13 "facility" is used in a general sense and not in a specific
14 sense, in a common sense meaning, is even in the definition
15 itself. The word "facility" is used in the definition of
16 "thermal power plant" five times. You cannot come up with a
17 coherent sentence if you kept putting the definition of
18 "facility" into the definition of "thermal power plant."

19 (Music coming through telephone line.)

20 MR. GALATI: And a perfect example, if you look at
21 our additional brief, in our additional brief --

22 PRESIDING MEMBER BOYD: Excuse us, Mr. Galati.
23 This may be a problem. Somebody out there in telephone land
24 has put their phone on mute and we now have Muzak
25 broadcasting throughout our --

1 (Music stopped.)

2 PRESIDING MEMBER BOYD: Thank you. Or maybe our
3 staff. Anyway, excuse the interruption, Mr. Galati.

4 MR. GALATI: Thank you.

5 PRESIDING MEMBER BOYD: An example of what Hearing
6 Officer Vaccaro tried desperately to preclude with her
7 polite remarks about please mute, please be careful of any
8 noises you make. You can't mute your phone out there
9 because everything is broadcast in the hearing room here.
10 Go ahead.

11 MR. GALATI: Thank you. At page 9 of our
12 additional brief we show you in Section 25120. The last
13 sentence of Section 25120 says: "Thermal power plant does
14 not include any wind, hydroelectric or solar photovoltaic
15 electrical generating facility."

16 So if you had to use the word "facility" there
17 using the definition you would come up with an absurd result
18 that the Legislature intended to exclude from mandatory
19 exclusive jurisdiction of the Energy Commission solar PV
20 projects that were also solar thermal projects. And we know
21 that's not the case and we show you the legislative history
22 in our attachments of that provision, the 1988 amendment,
23 that they intended to not require PV projects to the Energy
24 Commission. We are not doing anything that would change
25 that.

1 So there is a perfect example where the word
2 "facility" if you used, if you stuck to the narrow
3 interpretation of the definitions, ignored the legislative
4 finding to let the context drive you, not look at the plain
5 meaning of the language, ignored the cases where you tried
6 to harmonize, you would come up with an absurd result.
7 25502.3 as staff has proposed, is the same way.

8 In addition the word, the word "thermal power
9 plant." Again, the rest of that definition uses the term
10 "facility" many, many times. In fact, staff struggled with
11 it at the very beginning of the Warren-Alquist Act in
12 developing regulations because they didn't know what the
13 difference between a "related facility," which is not
14 defined in the statute, and a "facility."

15 So they came up with a definition of "related
16 facilities" in the regulation. Because the word "facility"
17 is used in the Warren-Alquist Act many times when it does
18 not mean a power plant using thermal energy only greater
19 than 50 megawatts. So we ask you to not throw out your
20 common sense and try to figure out what this waiver
21 provision meant.

22 So staff agrees that the waiver provision must
23 have had some reason to be there, 25502.3. And so staff
24 believes, as did we when we first read it until we did the
25 further research, is there were these grandfathering

1 projects I told you about, the 25501. That maybe it applied
2 to them and it was inadvertently left in the Warren-Alquist
3 Act and it really has no purpose.

4 The problem is the Supreme Court doesn't allow you
5 to make a determination that the Legislature, although you
6 may think they did, you have to assume they intended to
7 leave it in place. And I'd like to in a little bit ask Bob
8 Therkelsen to recall what happened in 1994 while he was here
9 to help enlighten that.

10 But let's first look at the legislative history
11 from 1974. Projects that were on the list were projects
12 that the Legislature deemed were going to be built in three
13 years. There is also a provision that says if you are not
14 on the list --

15 (Voices interfering over the Telephone line.)

16 PRESIDING MEMBER BOYD: An open conversation.
17 Folks, people talking out there, we're listening to you.
18 You're broadcasting in the room and interrupting the hearing
19 so please be careful.

20 SPEAKER: We apologize.

21 PRESIDING MEMBER BOYD: Thank you.

22 MR. GALATI: So 25501 is the grandfathering
23 provision that says, here's all the grandfathered projects
24 that can't come in -- don't have to come here. You have a
25 CPCN, you were going to start construction in three years.

1 We're going to make a list of those projects that we know
2 are going to start construction in three years. We are also
3 going to give you a test that if you are not on the list you
4 could still go through and demonstrate you were planning
5 construction for three years. All of those projects were
6 excluded and exempted from Energy Commission jurisdiction.

7 In the same series, in the 2501 series the
8 Legislature included a waiver. It's a specific waiver.
9 It's 25501.7. And it says, all those people, the CPCN,
10 going to start construction or on the list, if you want to
11 come to the Energy Commission go ahead and waive and come
12 here.

13 Now we move to the next provision, which is the
14 2502 series. It's a different series. And there's another
15 waiver there, 25502.3. And it says by its very terms,
16 except for those guys that are waiving under 25501.7, any
17 person for a facility excluded, can use the waiver. We
18 believe that the language itself shows that these are
19 separate and distinct.

20 It doesn't mean that someone on the list couldn't
21 use the 25502.3 waiver if for some reason they didn't start
22 construction or something like that. But it certainly was
23 not intended just for that. Why would the Legislature have
24 created two exact waivers to do exactly the same thing and
25 put them in two separate sections and use different language

1 and then say in one, except the other? It doesn't make any
2 sense. It isn't supported that that 25502.3 was intended
3 for the grandfathering provision, they had their own waiver.
4 Therefore, it must apply to something.

5 More telling, if you're going to use the
6 legislative history you ought to use all of it, not just
7 1974. Not just the Attorney General's opinion, which we
8 believe supports it's two separate, distinct waivers. Not
9 the Leg Council's opinion which we cited which supports two
10 distinct waivers. Not the language itself in 1974, which we
11 believe shows two distinct waivers. But in 1994 when the
12 Legislature went through with the Energy Commission's help
13 and took out obsolete provisions it consciously elected to
14 keep 2502.3 in and of itself.

15 So what I would like to do at this time is to ask
16 Bob Therkelsen to come up for a few minutes and describe,
17 since he was intimately involved in that amendment in 1994
18 on behalf of the Commission.

19 MR. THERKELSEN: Good morning, Commissioner Boyd,
20 Ms. Vaccaro and Mr. Olson.

21 PRESIDING MEMBER BOYD: Good to see you back.
22 It's happening more and more, I notice.

23 MR. THERKELSEN: Thank you. My name is Bob
24 Therkelsen, I am representing Solar Trust of America on this
25 particular issue. What I would like to do, I guess first of

1 all, is indicate that I concur with Mr. Galati's analysis of
2 the waiver and the language. I think the plain reading is
3 very straightforward and is consistent with my reading. It
4 also, I believe, is consistent with the policy objectives
5 that were developed over the course of the Warren-Alquist
6 Act, or I should say the Commission's implementation of the
7 Warren-Alquist Act. And also with what the legislative
8 action was or was not in 1994.

9 Let me kind of break my comments into two pieces,
10 one historical and one is 1994 and afterwards. When I
11 joined the Energy Commission back in 1975 one of my first
12 responsibilities, requirements was to look at the Warren-
13 Alquist Act to see if I could understand it. A lot of us
14 back then were trying to sort out what it meant and how it
15 was to be applied.

16 And in going through the siting section, to me at
17 that time, it was clear that there were all these projects
18 that were to be exempt from the process. The utilities made
19 sure that their projects that they had in the pipeline or
20 anticipated were protected from this new animal. And there
21 was the process that would be applied to move things moving
22 forward.

23 There also then was that waiver to exempt any of
24 those projects the utilities had in the pipeline. But
25 again, in my reading early on there was the waiver provision

1 that Scott is referring to that was kind of an opt-in
2 clause. That's the way that I understood it at the time and
3 understood it for years subsequent.

4 Now the question is, why didn't anybody ever use
5 that provision if it was there? I think the answer to that
6 is very simple. Back in the 1970s the utilities were still
7 putting in their next string of projects, High Desert
8 Nuclear Power Plant, CalCoal, Fossil 1 and 2. You can name
9 the list of projects that were large utility projects.

10 After that came the QF era where projects
11 basically that were smaller were allowed to reduce power
12 purchase agreements. And most of those projects were small.

13 They would be logical ones to come into the Energy
14 Commission's process. This was in the 1980s.

15 Those projects, however, were deathly afraid of
16 the Commission's process. Number one, it was still
17 uncertain. It didn't provide any guarantees at that time.
18 It was more detailed and excruciating than the local
19 government process, particularly if you had political
20 support for your project at a city or county level. Sounds
21 familiar even now.

22 But in addition to that the Commission had this
23 thing called the "need assessment." And at that day and age
24 we actually had an oversupply of electricity. The
25 Commission actually had a queue where if you were a project

1 you were allowed only X number of megawatts per year to be
2 permitted. Projects got into that queue and, you know, were
3 either dealt with or not dealt with. In fact I remember
4 hearings in this very room trying to determine what would be
5 in the queue and what wouldn't be in the queue and how it
6 would work, et cetera.

7 There was an IQ test for all QF developers back
8 then. And that is, what size do you build a power plant in
9 California. And the answer was, 49 megawatts because you
10 did not want to come into the Energy Commission's
11 jurisdiction and experience the need test along with
12 everything else.

13 Well the world changed in the 1990s. As you
14 remember deregulation was something that was the new thing
15 and projects at that point in time were looking to a new,
16 unregulated market in the electricity industry. Competitive
17 market I should say in the electricity industry.

18 And actually if you look at a diagram of what the
19 applications were being received by the Commission in the
20 1990s it dropped off precipitously. In fact, one thing I
21 would suggest in terms of context is in 2000 the Commission
22 produced a document called *Improvements to the Energy*
23 *Commission's Energy Facility Licensing Process*, which kind
24 of compares what was going on in the Commission before 1996
25 and after 1996.

1 In terms of, very briefly, that context at that
2 time, 1994. I was the Deputy Director of the Energy
3 Facility Siting and Environmental Protection Division. I
4 was working with the Siting Committee and with the General
5 Counsel in terms of trying to make revisions to the Warren-
6 Alquist Act. We saw restructuring coming. We wanted to
7 make sure that we were competitive with other state agencies
8 in terms of our functions and duties. We wanted to clean up
9 the law to get rid of irrelevant, old things. If we could
10 put in new items that we thought would be appropriate, and
11 frankly, we tried to actually stay away from major new
12 initiatives at that time.

13 All of the projects being proposed in the '90s, in
14 fact in 1995 we had zero new siting applications; in 1994 I
15 think we had one or two. But everybody was uncertain what
16 restructuring was going to do. They didn't want to propose
17 new power plants. But they knew to be competitive they had
18 to be big. They had to take advantage of economics of scale
19 and they also needed to be natural gas. That was the fuel
20 of choice given the fact that we had an aging power plant
21 fleet. We had declining reserves. We needed to build power
22 plants and build them fast. Commissioner, as you recall,
23 during the energy crisis we did them in 21 days and four
24 months and six months, everything else.

25 Anyway, that was the context, then, of the

1 legislative changes that we looked at. So it was a cleanup.

2 It was getting rid of old material. And we intentionally
3 talked to developers to see what was important to them and
4 several developers came to me and said, look. We realize
5 that the committed market is coming but we would like an
6 option to come into the Commission. My reaction was, it's
7 already there. Nobody has exercised it but it's there.

8 So when we went through the Warren-Alquist Act,
9 when we talked to the Siting Committee we excised, you know,
10 irrelevant sections but we left in the provision that Scott
11 is talking about because we knew it was an opt-in provision.

12 We didn't make a big deal of it, it already existed. There
13 wasn't any reason to make a big deal of it. Besides, we
14 didn't want people to think we were doing a power grab and
15 misunderstanding what was going on at the time so we left
16 that section in.

17 Now the question remains, why didn't anybody take
18 advantage of it? Well as I mentioned before, the
19 competitive market moved in. And after those amendments
20 were adopted by the Legislature people were proposing big
21 projects, natural gas projects. PV was thought of at the
22 time but only really in the context of rooftop solar. It
23 wasn't really thought of in terms of a larger thing.

24 In fact, most solar facilities of any kind,
25 whether they were concentrating or PV, were realized to be

1 very expensive and only in unique circumstances would they
2 really be proposed in a competitive market. So frankly, as
3 deputy director of the siting division at that time, I
4 didn't think that we would be doing much of those. We had
5 dealt with solar before, you know, the Luz projects. I
6 didn't, frankly, think we would see any solar projects for a
7 long time. So that's why the waiver had not been used.

8 In terms them of where we are today. My feeling
9 now, as then, is that the plain meaning of the language
10 basically allows the waiver. It was an option that we
11 strategically made a decision in 1994 to leave in so it
12 could be taken advantage of if desired by a developer. And
13 I think it also is consistent with the action of the
14 Legislature. They concurred with our recommendation. They
15 eliminated a number of sections that were outdated but they
16 left that provision in at our recommendation.

17 I would be more than willing to answer any
18 questions. Again, I support the proposal that Scott is
19 putting forward.

20 MR. GALATI: So if I could just -- I promise I'll
21 only take a minute more just to summarize. We think that,
22 again, the provision does not require you to come here for a
23 PV project. It doesn't, we're not suggesting it should.

24 We still believe that our interpretation is the
25 only reasonable interpretation of the plain meaning, it's

1 supported by the legislative history both in '74 and in
2 1994.

3 We believe that if you stick to the narrow
4 interpretation of "facility," find that it actually applied
5 to the grandfathering provision as proposed by staff, you
6 would be making a decision that the Legislature in 1974
7 created two different language pieces of a waiver, two
8 separate ones to accomplish the exact same thing. And you
9 would also be ignoring in 1994 the conscious decision to
10 leave the waiver in place, even though no grandfathering
11 provision was still in existence. Projects that were
12 subject to the grandfathering provision were subject for
13 three years or a CPCN.

14 And you still can waive, by the way, if you have a
15 CPCN you still can waive under 25501.7. But 25502.3 we
16 think is a very, very reasonable interpretation. We believe
17 that it's supported by the case law from the Supreme Court
18 on how it would be interpreted. I think there is very
19 little risk to the Commission of acting on this voluntary
20 waiver and having a lawsuit or having a lawsuit that would
21 be lost.

22 So we would like to make sure that we are -- while
23 we are dealing in the context of Ridgecrest it's a legal
24 interpretation and it will have ramifications for other
25 developers who may choose at their own to come here with a

1 project that wouldn't normally have to come here.

2 So thank you for as much time. I apologize for
3 taking that much time but it was a, it was sort of a complex
4 issue to write about and I think it's easier to talk about,
5 so thank you.

6 PRESIDING MEMBER BOYD: I have no questions. I
7 appreciate the presentation. No need to apologize from my
8 perspective. This is a complex legal issue that we have to
9 adjudicate.

10 MS. BELENKY: I'm sorry, can I -- this is Lisa
11 Belenky at the Center for Biological Diversity. I just
12 wanted to make one comment which is that I have a previously
13 scheduled court call at 11:00 and I will need to get off the
14 phone and I will try to call back in right afterwards. I
15 wasn't able to reschedule that hearing, which was scheduled
16 before this call.

17 HEARING OFFICER VACCARO: Thank you for that
18 information, Ms. Belenky. The next in order was going to be
19 staff. I don't see any particular reason why can't hear
20 from you next. I do have two questions, though, for the
21 applicant. So if you would just hold on for just a few
22 moments, Ms. Belenky, I think we can hear from you before
23 11:00.

24 MS. BELENKY: I am not asking you to change the
25 order. I am just informing you so that there isn't the

1 impression created that I am not paying attention or
2 interested or trying to be involved in this. The hearing
3 was scheduled without any notice to the parties and asking
4 whether it was an appropriate time and it turns out that it
5 is not for one of the parties; it is a very difficult time
6 for me. And I am just making it clear that I am here, I am
7 not asking you to change the order.

8 HEARING OFFICER VACCARO: I understand that. And
9 what I am doing is trying to extend a courtesy to you. So
10 if you would like to go next, Ms. Belenky, the Center for
11 Biological Diversity is certainly welcome to do that. Right
12 now I do have two questions for the applicant and then we'll
13 ask you whether or not you are willing to make your comments
14 at this time before your 11:00 o'clock call.

15 Mr. Galati --

16 MS. BELENKY: This is not a comment period, this
17 is oral argument and I cannot actually do oral argument on a
18 matter when I am up against a deadline to be on a court
19 call. The District Court would be very unhappy with me if I
20 am not on that call at the exact right moment. So I would
21 not ask for it to be that I be given some small amount of
22 time before I have to get off. I was simply trying to
23 explain why I would have to leave and come back. Thank you.

24 HEARING OFFICER VACCARO: Okay, thank you.

25 Mr. Galati, two questions for you. I think what

1 is not clear in the motion, and I didn't see it in the reply
2 papers and still haven't heard anything yet from the
3 applicant so if I have missed it I apologize. But perhaps
4 you could clarify what it is that the applicant is
5 proposing. I think the motion papers state that Solar Trust
6 wishes to inform the Committee that it is exploring redesign
7 and that the redesign would utilize photovoltaic technology
8 but I think I am not entirely clear.

9 Is it that the redesign envisions a 100 percent PV
10 facility? Is it that there would be a PV component? Is
11 that something that has been put in writing before all of
12 the parties? Because I am not sure on that. Please don't
13 answer yet because I'll give you the second question and
14 then you can answer everything.

15 Just assuming for the sake of argument that the
16 applicant is correct in its interpretation of the statute.
17 The statute also has some very plain language used that
18 specifically states, and I am sure the applicant and
19 everyone is aware of this: "Any person proposing to
20 construct a facility excluded from the provisions of this
21 chapter may waive such exclusion by submitting to the
22 Commission a Notice of Intention to file an Application for
23 Certification."

24 At this point the applicant has submitted an
25 Application for Certification for a 100 percent solar

1 thermal power plant. Haven't seen a Notice of Intent at
2 this point and I'm wondering whether or not the applicant
3 believes that that plain language would also be applicable,
4 assuming that you're correct in your interpretation of
5 25502.3.

6 MR. GALATI: I'll answer that question first. And
7 yes, we do believe we would have to file a Notice of Intent.
8 How the Commission handles such a Notice of Intent would be
9 a subject of debate at a later time of what that actually
10 means.

11 But you have to understand that we are in a
12 difficult position because the Commission has not heard this
13 waiver before. We certainly do not want to go out, redesign
14 a project that is 100 percent PV, file a Notice of Intent
15 with the Energy Commission and find out after all of that
16 work that we shouldn't be here. So we are asking for a
17 legal interpretation ahead of time. But our plan, our plan
18 is a 100 percent PV project that is much smaller than its
19 current footprint in order to reduce the environmental
20 impacts that have plagued the project. That is our plan.

21 We are not proposing a hybrid project. And
22 because we didn't -- we wanted the flexibility to continue
23 to work with the Commission on this we needed an
24 interpretation on this.

25 I will tell you that we did approach staff and

1 staff said that the Commission's direction was that they
2 were going to handle these kinds of things on a case-by-case
3 basis. And so while it is in the context of Ridgecrest for
4 us it is a pretty global request and understanding and
5 guidance that we're hoping to applicants in the future about
6 what their options might be. And it might be that a brand
7 new applicant would need to file a Notice of Intent. So we
8 do agree that the language does mean Notice of Intent.

9 HEARING OFFICER VACCARO: Okay, thank you. I
10 think at this time, Mr. Babula, if you're ready we'll hear
11 from staff.

12 MR. BABULA: Thank you. First I would just like
13 to start off, just to remind the Committee. While I
14 appreciate Mr. Therkelsen's historical perspective, he is
15 opining on legislation. And so the fact that he formerly
16 worked here shouldn't be given any greater weight in the
17 sense that he is not talking about our regulations, he is
18 trying to assess what legislation means and trying to put
19 his own opinion forth regarding the meaning of these
20 different sections.

21 I think one of the key things that Scott pointed
22 out here is this definition and the plain reading, the plain
23 reading of the Warren-Alquist Act definition of thermal
24 power plant. It's been discussed, it's been briefed. And
25 facility, thermal power plant 50 megawatts or larger, that's

1 our starting point.

2 A lot of what he said I agree with. One of the
3 key differences is there's these two waiver provisions. The
4 applicant's view is that this 25501.7, that applies to these
5 grandfathered projects, whether it be one that already has
6 an approval from the PUC or it's one of these three-year
7 ones that could be constructed in three years or it's on the
8 list of ones the Legislature found met that. So his view is
9 that those -- that .7 handles those particular projects and
10 this 25502.3 is for something else.

11 However, if you look at my submission in my brief,
12 the original 25501.5 section, which is the list of projects
13 the Legislature found met this three year construction date.

14 At the very end it identifies both those waiver section as
15 applicable. Where it says: "To the extent that Sections
16 25501.7 or 25502.3 is made applicable." And this parallels
17 the Attorney General opinion that I also submitted as part
18 of my brief where it's talking about the Nuclear A project,
19 which was a PG&E project that was listed. And the Attorney
20 General opinion says they can use both, either 25501.7 or
21 25502.3 to then come before the Energy Commission.

22 So what is the difference between these two
23 sections? Well, it's important to note that even though
24 they may apply to the same projects they are different in
25 that one allows for a waiver to come before the Energy

1 Commission by filing a Notice of Wavier and the other one, a
2 Notice of Intent. So the difference is what the applicant
3 is going to have to do to affect these waivers.

4 So the fact that they apply to the same types of
5 projects, it isn't unexplainable in that you don't have to
6 create a new definitional exemption to say, well what's the
7 point? The point is one is for projects that are just
8 beginning, whereas if you are already further along and you
9 want to do a waiver then you can use .7. And that is
10 consistent with the Attorney General's opinion and also the
11 language in the Warren-Alquist Act itself when it was
12 originally submitted where it has both sections in there.

13 Another thing that the applicant really has not
14 been able to produce is anything in the legislative history
15 that discusses this ability for someone to come before the
16 Commission voluntarily with a project that is not thermal.
17 They are just focusing on PV but their interpretation would
18 lend itself to wind, to hydro as well as PV.

19 Now I have -- in the applicant's second brief they
20 had some legislative history from SB 928 which was these
21 1988 changes where they added in the language thermal power
22 plant is not PV and hydro and wind are not thermal. And
23 I'll pass out these -- this is just one page from that, from
24 the Senate Committee on Energy and Public Utilities and it
25 talks about the limitations of the Warren-Alquist Act. And

1 nowhere in here is there any discussion that someone can
2 voluntarily come before us with a PV project or a hydro or a
3 wind. In the Comments section it says, or in the

4 Background:

5 "Under the Warren-Alquist Act the
6 California Energy Commission is responsible
7 for siting thermal power plants of a size
8 equal to or greater than 50 megawatts.

9 Electrical generating facilities which are
10 not thermally powered are exempt from the
11 CEC's siting authority."

12 And this would be the place where the Legislature
13 would want to remind people that there is this voluntary
14 aspect because they are adding in language specifically in
15 here that says, thermal power plants do not include
16 photovoltaic and hydro and wind. So this is really
17 something that needs a legislative solution if there is
18 ambiguity.

19 There is nothing that they have been able to
20 produce that has ever been mentioned in any of the
21 legislative history, whether we're talking about '74 or '78
22 or the '95 changes or the '88 changes that articulate this
23 exemption allowance for projects to come before us that are
24 not thermal.

25 I think my brief fairly clearly identifies the

1 staff's argument. And let me just check with my, check with
2 Eric here to see if he has anything to add.

3 (Mr. Babula confers with Mr. Solorio.)

4 MR. BABULA: Well let me just summarize an
5 important part again and this is the difference between .7
6 and .3 with the Notice of Intent/Notice of Waiver. And this
7 also addresses the reason these two provisions are still
8 around is arguably they could still apply to these PUC-
9 granted projects that may have not -- for some reason have
10 not started construction yet.

11 But the main focus is if you are going to do a
12 Notice of Intent, that's really at the beginning of the
13 process. And so if your project when the Warren-Alquist Act
14 was first put forth, if your project is far enough along or
15 has gotten, received something from the PUC, then you would
16 want to do the Notice of Waiver because you have already
17 gone through most of the environmental analysis and so forth
18 and so that would be the applicable one. Whereas if you are
19 just starting, .3 would be the one you go for. And again,
20 there is just nothing in the legislative record history of
21 anyone ever identifying these waiver clauses that would
22 allow for these non-thermal plants to come before us. I
23 think that's all for now, thanks.

24 PRESIDING MEMBER BOYD: Thank you. Not being a
25 lawyer this is extremely interesting, me having to

1 adjudicate interpretations of the law that so far parties
2 both argue things work in their favor. Now more than many
3 times I sympathize with my friends who are judges.

4 HEARING OFFICER VACCARO: Okay, sorry for that
5 brief intermission.

6 I think, again as I mentioned, we'll hear first
7 from the parties that submitted written briefs in response
8 to the motion. There were only a handful of parties who did
9 that, Center for Biological Diversity of course being one.
10 However, Ms. Belenky did indicate that for a short time she
11 will be offline and hopefully will be back online to make
12 oral argument.

13 So I think what we'll do at this point is move
14 forward to the Western Watersheds Project and we'll hear
15 from you at this time.

16 MR. BABULA: Before you do that would you like me
17 to pass out what I referred to? This would be the Senate
18 Committee on Energy and Public Utilities, their assessment
19 of -- this is what I read from, so the Committee can have
20 it.

21 HEARING OFFICER VACCARO: Mr. Babula, yes, it's
22 fine if you hand that out. I think what's also important
23 that you do is that you get that docketed because that is
24 something that I think no one has referred to or seen before
25 this time.

1 MR. BABULA: Right.

2 HEARING OFFICER VACCARO: So handing it out is
3 fine; you can do it at the end of the proceeding. And then
4 if you go ahead and get that docketed as well, thank you.

5 So at this time, Mr. Connor, if you are still on
6 the line we would like to hear from Western Watersheds
7 Project.

8 DR. CONNOR: Yes, good morning, I am still on the
9 line. And listening intently, even though I am not a lawyer
10 either.

11 We made a number of points in our response to the
12 applicant's motion. First of all there's this issue of
13 interpreting the plain language of the Warren-Alquist Act
14 itself. And to summarize my first point, clearly the
15 Warren-Alquist Act itself specifically excludes photovoltaic
16 plants. I think that any interpretation of other clauses in
17 the document certainly have to address the specific
18 prohibition that's listed in the language and in the intent
19 of the Act.

20 Secondly, we are extremely concerned that if
21 jurisdiction, CEC jurisdiction is extended to PV projects or
22 to a specific PV project, this would actually violate CEQA.

23 Under the California Environmental Quality Act it is not an
24 applicant who chooses which agency will have jurisdiction.
25 It's the agencies themselves that determine which agency has

1 jurisdiction. And in this case we have a number of
2 potential agencies that would be the lead on a CEQA
3 analysis, on a standard CEQA analysis. These agencies would
4 be California Department of Fish and Game and Kern County
5 itself.

6 It's unclear based on the brief description of the
7 project, of the revised PV project that we received from the
8 applicant, where in fact the project would be located. But
9 the indication was that it would be located south of Brown
10 Road, in which case it would be entirely on federal land, in
11 which case the appropriate lead agency would apparently be
12 California Department of Fish and Game. If the project is
13 located on private land then really the lead agency
14 (background noise) is the county. But it certainly is
15 unclear from the --

16 HEARING OFFICER VACCARO: Excuse me, Mr. Connor, I
17 have to interrupt you for just a moment to remind our other
18 callers that we need you to please hit the mute button
19 because we can hear everything you're doing, even when you
20 move papers. So right now we are hearing from another
21 caller's phone a lot of background noise that is making it
22 difficult to hear Mr. Connor. So again, please hit the mute
23 button until it is your turn to speak. I apologize,
24 Mr. Connor; if you could now continue.

25 DR. CONNOR: Okay. Okay, so we have this issue

1 that CEQA itself lays down the direction of who decides who
2 the lead agency is on a project. And the choice of the lead
3 agency is made by those agencies that have a role in this
4 project. It is unclear from the project description what
5 role Kern County, if any, may have in this project. But
6 clearly there are going to be issues related to road use,
7 transmission lines and so on that may require county
8 permits. So it's unclear, you know, which agency should
9 have lead jurisdiction. But clearly in this case it would
10 have to be the agencies to decide and not the project
11 applicant.

12 And thirdly, we object to the applicant's approach
13 because it basically smacks of forum shopping. What's going
14 on here is despite the fact that repeatedly the project
15 applicant has stated that staff opposed the project it still
16 wants the California Energy Commission rather than
17 California Department of Fish and Game or the County to
18 review the project.

19 And we can only interpret that as meaning that the
20 project proponent thinks that they are still going to get a
21 more favorable review from the California Energy Commission.

22 And if the situation is such that the applicant can choose
23 which of these agencies is going to be the lead agency under
24 CEQA, it's essentially picking the best forum to get the
25 result it desires.

1 So those are our, those are our statements on this
2 motion.

3 HEARING OFFICER VACCARO: Thank you, Mr. Connor.

4 Desert Tortoise Council. Mr. Silliman, if you are
5 still on the line we would like to hear from you.

6 MR. SILLIMAN: Yes, this is Sid Silliman with the
7 Desert Tortoise Council. We did submit a written statement
8 in early July and that was properly docketed.

9 And in that statement we urged the Commission to
10 reject both the requests that are included in that motion
11 for the jurisdictional waiver and the revised scheduling
12 order. We urge the Commission to reject both of those.

13 The Desert Tortoise Council is a public group.
14 We're a small public group. We're also a nonprofit group.
15 And what I'd like to do is introduce a notion here that
16 there is a public interest that is at stake that needs to be
17 taken into consideration. On the one hand I think that
18 Solar Millennium/Solar Trust of America is really showing a
19 lack of public -- a lack of regard for the public in this
20 particular instance.

21 The intervenor groups have put in considerable
22 time and resources over the last months in good faith. We
23 participated vigorously in the Mojave Ground Squirrel Study,
24 which has now been abandoned.

25 And what we have seen since January is a series of

1 motions from Solar Millennium/Solar Trust of America, which
2 have been multiple and a number of them have been
3 contradictory. Motions I think in effect, to keep the
4 project alive before the CEC. They asked for a postponement
5 of the project to do the multiple -- the Mojave Ground
6 Squirrel Study then abandoned that. They requested to
7 withdraw the project in January then abandoned that motion
8 and come back with a series of requests for extension.

9 And I think that -- here is where there is a lack
10 of proper regard for the public and for the kind of
11 resources the public is putting in. And to boot in this
12 case, we don't have a public notice from Solar Trust of
13 America as to the new project. They're exploring it, they
14 are thinking about a redesign. It's a hypothetical project.
15 There is no real project here as yet.

16 Second, I think that this is not the forum for
17 making this decision. What Solar Trust of America is
18 requesting here is a major policy shift. And it seems to me
19 it is important to remember that the CEC as a forum, as a
20 decision-making body, is really largely outside the public
21 view, largely outside public scrutiny. There are very few
22 people today from the public on this call. I didn't hear
23 anybody recognized but I doubt there is anybody from the
24 media on this. This is an important policy shift that I
25 think, in fact, ought to be subject of some considerable

1 public review and public scrutiny. Certainly there are
2 other groups that would be interested in this.

3 Another way to put this is I think Solar Trust of
4 America is engaged in a kind of blatant attempt to capture
5 the CEC to serve its interest on the basis of argument that
6 goes far beyond the intent of the Warren-Alquist Act to
7 focus on solar thermal plants of 50 megawatts or larger.
8 This is not the forum to shift that focus because the public
9 doesn't provide, doesn't have the opportunity to review this
10 and participate fully. And I don't mean any disrespect to
11 the Commission but the reality is there is not much of the
12 public here. A major policy shift such as this really
13 should be made in the legislative arena. So again, this is
14 Sid Silliman, Desert Tortoise Council and I thank you.

15 HEARING OFFICER VACCARO: Thank you, Mr. Silliman.

16 The other brief as I mentioned a few moments ago is from
17 Center from Biological Diversity. I am just going to check
18 whether or not Ms. Belenky is back on the line and available
19 at this time to make oral argument?

20 MS. BELENKY: I have just rejoined and I would
21 like to -- if I could I would wait until the next person. I
22 don't know what happened in the, you know, the ten minutes I
23 was gone.

24 HEARING OFFICER VACCARO: In the ten minutes that
25 you were gone we -- I don't know if you heard any of staff.

1 We did hear from staff, we have heard from Western
2 Watershed Project and we have heard from Desert Tortoise
3 Council. And since you were the additional party who filed
4 a written brief it's actually perfect timing for Center for
5 Biological Diversity to make its oral argument.

6 MS. BELENKY: Okay, well thank you for giving me
7 this time. I think we submitted our papers, we generally
8 agree with the staff's interpretation on the statute and the
9 regulations.

10 I feel that the most important question here also
11 is that this looks to be an overreaching of the jurisdiction
12 of the Commission. There seems to be no standards and no
13 end in sight. If the Commission were to take jurisdiction
14 over this matter there would be no limit to its ability to
15 take jurisdiction over any other matter that was ostensibly
16 a power plant in the state of California. And we think that
17 this both encroaches on the jurisdiction of the counties and
18 cities and other entities and that it is not the intent of
19 the statute and it is not appropriate.

20 Otherwise I think we would simply stand on the
21 issues that we have raised in our brief and particularly
22 point the Commission also to the letter that was submitted
23 by the County of Kern, which is very actively dealing with
24 many of these applications at this time.

25 HEARING OFFICER VACCARO: Okay, thank you,

1 Ms. Belenky.

2 At this point we would like to hear from the other
3 parties to this action, even though they did not submit any
4 briefing. So, Ms. Klebaner, if you are still on the line is
5 there any argument that you would like to make on behalf of
6 CURE?

7 MS. KLEBANER: No, thank you for the opportunity.

8 HEARING OFFICER VACCARO: We have not yet heard
9 from Kevin Emmerich or Laura Cunningham of Basin and Range
10 Watch. I don't know if they have been able to join us. If
11 you are on the line this is your opportunity to make
12 argument.

13 (No response.)

14 HEARING OFFICER VACCARO: I am not hearing any
15 response.

16 So Kerncrest Audubon Society, I don't know whether
17 we have been joined by Mr. Burnett or Mr. Middlemiss. If
18 anybody is on the line on behalf of Kerncrest Audubon
19 Society this is your opportunity to make oral argument.

20 (No response.)

21 HEARING OFFICER VACCARO: Okay, I am not hearing
22 any response.

23 I think then the reasonable and fair thing to do
24 before we move onward with public comment is to allow the
25 applicant an opportunity to respond to the arguments made by

1 the other parties. Mr. Galati.

2 MR. GALATI: Thank you, I'll be brief.

3 First responding to staff. I just have a
4 question. Why would anybody choose to go through the NOI
5 process when all they had to do was to file a simple Notice
6 of Waiver? The NOI process, especially back in the '70s and
7 '80s is a long, lengthy process that could take up to 36
8 months and then you had the right to file an AFC. So nobody
9 on their right mind who was on the list and was
10 grandfathered would have elected to do the NOI process
11 versus the Notice of Waiver. It has nothing to do with ho
12 far you are in the process. If you were at the beginning of
13 the process and didn't have to go through the NOI you
14 wouldn't.

15 Second of all, the Attorney General opinion on --
16 the issue about thermal power plant. A project that uses
17 thermal energy that is less than 50 megawatts is not a
18 thermal power plant. So anybody that also says that this
19 waiver could have possibly been for projects that are
20 smaller than 50 megawatts, they aren't a thermal power plant
21 in the same way as a PV project is not a thermal power
22 plant.

23 That's how the Legislature has written the
24 provision. They did not write a provision that says PV is
25 excluded from jurisdiction. They did not write a provision

1 that says, projects less than 50 megawatts are excluded from
2 jurisdiction. They included a definition of thermal power
3 plant. And so you heard Mr. Therkelsen discuss how since
4 1974 and certainly in 1994 everybody thought that maybe
5 somebody who uses this might be a 49 megawatt person who
6 wouldn't normally have to come here.

7 But I contend when you look at the language, a 49
8 megawatt gas-fired power plant is no more a thermal power
9 plant than a 70 megawatt PV project. So the waiver applies
10 to something or it applies to nothing. That is really the
11 crux of our argument.

12 It is inappropriate to read the term "facility"
13 and not use the definition of thermal power plant. They
14 need to be read together. And the only way to come up with
15 staff's analysis is to only read part of that definition.
16 It's either to say it only applies to grandfathering
17 provisions and the Legislature was not smart enough and the
18 Energy Commission was not smart enough to take out that
19 provision when they took out all the other provisions, which
20 the Supreme Court says you cannot do. Or it is only to read
21 part of the definition and say, oh, it applies to thermal
22 projects less than 50 megawatts.

23 You have to read them together. And for evidence
24 of why you read them together, and other people, not just
25 Mr. Galati talking, the Attorney General opinion that they

1 cite reads them together. And the Legislative Council
2 opinion that we cite reads them together. You must read
3 them together. And when you do you come out with a
4 provision that has no purpose.

5 As far as 25502.3 being listed. This is what I
6 believe to be the case. The 25502.3 waiver is the big
7 circle. It's the large, general waiver. The 25501.7 is the
8 waiver specifically for those smaller projects. I assume
9 those projects on the list.

10 25501.7 is still intact. If somebody had a CPCN
11 on a project and wanted to do a 30 megawatt addition;
12 wouldn't normally be here. Let's even say it was thermal,
13 okay. A 30 megawatt addition. If they had a CPCN they
14 could waive the provisions that they are excluded and do
15 that modification under 25501.7 today. Because it still is
16 intact, it just no longer deals with grandfathering projects
17 on a list or projects that were there for three years. It
18 deals with projects that have a CPCN. And who knows, if
19 somebody had a CPCN in 1972 or they got it when they were
20 under the list and they now want to add 30 megawatts to it,
21 they could waive under 25501.7 and come to the Commission.

22 But the Legislature in 1974 recognized those
23 weren't all the people that could waive. They needed a
24 general waiver, a much larger waiver, and that's the only
25 explanation for 25502.3 and it's what they said in 1994.

1 And you heard Mr. Therkelsen say -- and while Mr. Therkelsen
2 does not speak on behalf of the Legislature he does remember
3 why the Energy Commission didn't ask for 25502.3 to be
4 removed. That just gives us just an extra little
5 underpinning in case there is any question.

6 But look at the specific language. The specific
7 language in and of itself. You don't need any legislative
8 history. You just need the simple provision of the case law
9 that says, you can't come up with absurd results. Need to
10 follow the legislative guidance to say, don't wed yourself
11 to definitions when they don't make sense. And look at the
12 provision that says, this waiver is different than 25501.7
13 because it says "except that waiver."

14 To address the issue on forum shopping. We're not
15 talking about forum shopping for who does the CEQA analysis,
16 okay. And I know that you might be dealing with that in
17 other projects. We're talking about who issues the permit,
18 that's what we're talking about. And if the waiver is
19 applicable and if an applicant elects to use the waiver they
20 are subject to the Energy Commission's exclusive permitting
21 jurisdiction which complies with CEQA.

22 I would also like to address this basic notion
23 that somehow local agencies are gyped. That local agencies
24 don't have a voice or that the public is duped if we come to
25 the Energy Commission. I challenge anybody in this room and

1 on the phone to find a more rigorous process and more public
2 input in a CEQA-related matter than any project that I have
3 ever worked on at the Energy Commission.

4 There's more public hearings and public
5 opportunity in this process than there is required by CEQA.

6 You know, CEQA you don't even have to have a public
7 hearing, just written comments. At the Energy Commission
8 there's the right to put on evidence, there's the right to
9 challenge, there's workshops. There is no public disservice
10 by an applicant asking to come here. There is only a public
11 service if they come here.

12 So this idea that there is an ulterior motive that
13 we are going to try to get out of mitigation or not listen
14 to the local agencies, when has that ever happened at the
15 Energy Commission? Never. The local agencies have a say,
16 they have access and the public has more access here than
17 ever before. I also challenge just a simple look at the
18 mitigation that projects that went through the counties are
19 paying and mitigating versus here at the Commission.

20 So again what we are talking about here is an
21 interpretation of the existing law. You have the right to
22 do it. You are the agency to do it. It's your law. And we
23 think we presented to you a very, very clear case how you
24 are not extending your jurisdiction, you are just invoking
25 this particular provision that has been there since 1974 and

1 was reaffirmed in 1994.

2 I think that's all we have to say in rebuttal so
3 thank you for that opportunity.

4 HEARING OFFICER VACCARO: Okay, thank you,
5 Mr. Galati. I think your final comments are probably a very
6 good segue to the public comment portion of today's
7 proceeding. I think it would be appropriate, given that
8 Mr. Galati just referenced the local public agencies, to
9 hear from the County of Kern. So, Mr. Murphy, I notice that
10 you are still on the line. If you are willing to make any
11 comment -- I know that we did receive the letter just this
12 morning from Kern County so this is your opportunity in the
13 public comment portion to speak if you would like to do so.

14 MR. MURPHY: Yes we would, I appreciate that.
15 Again, my name is Craig Murphy; I'm the Division Chief for
16 the Kern County Planning and Community Development
17 Department. A couple issues I'd like to address. First of
18 all from a permitting standpoint, solar photovoltaic
19 projects in Kern County require the issuance of a
20 conditional use permit.

21 The issue for the County here really is the fact
22 that the project is proposed on private land. Kern County
23 is very familiar with solar photovoltaic projects. We have
24 been processing 20 megawatt projects up to 900 megawatt
25 projects. We have completed 12 of these projects. We have

1 got 15 Environmental Impact Reports that are currently in
2 process. I am pleased to say from a processing standpoint
3 we are getting these documents out and ready for public
4 review and consideration by our local officials in
5 approximately 11 to 12 months. So we are extremely
6 knowledgeable when it comes to solar photovoltaic projects.

7 And we really consider it, especially when we talk about it
8 on private land, as an issue of land use compatibility.

9 Determinations have to be made regarding the
10 preservation of ag land. View sheds are impacts that have
11 to be looked at, evaluated and should have a local land use
12 decision-making process. Access not only to the site but to
13 surrounding property owners. Many times these projects are
14 located in areas adjacent to some residential or other uses.

15 Public impacts. Specifically, solar photovoltaic
16 projects and the panels themselves are exempt from being
17 reassessed by local jurisdictions. We have specific
18 mitigation that we have worked out with the industry. We
19 have been working on these for probably about two years now
20 as these projects started initially coming forward and we
21 have specific mitigation and conditions that we have been
22 applying to all of our solar projects.

23 Again, what it really comes down to from our
24 aspect is that this is an issue of local jurisdiction, land
25 use compatibility. You know, I don't see any reason why we

1 wouldn't be able to handle this project and expedite it to
2 get it to the decision-making process any more efficiently
3 than anybody else.

4 With regards to the comments about local input.
5 While it very well may be that there is public input through
6 the CEC process, when it comes to these type of issues
7 people know their council members, they know the board of
8 supervisors members. They're familiar with the process,
9 they're familiar with being able to go to a board hearing
10 and stand up and speak. So while there may still be an
11 opportunity for public process, when it comes to projects on
12 private lands clearly people are more comfortable calling us
13 to ask questions, appearing before our elected officials to
14 state their comments, than they would be in any other forum.

15 You know, in all honesty, if the CEC were to take
16 jurisdiction, you know, the local agency considers that that
17 they would be subverting the local zoning process and the
18 local responsibilities that the Kern County Board of
19 Supervisors would have when it comes to jurisdiction on
20 local property.

21 There are no technical engineering expertise that
22 is necessary for a solar photovoltaic project that the
23 County would not be able to handle and deal with. Again,
24 there are franchise routes when it comes to connection to
25 substations that have to be dealt with. These are all

1 issues that the County is extremely familiar with, extremely
2 knowledgeable when it comes to the processing. We have been
3 working with the industry for over two years on these
4 projects. We are preparing Environmental Impact Reports for
5 any project of substantial size given the local and
6 cumulative effects associated with these projects.

7 And quite honestly, I would doubt that there is
8 any local jurisdiction that is more familiar or
9 knowledgeable when it comes to these types of projects than
10 Kern County. When it comes to renewable energy, we have
11 adopted our renewable energy goals. We have been processing
12 wind and solar projects for an extended amount of time and
13 it is our determination that this is a land use
14 compatibility issue that is more appropriately addressed at
15 the local level than through the CEC.

16 With regards to whether that is a possibility of
17 the project or portions of it being proposed on BLM
18 property. I would also note that we have a number of
19 projects where we are preparing joint EIR/EIS documents that
20 are also proposed on BLM. Again, these are things that we
21 are not unfamiliar with.

22 And it is just our position that really when it
23 comes down to the siting of these projects it is more one of
24 local land use compatibility. Decisions have to be made on
25 whether or not certain projects are appropriate in certain

1 locations and we have the process in place by which we can
2 go through that analysis and ultimately that decision-making
3 process.

4 And it is our determination that specifically when
5 it comes to private property, any taking of the local
6 elected officials' jurisdiction when it comes to the types
7 of mitigation, the types of conditions and the types of land
8 use authority and permitting process, we believe that would
9 be inappropriate. And we don't see any reason why it is not
10 more efficient and better to have the project proposed and
11 processed at the local level than through the CEC.

12 So again, that would conclude my comments. I
13 would absolutely be willing to answer any questions your
14 Commission may have or anything along those lines.

15 PRESIDING MEMBER BOYD: Mr. Murphy, this is
16 Commissioner Boyd. A little bit of a reaction to your
17 presentation and your written submittal. What I see before
18 us now is no question on your process, on your county's
19 knowledge. Your county, in my long familiarity with it, has
20 every right to feel proud of your processes and your
21 knowledge.

22 And this is not an action to consider taking away
23 your jurisdiction in any way, this is, as I have listened to
24 it and read all the materials, is a question of the right of
25 an applicant to voluntarily request it be subjected to the

1 CEC standard process rather than not. And that has yet to
2 be adjudicated or decided. So it is not to be -- it should
3 not be interpreted as taking away your jurisdiction.

4 The other point that is puzzling to me, and the
5 applicant or staff or others can comment at any appropriate
6 time, is the private land versus public land issue you have
7 raised. Your letter is pretty strong on the point that all
8 solar PV projects on private land are the jurisdiction of
9 your elected officials. And you have made the argument that
10 land use on private property therefore is the sole
11 jurisdiction of the Kern County Board.

12 I don't even think that's a question before us or
13 if that's that relevant a statement to the question before
14 us. But I just wanted to point out at this point this
15 Commissioner doesn't see it as a private land versus public
16 land issue. Or do I see it as us versus Kern County or any
17 taking away of jurisdiction. Anyway, I wanted to say that
18 at this point in time because I am a little puzzled by some
19 of the testimony and we'll have to deal with it.

20 MR. MURPHY: Commissioner Boyd, if I may respond.

21 I do appreciate those comments. I don't believe that it
22 would be the CEC that would be doing this. I think we are
23 more afraid of the unintended consequences. We have a
24 number of solar projects that we are currently processing.
25 And I am not saying that your -- that the CEC doesn't have

1 the right to make this determination or whether or not --
2 you know, I know that most of the discussion previously was
3 along whether or not you can or cannot even take that
4 action.

5 I bring for you a more straightforward approach
6 when it comes to the actual processing and just the opinion
7 that in practicality and in process, based on the issues
8 that have come up in terms of our processing, that we
9 believe that it is more appropriate that these be handled at
10 the local level rather than through the CEC.

11 Again with that being said, I do appreciate your
12 comments and in no way did we really take that as the case.

13 We are just more concerned about every single project then
14 deciding and making that determination, well, I'm going to
15 go through the CEC process instead. You know, I have no
16 idea exactly what you would require. Again, we have had a
17 number of discussions with smaller projects ranging in size
18 from 10 to 15 megawatts to again, we processed a 900
19 megawatt solar PV project.

20 So again, part of it really has to do with the
21 potential unintended consequences. And again, it is just
22 our position that given the fact that really what it comes
23 down to is a land use compatibility issue, whether or not
24 it's appropriate for this site to be located at this
25 location adjacent to these additional uses. Especially

1 since the fact that we are not allowed to reassess a
2 majority of the projects based on property taxes, based on
3 the fact that there are a number of interconnection concerns
4 that need to be dealt with. Not so much in the Ridgecrest
5 area but in the Rosamond area specifically. It is just our
6 position that this is better and more appropriately
7 processed at the local level.

8 But again, with that being said, if our letter
9 came off, you know, it did not intend to come off that the
10 CEC was trying to take over land use decision-making from
11 our local officials. We were just afraid of unintended
12 consequences and the fact that that is generally not the
13 case when it comes to other types of projects that we
14 consider to be of, you know, where the primary issue is one
15 of land use compatibility.

16 PRESIDING MEMBER BOYD: I thank you for your
17 comments. It still leaves a big question lying on the table
18 for us to consider. I struggle to see that big a difference
19 at this point in time between a PV project and any other so-
20 sized industrial project.

21 And it does seem to me that any county's concerns
22 would be considered in the state process just as much as
23 they would be considered by the local folks. But that's not
24 the issue here so thank you for your response.

25 And I don't know, Mr. Galati, if you want to -- or

1 the staff wants to comment at all since I've started an
2 exchange here.

3 MR. GALATI: No, other than I can just say to Kern
4 County, there are all good reasons that an applicant might
5 elect to go to the County. Certainly here -- worked on a
6 lot of projects where the issues were primarily county,
7 including a lot of the renewable projects that we processed
8 last year.

9 And we think that the Energy Commission made us
10 comply with the County's LORs. And the Energy Commission
11 looked at impacts, looked at the effects of the tax base and
12 the revenue and what the impacts were and there's quite a
13 bit of mitigation in a lot of those projects that have to
14 deal with those impacts to the County that would normally be
15 offset by taxes. I think that the Commission has been doing
16 that because all projects since the Commission has been
17 around have been in a city or a county and the Commission
18 has a long history of incorporating that county process,
19 through staff analysis and through actual testimony and
20 decision-making.

21 I understand that Mr. Murphy is proud of what he's
22 done and we'd certainly like to continue to talk with him
23 about how good he is. We're a developer and we are not
24 doing one project in California, we want to be here for a
25 long time. So we'll continue to talk to Mr. Murphy but I

1 think it doesn't have any bearing on what we had asked you.

2 MR. BABULA: I would just add that the -- I mean
3 the County, I can understand the County's concern being that
4 if they have a number of developers who have been coming
5 before them and they suddenly have this new option that
6 wasn't clearly around before then that could change the
7 dynamics in the way the counties deal with developers,
8 trying to get things done there, if they have an out where
9 they can just come over to the Energy Commission.

10 PRESIDING MEMBER BOYD: Well, I guess I am old and
11 curmudgeonly enough to feel, and experienced enough to feel
12 that the Energy Commission process is pretty fearsome,
13 foreboding, lengthy, thorough. Up until today I would have
14 thought people would go out of their way to avoid coming to
15 the Energy Commission. But we're dealing still, in my mind,
16 with an issue of interpretation, the meaning of law. Enough
17 said.

18 HEARING OFFICER VACCARO: We'll continue with the
19 public comments. We have a number of callers who are not
20 identified. I suspect some of you are members of the public
21 who would like to make a comment. So if we could hear from
22 you at this time we'd appreciate it.

23 (No response.)

24 HEARING OFFICER VACCARO: There is no one
25 clamoring to be heard but again I'll make the call. If

1 there are any individuals on the phone line, members of the
2 public --

3 MS. DECKER: Hello?

4 HEARING OFFICER VACCARO: Or members representing
5 agencies, we'd like to hear from you.

6 MS. DECKER: Hello?

7 HEARING OFFICER VACCARO: Hello.

8 MS. DECKER: This is Judy Decker from Ridgecrest.

9 HEARING OFFICER VACCARO: Hi, Ms. Decker. Would
10 you like to make a comment at this time?

11 MS. DECKER: I have a question. The gentleman
12 from Kern County talked extensively about this project and
13 private land and Mr. Galati did not question that. Does the
14 project now include private land?

15 HEARING OFFICER VACCARO: Mr. Galati, if you would
16 like to answer.

17 MS. DECKER: And if so, where is it?

18 MR. GALATI: No, the project does not include
19 private land. What we are looking for is a configuration
20 south of Brown Road in a smaller way to mitigate the impacts
21 that have been identified. I apologize for not correcting
22 the Kern County Planning Director on that issue. But I
23 think the issue before the Commission is unrelated to
24 whether it's private or public land, as Commissioner Boyd
25 said. But we are not proposing anything on private land.

1 MS. DECKER: All right, thank you. And if you are
2 doing a new project I do have another question for you.
3 Does not the issue of the Mojave Ground Squirrel still,
4 still be there?

5 HEARING OFFICER VACCARO: I'll answer that at this
6 time, Ms. Decker. The actual or potential impacts of the
7 project that is currently before the Commission or proposed
8 redesign are matters that would certainly be a part of the
9 evidentiary process, things that would be included in the
10 staff assessment subject to other comment and testimony from
11 parties as well as interested persons.

12 But none of those matters are at issue today. The
13 only question before the Committee is to hear from the
14 parties and from the public on the very narrow issue of the
15 applicant's intention to use this provision of law to have
16 the Energy Commission assume jurisdiction over what might be
17 a 100 percent photovoltaic project.

18 MS. DECKER: Right. Well, I will echo
19 Mr. Silliman's sentiments about, about the public also.

20 HEARING OFFICER VACCARO: Okay, thank you.
21 Are there any other members of the public on the
22 telephone who wish to make a public comment at this time?

23 (No response.)

24 HEARING OFFICER VACCARO: Not hearing any. I
25 don't see any members of the public in the room but I have

1 been wrong about that before. So I will scan the room and
2 ask whether or not there are any individuals in the room who
3 wish to make a public comment?

4 (No response.)

5 HEARING OFFICER VACCARO: No one is even making
6 eye contact with me at this moment so I am going to take
7 that as a no. And unless Commissioner Boyd has any further
8 questions I will turn this over to him to adjourn today's
9 proceeding.

10 Before I do that, the Committee will not be
11 issuing a decision from the dais. This is a matter -- it's
12 weighty, a lot of complex issues as briefed by the parties.
13 This is a matter that will be taken under submission by the
14 Committee.

15 PRESIDING MEMBER BOYD: This is Commissioner Boyd.
16 In closing it would be very easy for me to just say, fine,
17 we have taken everything under submission and we will --

18 (Music coming through telephone line.)

19 PRESIDING MEMBER BOYD: How appropriate. Somebody
20 has their Muzak playing again throughout our room. Thank
21 you. Thank you, Maggie, I believe.

22 In any event, I am compelled to make a few
23 comments that don't bear on the specifics of the decision as
24 I see it but just to make it clear again, as has been stated
25 before, we are not deciding on this project or a project.

1 Not deciding that the CEC has jurisdiction over PV in
2 general. React to earlier comments about people capturing
3 the CEC or its Commissioners. I don't think that's been the
4 truth, a fact in the past and I don't think that's a true
5 statement.

6 And the decision here does not, does not really
7 bind any other decision. We have had the public land versus
8 private discussion. We have had points of view on this is
9 an attempt to exclude public process and it's forum
10 shopping. And I think I would concur with any comments
11 about the thoroughness of the Energy Commission's process
12 and the staff's process. It's not necessarily the
13 Commissioner's process, the entire process. And I would
14 historically think people would try to stay away from here
15 if at all possible.

16 Therefore, the question before us, again in my
17 mind, is looking at the statutes, "the law" quote/unquote,
18 as to an applicant having the legal right under this law to
19 voluntarily submit to CEC review. I think that's a simple
20 lay, my simple lay interpretation. That is the issue we
21 have taken under submission and have to debate.

22 It has nothing to do with the thoroughness or
23 competence of a review process at a local level. It does
24 not exclude the CEC process in general. No matter what the
25 project is it does not exclude any local input or any input

CERTIFICATE OF REPORTER

I, JOHN COTA, an Electronic Reporter and Transcriber, do hereby certify that I am a disinterested person herein; that I recorded the foregoing California Energy Commission Committee 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 28th day of July, 2011.

JOHN COTA