



Commissioners Present (\*Via Phone)

Robert B. Weisenmiller, Chair  
Karen Douglas  
Carla Peterman

Staff Present:

Rob Oglesby, Executive Director  
Michael Levy, Chief Counsel  
Lynn Sadler, Public Advisor's Office  
Jennifer Martin-Gallardo  
Jeff Ogata, Staff Counsel  
Harriet Kallemeyn, Secretariat

Also Present:

Interested Parties (\* Via WebEx)

\*Christopher T. Ellison  
Samantha Pottenger, Ellison, Schneider & Harris  
Elizabeth Klebaner, Adams Broadwell Joseph & Cardozo  
for CURE  
Sabrina Teller, Remy Thomas Moose & Manley  
for Imperial County Planning and Development Services

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1. COMPLAINT AGAINST ORMAT NEVADA, INC. BROUGHT BY CALIFORNIA UNIONS FOR RELIABLE ENERGY (11-CAI-02). Possible approval of Proposed Order on a Petition for Reconsideration of the Energy Commission's decision of December 5, 2011, to dismiss California Unions for Reliable Energy's (CURE) Complaint and Request for Investigation. (Docket No. 11-CAI-02), Order No. 11-1130-4.	4
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P R O C E E D I N G S

FEBRUARY 13, 2011

9:07 a.m.

CHAIR WEISENMILLER: Let's start the hearing.

(Whereupon, the Pledge of Allegiance was recited in unison.)

Let's start with Jeff. Do you want to go through the Draft Decision? And then we'll turn to the Applicant, then the Complainant. Jennifer.

MS. MARTIN-GALLARDO: I'll start us off today. On June 3rd, 2011, California Unions for Reliable Energy filed a complaint asking the Commission to investigate whether two power plants owned by Ormat Nevada were subject to the Commission's licensing jurisdiction. The first power plant, North Brawley, has the permit granted by Imperial County and the second, East Brawley, is in the application phase right now.

After an Evidentiary Hearing and consideration of the parties' briefs, the Commission dismissed C.U.R.E.'s complaint. The evidence showed that both power plants have, or will have, the generating capacity of less than 50 megawatts, and thus are not subject to Commission jurisdiction under the Warren-Alquist Act. C.U.R.E. failed to provide

1 sufficient evidence to the contrary.

2           On January 4th, 2012, C.U.R.E. filed the  
3 Petition for reconsideration of that decision. The  
4 two main arguments are apparently that, first,  
5 C.U.R.E. believes that the Permit and the Permit  
6 Application for the power plants should be  
7 determinative for whether the Commission takes  
8 jurisdiction, and 2) that the Commission failed to  
9 apply, or at least correctly apply, its own  
10 regulations, the regulations that set out the method  
11 of calculating the generating capacity of the power  
12 plant.

13           Section 1720 of Title 20 requires the  
14 Commission to hold a hearing for the presentation of  
15 arguments on the petition and must act, grant, or deny  
16 the Petition within 30 days. The parties have agreed  
17 to extend the 30-day deadline until today. After  
18 reviewing the briefs from parties on this matter, the  
19 Commission has drafted a Proposed Order denying the  
20 Petition for reconsideration.

21           CHAIR WEISENMILLER: Thank you. C.U.R.E.,  
22 would you discuss your complaint?

23           MS. KLEBANER: Good morning, Commissioners.  
24 Elizabeth Klebaner for CURE. Congratulations,  
25 Commissioner Peterman, for your recent confirmation.

1           I actually have two handouts I'd like to  
2 pass out if that's all right, before I begin my  
3 presentation. I think I have enough copies for  
4 everyone here.

5           CHAIR WEISENMILLER: Sure.

6           MS. KLEBANER: Commission, you should grant  
7 C.U.R.E.'s Petition for Reconsideration. A Petition  
8 for Reconsideration should be granted when a  
9 Commission decision makes an error of law. Counsel  
10 for Ormat intends to argue that C.U.R.E. misstates the  
11 record, but we actually agree with Ormat. Ormat  
12 applied for a Conditional Use Permit to construct the  
13 North Brawley Geothermal facility with Imperial  
14 County, it received that permit, that permit is for  
15 six generating units. Ormat is now seeking a second  
16 Conditional Use Permit from Imperial County to  
17 construct the East Brawley Geothermal facility. That  
18 permit application is for up to six -- and I quote --  
19 "generating units."

20           Staff and Ormat agree that only five  
21 generating units have a combined generating capacity  
22 of 49.5 megawatts. Six generating units have a  
23 generating capacity of more than 50 megawatts. So the  
24 argument here isn't about the facts, it's about the  
25 law. The legal question is does Imperial County have

1 authority to issue a permit for six generating units?  
2 The Warren Alquist Act clearly states that it does  
3 not.

4           If you would refer to the handout with the  
5 relevant sections of the Public Resources Code,  
6 Section 25110 defines facility to include a thermal  
7 power plant; Section 25120 of the Public Resources  
8 Code defines a thermal power plant as an Electric  
9 Generating facility using any source of thermal energy  
10 with a generating capacity of 50 megawatts or more.  
11 And finally, under Section 2500, this Commission has  
12 mandatory exclusive jurisdiction to site all  
13 facilities in the state, that is, thermal power plants  
14 with a generating capacity of 50 megawatts or more.  
15 And no construction of any facility can begin without  
16 a Commission issued permit.

17           In the adopted decision, the Commission  
18 determined that it lacks jurisdiction when a developer  
19 proposes a facility, within the meaning of the Act,  
20 and even when a local jurisdiction issues a permit for  
21 a facility within the meaning of the Act. The  
22 decision is wrong in the law.

23           Under the Warren Alquist Act, this  
24 Commission has mandatory jurisdiction that is  
25 continuing over facilities, that is, thermal power

1 plants with a generating capacity of 50 megawatts or  
2 more. The Commission has jurisdiction whether the  
3 facility is proposed, or whether it is built. Only  
4 this Commission can consider an application and  
5 license, six generating units at the North Brawley and  
6 East Brawley sites. Accordingly, the North Brawley  
7 Permit is invalid and the East Brawley Permit, if it  
8 is issued, would also be invalid.

9           At the November 30th hearing, your counsel  
10 advised you that you could ignore the permit, the  
11 North Brawley permit, and you could ignore the East  
12 Brawley permit application, because staff routinely  
13 looks -- doesn't pay attention to the permits; staff  
14 looks at what is actually being built, or staff relies  
15 on the project proponents' statements of what is  
16 actually being built over what is proposed to be  
17 built. But one reason C.U.R.E. shows that is actually  
18 not the case, in the Santa Clara Data Center case, the  
19 Commission didn't wait to see what would actually be  
20 built, the Commission also didn't rely on the project  
21 proponents' proposed design for the facility. In that  
22 case, the project proponent applied for a permit  
23 within Santa Clara to install 32 diesel generators.  
24 The cumulative capacity of those generators was more  
25 than 50 megawatts -- 72 megawatts to be exact. The

1 project would be built in two phases, the first 60  
2 megawatts first, or, excuse me, the first 16  
3 generators first with a generating capacity of 32  
4 megawatts. The Commission didn't wait to assume  
5 jurisdiction until the full facility was built. The  
6 Commission assumed jurisdiction based on the  
7 generating equipment described in the permit. The  
8 Commission there also ensured that an invalid permit  
9 would not issue by requiring the Bay Area Air Quality  
10 Management Control District to limit the permit to  
11 only the first 16 generating units, and to actually  
12 require the project proponent to return to the  
13 Commission and either apply -- submit an application  
14 for certification, or otherwise require the Commission  
15 to find that that facility would be compliant with the  
16 Warren Alquist Act before a Phase 2 could be built.

17           The Commission's failure to assume  
18 jurisdiction in this case is arbitrary and it violates  
19 the Warren Alquist Act. You should not adopt the  
20 Proposed Order because it makes the same error of law  
21 as the adopted decision. The Proposed Order concludes  
22 that the Commission lacks jurisdiction because Ormat  
23 testified that Ormat installed five generating units  
24 at North Brawley and that Ormat plans to install only  
25 three generating units at East Brawley; but the fact

1 is that the North Brawley permit is for six generating  
2 units, and the East Brawley permit application is also  
3 for six generating units.

4 Under Section 2500, only this Commission has  
5 jurisdiction to issue those permits. And finally, you  
6 are required to assume jurisdiction under Section 2500  
7 of the Act.

8 Allowing an adopted decision to stand sets a  
9 dangerous precedent for this Commission because it  
10 invites developers to seek permits for facilities  
11 within the meaning of Act from local jurisdictions.  
12 The decision further gives the basis for a project  
13 proponent to argue that this Commission lacks  
14 jurisdiction until a facility has actually been built.  
15 This is not the law. Section 2500 states, "No  
16 construction of any facility or modification of an  
17 existing facility shall be commenced without first  
18 obtaining certification from this Commission."

19 In our Petition for Reconsideration, we also  
20 explain that the Adopted Order violates Section 2003  
21 of the Commission's Regulations because the Commission  
22 may not consider actual fuel constraints when  
23 determining generating capacity for the purpose of a  
24 jurisdictional determination. This is the second  
25 error of law in the Adopted Decision and the Proposed

1 Order. And it's easy to see why. Does this  
2 Commission lose jurisdiction over a 100 megawatt  
3 natural gas-fired plant when the local utility decides  
4 to size down the natural gas delivery pipeline such  
5 that that facility can only generate 49.5 megawatts?  
6 Of course not. The Commission still has jurisdiction  
7 over the generating equipment at that site.  
8 Conversely, does this Commission gain jurisdiction  
9 over a 20 megawatt facility where fuel supply is  
10 unlimited? Clearly not.

11           Section 2003 is just about the maximum  
12 physical capacity of the generating equipment. In  
13 fact, if you refer to the second handout that I passed  
14 out, if you flip to page 3 which explains how -- this  
15 is actually your staff's guidance on how to apply  
16 Section 2003 of the Regulations, your version of it  
17 should be highlighted in the relevant parts -- step 1  
18 describes how gross rating determination is  
19 determined. One of the key assumptions in that  
20 evaluation is that staff and the project proponent is  
21 to assume maximum fuel input conditions when  
22 calculating generating capacity.

23           The Commission must withdraw the Adopted  
24 Decision. In the Revised Decision, the Commission  
25 must conclude that it has jurisdiction that the North

1 Brawley Permit is invalid and the East Brawley Permit,  
2 if issued, would be invalid.

3 Now, we're not looking for North Brawley to  
4 be dismantled or turned off, we are just asking you to  
5 assume jurisdiction as you are required to do under  
6 the Act, and require Ormat to file an Application for  
7 Certification or otherwise come into compliance with  
8 the Act.

9 The Adopted Decision and the Proposed Order  
10 contain legal errors. As a matter of law, you have  
11 exclusive mandatory jurisdiction over thermal power  
12 plants with a generating capacity of 50 megawatts or  
13 more. The North Brawley Permit and the East Brawley  
14 Permit Application are each for six generating units.  
15 Staff and Ormat agree that only five generating units  
16 have a generating capacity of 49.5 megawatts.  
17 Therefore, you have jurisdiction over North Brawley  
18 and the East Brawley facilities. Thank you.

19 CHAIR WEISENMILLER: Thank you. All right,  
20 Ormat?

21 MS. POTTENGER: Good morning, Samantha  
22 Pottenger on behalf of Ormat. Also here with me today  
23 is Chris Ellison with Ellison Schneider & Harris, and  
24 on the phone we have Bob Sullivan with Ormat.

25 We would like to thank the Commission for

1 their Proposed Decision. We agree with the points  
2 raised in it. We believe C.U.R.E. has failed to raise  
3 either new evidence that could have been raised during  
4 the course of the hearing and C.U.R.E. has failed to  
5 raise any identifiable error of law in the  
6 Commission's decision, or error of fact.

7 I would just like to address one point that  
8 C.U.R.E.'s attorney has raised. C.U.R.E.'s technology  
9 is unique, it's not a plug-and-play generator, it is  
10 specifically designed to the resource and it is  
11 specifically tailored to the resource site.

12 C.U.R.E.'s attorney stated does Imperial County have  
13 the authority to authorize six generating units, and  
14 they stated no. I would argue, actually, Imperial  
15 County does have the authority to authorize a facility  
16 with six generating units.

17 The trigger for Imperial County's permitting  
18 jurisdiction is not the number of generating units, it  
19 could be six, it could be five; the crucial issue is  
20 what is the generating capacity of the plant. Here,  
21 Ormat's facilities, both North Brawley and East  
22 Brawley, were planned for 49.9 megawatts. That is the  
23 actual planned physical capacity that was planned for  
24 North Brawley, 49.9, whether it took six generating  
25 units to get there, whether it took five, that is the

1 ceiling for the facility.

2 Now, in this case, Ormat sought and received  
3 a permit for 49.9 met megawatts. There are specific  
4 permit conditions in there that state that, should  
5 Ormat decide to install additional generating capacity  
6 at North Brawley, that would increase that facility's  
7 generating capacity before 49.9 additional permits  
8 would have to be sought. Clearly, Imperial County has  
9 not authorized the facility in excess of 49.9  
10 megawatts.

11 In summary, I would just like to state that  
12 C.U.R.E. has failed to meet the Commission's standard  
13 for a Petition for Reconsideration, and we are  
14 available to answer any questions that you might have.  
15 Thank you.

16 CHAIR WEISENMILLER: Thank you. Staff?

17 MR. OGATA: Good morning, Chair  
18 Weisenmiller, Commissioner Douglas, Commissioner  
19 Peterman. My name is Jeff Ogata; I'm counsel for  
20 staff in this matter.

21 When we were here last for the Commission, I  
22 stood up sort of impromptu and decided that I would  
23 have to get up and tell you that I agreed with most of  
24 what C.U.R.E. was saying, but I disagree with their  
25 conclusion, and I find myself again this morning

1 having to say the same thing: I agree with most of  
2 what C.U.R.E. is saying, but again, I respectfully  
3 disagree with their conclusion in this matter. And  
4 I'll tell you why, there are at least three reasons  
5 why, and then I will address the Santa Clara issue,  
6 even though it's a pending matter before the  
7 Commission, I think it is appropriate to just discuss  
8 the jurisdictional aspect of that because that has  
9 already been decided more or less.

10           First of all, C.U.R.E. states in its  
11 comments on Order Denying Reconsideration, filed  
12 February 10th, 2012, that the Commission has exclusive  
13 jurisdiction no matter what the project developer  
14 actually decides or says it will actually build. Now,  
15 one of the problems with jurisdiction is that it's  
16 very case specific and it's very dangerous to over-  
17 generalize in terms of what the Commission has or has  
18 not done in the past. I believe there is a reason  
19 there is no precedential decision on this matter, is  
20 because every case really depends on the facts. Santa  
21 Clara is a case that involves back-up diesel  
22 generators; this case involves geothermal, Luz  
23 involves solar thermal. Every case is very different.  
24 And depending upon the facts, staff has to analyze  
25 those specific facts to see whether or not it meets

1 our definition of generating 50 megawatts or more.

2           So, in fact, it's not true that no matter  
3 what the project developer actually decides to build  
4 or says it's going to build that determines  
5 jurisdiction, it's what the net generating capacity is  
6 based upon our analysis, based upon the facts of the  
7 case. And the definition itself indicates that  
8 because it refers to taking into account the actual  
9 meteorological conditions, which also includes things  
10 like the altitude, humidity, the atmospheric pressure,  
11 and it includes the extraction induction conditions  
12 for steam turbine generators. So none of that is set  
13 in stone, it's always dependent upon the actual facts  
14 of every individual case.

15           So to the extent that our jurisdiction  
16 certainly depends upon thermal power plants with a  
17 generating capacity over 50 megawatts, in this case,  
18 staff found, after analyzing all those things based  
19 upon the actual facts specific to this case, that the  
20 projects would be able to generate no more than 49.5  
21 megawatts; in fact, staff determined actually that  
22 number was 47, but since Ormat said 49.5, staff went  
23 and did the analysis and then determined, okay, based  
24 upon what we thought Ormat was saying, 49.5 is  
25 correct. But in terms of staff's more careful

1 analysis, they actually felt 47 was really what the  
2 maximum of that generating capacity is, but that's  
3 neither here nor there because, either way, it's below  
4 50 megawatts.

5 C.U.R.E. also says on page 5 of that  
6 document that only the physical capacity of a turbine  
7 generator determines jurisdiction. Again, as I  
8 indicated that is not true, it's not just the physical  
9 capacity. If that was the case, we could just look at  
10 the nameplate rating and say, "Oh, it's 50 megawatts,"  
11 or, "No, it's not 50 megawatts." It's not just the  
12 physical capacity, it includes all these other factors  
13 that I've just indicated, and staff has to do that  
14 analysis.

15 So with respect to the fuel supply, we do  
16 look at whether or not there's enough fuel going  
17 through this pipe to create the maximum generating  
18 capacity of a turbine. And so, in this case, there  
19 was, if you will, sort of crudely, there's this big  
20 pipe which brings up all the steam, and staff did its  
21 analysis based upon this big pipe. But the fact of  
22 the matter is, right now, as Ormat's witness  
23 testified, the amount of steam going through this big  
24 pipe is probably only sufficient to fill half the  
25 pipe. But, again, staff doesn't really care about

1 that because we did the analysis based upon whether or  
2 not they could fill this big pipe, and if they filled  
3 it, what would be the maximum generating capacity.  
4 And based on that, again, staff determined it was  
5 49.5. So it really is not just the physical capacity  
6 of the turbine, it does rely upon the amount of fuel  
7 going through there, also the ambient conditions and  
8 all these other factors. So it's not just a simple  
9 thing of saying, "Oh, it's just the physical  
10 capacity," that's just not true.

11 And staff did the analysis pursuant to the  
12 Regulations, so we followed our Regulations; we  
13 followed our past practice that we've been doing for  
14 at least 30 years, as far as I know.

15 C.U.R.E. also indicated in its Petition for  
16 Reconsideration filed on January 4th that jurisdiction  
17 arises when a plant is proposed for over 50 megawatts.  
18 Clearly, that is true. In this case, the plant is  
19 proposed for 49.5. As I stated before, we don't  
20 really look at the permits to tell us whether or not  
21 we have jurisdiction, we do an actual analysis. Now,  
22 C.U.R.E. is sort of indicating now that they want it  
23 both ways, first, they say that this plant -- the  
24 permit says there's going to be six generators, and  
25 therefore we have jurisdiction. The permit also says

1 it shall not exceed 49.5. So if staff were to just  
2 take into account solely the permit, what is staff  
3 going to do? I mean, if we didn't do the analysis, we  
4 would say, "Oh, the permit says 49.5," and that would  
5 be the end of the matter. But we don't do that. We  
6 look at what they actually built -- in this case, the  
7 North Brawley, and it was five generators. They  
8 didn't build six, if they built six, everyone agrees  
9 over 50 megawatts; they built five. So we look at the  
10 actual physical capacity of this power plant because  
11 what we believe what 2500 of the Public Resources Code  
12 says to do, it is a facility, it's on the ground as  
13 built, that generates less than 50 megawatts.

14           There's a different problem with the one  
15 that is proposed because, clearly, that one is  
16 theoretical, so they are proposing to build a power  
17 plant, again, their permit says less than 50  
18 megawatts. So what is staff to do? Are we supposed  
19 to just then look at the permit and say, "Oh, less  
20 than 50 megawatts, end of analysis?" We don't do  
21 that. We ask them what they're going to build, they  
22 told us what they were going to build, and we caveated  
23 our recommendation based upon the fact that -- and we  
24 do this in every case -- based upon the fact that, if  
25 a developer builds something different than what they

1 told us, we always reserve our right to go back and  
2 redo the analysis, and the developers understand that  
3 they do that at their peril because the Commission  
4 will come back, and it has come back in previous  
5 cases, to tell somebody, "Gee, you know what? What  
6 you built is actually over 50 megawatts, therefore you  
7 need to deal with us and come back to us."

8           Santa Clara is an example of that. When  
9 they first came in the Commission in 2008, they gave  
10 us a description of the project, asking for a  
11 determination of jurisdiction. But they also said,  
12 "We're going to build this in two phases." And in  
13 2008, they really weren't sure whether they were going  
14 to go forward with both phases or not. And so we had  
15 a discussion with the developer and we indicated to  
16 them that, yes, we believe that based upon the project  
17 description, and as you describe it, both phases, it  
18 is jurisdictional. But they continued to say, "We're  
19 not really sure about the second phase." If it was  
20 just the first phase, it would only be half that and  
21 therefore not jurisdictional.

22           So staff indicated to them that, "Fine,  
23 since you don't really know what you're doing, you go  
24 ahead and build the first half, but if you decide to  
25 build the second half of this project, you must come

1 back to the Commission." And lo and behold, they  
2 decided to build the second half, and that's why the  
3 SPPE was filed. There was no debate about  
4 jurisdiction in that case. And, yes, it may not have  
5 been exactly "file your SPPE," or "file your ASE with  
6 us" at the exact time we determined jurisdiction, but  
7 in the spirit of being sort of, you know, aware of the  
8 fact that circumstances change, we allowed them to  
9 build the first half, which was not jurisdictional,  
10 the first phase, but indicating to them that they  
11 needed to come back and they did. So there's no  
12 debate about that.

13           So that's a very different case. And, in  
14 fact, the facts of the case are so different that I  
15 would even hesitate to say that it's really worth  
16 discussing further than that. And, again, this is an  
17 ongoing case, so I don't think we'll get into the  
18 merits of it. But, again, for jurisdictional  
19 purposes, I just wanted to explain to you how that  
20 case came to the Commission.

21           So, in conclusion, I want to emphasize the  
22 fact that all these cases are fact specific. And you  
23 can't really point to a number of different cases to  
24 say whether or not we did something right or we did  
25 something wrong. Staff did the analysis that we

1 always do; it was very straight forward, even though  
2 it's sort of complicated by the fact that we have to  
3 take into account all these other factors. But we  
4 determined what the net generating capacity is based  
5 upon how much fuel can get through this thing, and  
6 based upon the design, we look at in terms of the  
7 steam turbine, we look at how much steam is produced  
8 and can get through this hole to the steam turbine  
9 generator, what does it generate, we take a look at  
10 all the auxiliary loads and we subtract those out, and  
11 we come to a number.

12           Now, what C.U.R.E. did is that they  
13 proposed, in terms of the hearing, they proposed sort  
14 of a different way of using the generating capacity,  
15 they proposed that staff look at -- that the  
16 Commission look at -- using up the entire extra  
17 margin, including that in that generating capacity.  
18 Based upon that approach, they came to the conclusion  
19 that this project was more than 50 megawatts. That  
20 may be an appropriate way to look at this project, but  
21 that's not the way the Commission has looked at these  
22 in the past. We've looked at it in terms of what is  
23 the design, understanding that power plants do need a  
24 margin of safety, and that occasionally they will  
25 generate more than 50 megawatts, that's a fact, we

1 don't deny that; power plants that are 49.9 will on  
2 occasion deliver more than 50 megawatts, however, they  
3 can't do it on a continuous basis. And the testimony  
4 of Ormat, I think, proved that out, as well. They  
5 explained that they cannot continue that on any  
6 continuous basis without serious damaging their  
7 project. So that is why the Commission in the past  
8 has rejected that approach and continues to use an  
9 approach that staff has done in this case.

10           So, again, I just want to emphasize that we  
11 believe that the staff has proceeded in a manner that  
12 is set out in our Regulations, that the Commission has  
13 properly listened to the testimony in this case, and  
14 rejected C.U.R.E.'s proposal, alternative proposal for  
15 how we look at net generating capacity, and that the  
16 Commission's decisions should be upheld and should  
17 reject the Petition for Reconsideration. Thank you.

18           CHAIR WEISENMILLER: Thank you. Are there  
19 other Interveners in this case, either in the room or  
20 on the phone?

21           MS. TELLER: Good morning. I'm Sabrina  
22 Teller with Remy, Moose and Manley and I'm here on  
23 behalf of the Intervener, County of Imperial, but we  
24 don't have anything to add to the testimony, I'm  
25 sorry, well, the presentation by Ormat, and we have

1 filed papers jointly in those filings. Thank you.

2 CHAIR WEISENMILLER: Thank you. Any public  
3 comment?

4 MS. KLEBANER: May I please respond before  
5 we proceed?

6 CHAIR WEISENMILLER: Oh, I'm going to go for  
7 -- sure -- I'm going to give you an opportunity to  
8 respond, but just let me see if there's any public  
9 comment.

10 MS. KLEBANER: Okay, thank you.

11 CHAIR WEISENMILLER: No public comment.  
12 C.U.R.E. Your chance to respond.

13 MS. KLEBANER: Thank you. I would like to  
14 first respond to your staff counsel Ogata's  
15 presentation. Mr. Ogata states that generating  
16 capacity calculations are case specific. But the  
17 Warren Alquist Act isn't case specific. Section 2500  
18 states you have jurisdiction, mandatory exclusive  
19 jurisdiction, over any thermal power plant with a  
20 generating capacity of 50 megawatts or more. Your  
21 Regulations, which instruct you how to calculate  
22 generating capacity are also not case specific. They  
23 must be applied in the same way in every case.

24 And the question here isn't -- so the  
25 dispute regarding how your Regulations are to be

1 applied, and whether fuel can be considered or not, is  
2 a second issue; the first issue is what do you look at  
3 when you determine generated capacity? Do you look at  
4 what the developer is telling you it's proposing to  
5 build? Or do you look at the generating equipment  
6 that is described in the local permit authorizing that  
7 developer to construct that power plant? The Warren  
8 Alquist Act says that only you can issue a permit for  
9 a facility of a particular size, as in generated  
10 capacity. And the permit here, the permit that is at  
11 issue here and the permit application here all  
12 describe a facility with a generating capacity that is  
13 more than 50 megawatts. And again, I want to impress  
14 upon you that, taking aside the apparent argument  
15 between staff, C.U.R.E. and Ormat regarding how your  
16 Regulations are to be applied, even taking staff and  
17 Ormat's calculations on how they applied your  
18 Regulations to the facilities in question, that  
19 calculation would yield more than 50 megawatts because  
20 your staff and Ormat calculated the generating  
21 capacity for five generating units, finding that the  
22 cumulative capacity is 49.5 megawatts. Now, why five?  
23 Why five generating units? Why not six? What we're  
24 trying to impress upon you is that you have to look at  
25 six and not five because the North Brawley Permit is

1 for six, and the East Brawley Permit Application is  
2 also for six.

3           Going back to Section 2500 of the Warren  
4 Alquist Act, only you can issue those permits. And,  
5 actually, I don't see much of a difference between  
6 this case and Santa Clara, in fact, as I was hearing  
7 Mr. Ogata regale us of the facts of that case, it's  
8 even more similar than I thought. In that case,  
9 apparently, the project proponent wasn't sure whether  
10 they would pursue to Phase 2 and build 32 generating  
11 units, but the interesting thing is that the  
12 Commission assumed jurisdiction anyway, they didn't  
13 wait to see what would be built. They assumed  
14 jurisdiction based on the equipment described in the  
15 permit that that project proponent submitted to Santa  
16 Clara.

17           Mr. Ogata also makes the point, or makes the  
18 argument, that C.U.R.E. has mixed logic here, that  
19 we're asking you to look at the permit, but also  
20 ignore the permit; that's not what we're asking you to  
21 do here at all. What we're asking you to do is  
22 determine generating capacity in a way that is  
23 consistent with the Warren Alquist Act. And the  
24 Warren Alquist Act tells you that you are the only  
25 agency in this state that can issue a permit for a

1 facility of a particular size. The permits at issue  
2 here are for facilities that only you can permit. And  
3 only you can apply your -- well, your Regulations  
4 actually specify how generating capacity is to be  
5 calculated, so whatever the county thinks it is  
6 permitting is largely irrelevant to your determination  
7 because you have to proceed under Section 2003 of your  
8 Regulations, so even if the permit said 49.9  
9 megawatts, it doesn't matter, you have to apply your  
10 Regulations.

11 Now, lastly, I just want to respond to  
12 Ormat's presentation. Ms. Pottenger stated that the  
13 County does have authority to issue a permit for six  
14 generating units if the permit also states that the  
15 facility can't generate more than 49.9 megawatts.  
16 That is incorrect because only you can issue a permit  
17 for six generating units, and as I already said, the  
18 County's calculation of what the generated capacity is  
19 for those six units is irrelevant. In fact, your  
20 record here shows that only five generating units --  
21 your staff agrees, only five generating units have a  
22 generating capacity of 49.5. So the County's  
23 calculation is clearly in error if we're talking about  
24 applying your Regulations calculated under generating  
25 capacity of these power plants. I can take any

1 questions if you have them.

2 CHAIR WEISENMILLER: Jennifer, do you have  
3 anything else to say?

4 MS. GALLARDO: If you guys have any  
5 particular questions, I would be happy to answer them,  
6 but otherwise no.

7 CHAIR WEISENMILLER: Okay, thank you. So,  
8 Commissioners, any questions?

9 MS. POTTENGER: Chairman Weisenmiller, if  
10 possible, I would like to turn the microphone over to  
11 my more eloquent co-counsel here to rebut C.U.R.E.'s  
12 statements.

13 MR. ELLISON: Thank you. I'll be very  
14 brief. First of all, the staff is correct that  
15 C.U.R.E. is trying to have their cake and eat it too.  
16 They want you to focus on the portion of the permit  
17 that says six generating units, but ignore the portion  
18 of the permit that says 49.5 is the limit. Secondly,  
19 I would remind you, as I think you know, that at the  
20 time that permit was applied for, and at the time the  
21 permit for North Brawley was issued, the capacity of  
22 each generating unit was unknown, but these are custom  
23 made facilities whose capacity depends upon their  
24 actual installation at that particular site. So these  
25 permits say you can build a 49.5 megawatt plant and

1 you can use up to six generating units if you need six  
2 to get to 49.5. The fact that it only took five to  
3 get there has no jurisdictional significance unless  
4 Ormat went on to say, "We're going to go ahead and put  
5 in the sixth one." If we did say that, we would be in  
6 violation of the permit issued by the county and we  
7 would be jurisdictional to the Energy Commission, but  
8 none of that has happened.

9           And the last point that I would make is  
10 this, it's not the generating capacity of the  
11 generating units that determines the Commission's  
12 jurisdiction, it's the generating capacity of the  
13 thermal power plant that determines the jurisdiction,  
14 and that includes the generating units plus every  
15 other physical thing on the site. There is ample  
16 testimony in this record that, even with additional  
17 generating units, the physical capacity of the rest of  
18 the plant is still limited to 49.5 megawatts. And  
19 when I asked C.U.R.E.'s witnesses could they testify  
20 under oath that the plan itself as a whole could  
21 generate more than 50, their answer was no.

22           MS. KLEBANER: May I respond to that,  
23 please?

24           CHAIR WEISENMILLER: Sure.

25           MS. KLEBANER: Just to clarify for the

1 record, Mr. Ellison asked C.U.R.E.'s witnesses to  
2 state whether with the wells that the plant is  
3 connected to today, can the plant generate more than  
4 50, and the answer was no; however, our witness also  
5 testified that, with six generating units, which is  
6 what the permit is for, for North Brawley, and which  
7 is what the permit application is for East Brawley,  
8 the plants would absolutely have a generating capacity  
9 above 50 megawatts. Thank you.

10 CHAIR WEISENMILLER: Thank you.

11 Commissioners?

12 COMMISSIONER DOUGLAS: I have a few brief  
13 comments. I'm not convinced by the case that C.U.R.E.  
14 has put on that there were problems with the analysis.  
15 I wanted to go through some of the issues that we've  
16 heard about today. I may have a few questions, but  
17 I'm not even sure that I do. You know, one of the  
18 points that definitely came out, out of the hearing,  
19 that we had on this matter is the geothermal  
20 technology is not the same, not as plug-and-play, is a  
21 back-up diesel generator, or a thermal power plant  
22 that uses a fossil fuel. The question of fact that  
23 was most pursued and most litigated in the hearing  
24 was, as I understand it, over how much margin of  
25 capacity in the different component parts of the power

1 plant were needed, could you simply add up all of the  
2 capacity of all the component parts, should you have  
3 any margin in there in getting to 50 vs. 49.5 vs. 47,  
4 or whatever parties were arguing. I was convinced  
5 that, given the fairly unique nature of geothermal  
6 generation, and also given the conditions at the site,  
7 you know, particularly the fairly high levels of  
8 minerals in the brine, and so on, that the approach  
9 that the Energy Commission has taken for the time that  
10 we've made these jurisdictional determinations is the  
11 correct one. And while we certainly could change that  
12 approach, you know, I'm not convinced that we are  
13 compelled to, or that we would need to -- or that we  
14 would even be particularly well advised to. So that  
15 was the issue of fact that was most pursued at the  
16 hearing.

17 C.U.R.E. had also raised the issue of  
18 whether the two Brawley facilities should be  
19 considered one facility, but they didn't litigate that  
20 issue at the hearing, so they didn't present any  
21 evidence to substantiate that claim.

22 To my way of thinking, it shouldn't, you  
23 know, when we talk about the permit, the permit should  
24 not be dispositive to the energy commission in making  
25 a jurisdictional determination. A county might issue

1 a permit for a facility mistakenly, thinking it is  
2 under 50 megawatts, and we might do a technical  
3 analysis, and we might say, "No, under the way that we  
4 calculate what is jurisdictional and what the capacity  
5 of this power plant is, we actually think it's over  
6 the threshold." And in that context, we certainly  
7 wouldn't want to take the permit at its word, so to  
8 speak, we would want to do our own technical analysis.

9           Likewise in this case, we did that, you  
10 know, we didn't take the limitation of megawatts in  
11 the permit on its face and, you know, I think that the  
12 Committee -- I certainly would have had no patience if  
13 staff's position had been, "Well, the permit says they  
14 can't go over 50 megawatts, so we didn't do the  
15 analysis." That wasn't their position. Their  
16 position was that we did the analysis and we believe  
17 that this facility will not generate more than 50  
18 megawatts.

19           I struggle to understand the importance that  
20 C.U.R.E. is placing on the number of generating units.  
21 In the Santa Clara case, you know, there were more  
22 than six generating units. To me, you've got to take  
23 the amount of generation capacity of each unit, you  
24 know, add them up, or multiply by the number of units,  
25 in order to see if you're over the threshold or not.

1 In this case, because the capacity of the units was  
2 not known, the fact that five vs. six, or four vs.  
3 five, or one vs. two are built, matters to me much  
4 less than the number of facilities built times the  
5 generating capacity of each one. In this case, it got  
6 us under 50 megawatts. Obviously, if Ormat were to  
7 build one more, or were to find some way of  
8 continually generating more than 50 megawatts, you  
9 know, we would be -- we would consider the project  
10 jurisdictional, particularly if Ormat were to build  
11 the sixth in the permit. And we will go back and, in  
12 the Draft Order, we made it abundantly clear that we  
13 wanted staff to know that this finding and this  
14 decision that we're considering today is not a blanket  
15 insulation against them looking further if Ormat were  
16 to somehow change the plan, expand the capacity at the  
17 other unit, or whatever the case may be. We certainly  
18 don't want to send the message that staff shouldn't  
19 look into that. But under the facts as presented, you  
20 know, I don't see why five units vs. six is such an  
21 important fact. Obviously, if they had built all six  
22 that would be the deciding factor making them  
23 jurisdictional in this case given how they sized the  
24 units. You know, I am on the Santa Clara case, along  
25 with Commissioner Peterman, we had the first -- we had

1 the informational hearing a couple of weeks ago. The  
2 Santa Clara case, to me, is quite distinct and, to me,  
3 the back-up diesel generator sort of subset of cases,  
4 is very distinct. You know, I think it would be  
5 almost undisputed -- or completely undisputed that  
6 when the Warren Alquist Act was written, probably the  
7 last thing on people's minds at the time was data  
8 centers that needed 50 plus megawatts of back-up  
9 diesel generation in case they might happen to go  
10 down, and it was a very different world. And I think,  
11 just speaking for myself at the moment that we need to  
12 think about whether the full kind of technical -- full  
13 force of a technical and environmental review that we  
14 provide at the Commission is needed on some of these  
15 backup emergency projects. Nevertheless, they cross a  
16 threshold, and I've been responsible for authorizing  
17 more than one letter to be sent to data centers with  
18 the plans for back-up generation, emergency  
19 generation, warning them that if they cross the 50  
20 megawatt threshold, we will consider them  
21 jurisdictional and we will ask them to file an SPPE or  
22 an AFC in our process. So I've probably given the  
23 okay to send four or five of them, or more. And in  
24 most cases, they size below 50 megawatts.

25 In the Santa Clara case, the Commission

1 allowed the Data Center to go ahead with the first  
2 phase of the project, even though when they came in we  
3 told them that the two phases together would be  
4 jurisdictional. And I suppose, in some there is some  
5 sense that this was probably -- you know, if we were  
6 really really tightly following what, you know,  
7 pursuing jurisdiction to the outer limits, I suppose  
8 at the point which they came in with a concept that  
9 was over 50 megawatts, we could have told them they  
10 were illegally phasing by just building the first  
11 half. But because they came in and represented that  
12 they really didn't know if they would need to size the  
13 back-up diesel generators up higher, and so on,  
14 building phase 1 was something the Commission  
15 ultimately allowed. But building Phase 2 brought the  
16 entire project into Energy Commission jurisdiction.  
17 And so we're in that right now and none of that is a  
18 comment on the merits of that particular project.

19           So I do not -- I did not hear anything today  
20 that led me to think that the Santa Clara case sheds  
21 any particular light on the Ormat case that C.U.R.E.  
22 has brought to us. Let me see if there's anything  
23 else in my notes. I think that's all I have for you  
24 right now, Commissioners, but I just thought I would  
25 share my thinking on the main points that have been

1 raised by the parties. I didn't hear anything today  
2 that would cause me to analyze these issues any  
3 differently than I did in the past, but I thought the  
4 discussion was actually very helpful in terms of  
5 highlighting what some of the questions raised by the  
6 parties are, and helping us to kind of help put them  
7 into very clear statements and, in C.U.R.E.'s case,  
8 raising very clear statements of where they felt as  
9 though the analysis had not lived up to the word of  
10 the Warren Alquist Act and, you know, I don't agree  
11 with that, but I appreciate you presenting the issues  
12 as clearly as they did.

13 COMMISSIONER PETERMAN: I'll just also add  
14 that I take issues of jurisdiction very seriously and  
15 when this petition was brought to us, I wanted to  
16 learn more about the issues since I was not involved  
17 with this case, and appreciate the testimony we've  
18 received from all the parties during the various  
19 hearings. I think Commissioner Douglas' summary of  
20 the issues and what we've heard today, I agree with  
21 her summary of it, and I think she did an accurate  
22 assessment of the facts and whether we received  
23 anything that changes the original decision.

24 I was particularly -- I found particularly  
25 the geothermal testimony in the hearing and the

1 information that was discussed today very useful in  
2 terms of distinguishing between the nameplate capacity  
3 of the equipment and the actual generating capacity of  
4 the facility, and I feel comfortable with the manner  
5 in which staff has done the assessment of what the  
6 generating capacity of the facility is. And so, also,  
7 I didn't find anything new in today's presentations  
8 that would effect a change in my decision.

9 CHAIR WEISENMILLER: Thank you. As the  
10 other member who heard the case, I appreciate today's  
11 record in terms of -- it was good that the parties  
12 really went to basically the legal issues. In the  
13 case, we spent a lot of time on the fact issues, too,  
14 but I think by the time we got to the end, we  
15 concluded that, really, the heart of the issues were  
16 the legal issues and pretty much spelled it out, I  
17 think, very clearly at this stage. So I think the  
18 issues are pretty well joined and it does come back, I  
19 think, ultimately to the long term precedent of what  
20 we've been doing. And, again, I think this has been  
21 helpful in sort of reaffirming the Draft Order.

22 COMMISSIONER DOUGLAS: I am prepared to make  
23 a motion, however, it just occurred to me that in  
24 terms of framing it, it would be denying  
25 reconsideration of this item. Is that correct? All

1 right, so I will move that the Commission deny the  
2 Petition for Reconsideration.

3 MR. LEVY: Does that mean, for  
4 clarification, adopting the Order denying the Petition  
5 for Reconsideration?

6 COMMISSIONER DOUGLAS: Thank you. So, yes,  
7 that's right. So I move that the Commission adopt the  
8 Order denying Reconsideration.

9 COMMISSIONER PETERMAN: I'll second the  
10 motion.

11 CHAIR WEISENMILLER: All those in favor?

12 (Ayes.) This item passes unanimously.

13 Thank you.

14 And the next item is the Chief Counsel's  
15 Report.

16 MR. LEVY: I don't believe I have a report  
17 today, thank you.

18 CHAIR WEISENMILLER: Thank you. Public  
19 comment? This meeting is adjourned.

20 (Whereupon, at 9:57 a.m., the business meeting was  
21 adjourned.)

22 --o0o--

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24

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**REPORTER'S CERTIFICATE**

I do hereby certify that the testimony in the foregoing hearing was taken at the time and place therein stated; that the testimony of said witnesses were reported by me, a certified electronic court reporter and a disinterested person, and was under my supervision thereafter transcribed into typewriting.

And I further certify that I am not of counsel or attorney for either or any of the parties to said hearing nor in any way interested in the outcome of the cause named in said caption.

IN WITNESS WHEREOF,

I have hereunto set my hand this 16th day of February, 2012.

A handwritten signature in cursive script, reading "Peter Petty", is written over a horizontal line.

PETER PETTY  
CER\*\*D-493  
Notary Public